

June 27, 2000

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: DAVID WAYNE FINLEY

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

CHAIRMAN: Mr. D. G. Murray
BOARD Mr. W.J.A. Bulman
MEMBERS: Mr. R.G. McEwen

APPEARANCES:

Ms K.G.R. Laycock) Counsel for the Commission

This matter came on for Hearing January 10 - 14, 2000 in Brandon, Manitoba. The panel reconvened Monday, January 24, 2000 to hear oral arguments.

I. Background

Tom and Tara Kamann became clients of David Wayne Finley on July 19, 1996 and continued to deal with him until the fall of 1998. During this period, numerous trades were conducted in the Kamanns' accounts, certain of which resulted in a complaint to the Commission.

At the time of the hearing, Finley was 43 years old and had been married for 20 years. He and his wife had 3 children. He has been a registrant with the Commission since 1982, first with Investors and during the last 5 years with Midland Walwyn, latterly Merrill Lynch. The transactions in question arose while Finley's employer operated as Midland Walwyn and, as such, his employer will be referred to in these reasons as "Midland".

Finley is registered as a broker and investment dealer and his educational credits include (in addition to life insurance courses) the IFIC Course, CFP Course, Canadian Securities Course, the Conduct and Practices Course and the Branch Managers Course. He began working for Midland on June 1, 1996 and, with the exception of a five week period, has been a branch manager for that firm since January 28, 1998. He is currently the manager of both the Brandon branch and one of two Winnipeg branches. He has not been the subject of any prior complaints to or disciplinary proceedings with the Commission.

In 1996, 75-80% of Finley's business was in managed money products, primarily mutual funds. He testified that he did not advertise or market his services aggressively as he already had a

significant clientele. His evidence was that his average clients (including married couples) had average assets of \$300,000 - \$350,000.

The Kamanns did not fall into Finley's average customer profile. They had few assets. Mrs. Kamann was a pharmacist with an income of approximately \$50,000. Mr. Kamann, after graduation from high school, had risen over a number of years at the Manitoba Public Insurance Corporation to a middle management position. His income was in the same general range as that earned by Mrs. Kamann. According to their account documentation in July 1996 Tom Kamann was 32 and Tara Kamann was 25.

The Kamanns' assets in 1996 were just slightly greater than their debts. Their net asset value was less than \$20,000. The Kamanns had small RRSPs with the Bank of Montreal totaling about \$3,500. Tara Kamann also had an RRSP with Great West Life with a value of just \$5,000. Tom Kamann also had accumulated pension funds through his employment of about \$45,000, with roughly \$12,000 non-locked in and \$33,000 locked in.

The Kamanns testified that they had no knowledge or experience in investments or investing and while sensing that they had a tendency to overstate their naivete, the Panel did conclude that the Kamanns clearly were inexperienced investors. This in fact was acknowledged by Finley in his testimony. The Kamanns during their dealings with Finley relied upon him for investment advice.

II. Chronology of Events

July, 1996 – April 1998

The Kamanns became clients of Finley after Finley's sister, an acquaintance of Mrs. Kamann, asked him to meet with the couple. The Kamanns experience in investing had been limited to RRSP contributions and automatic payroll deductions with specific investments being determined by a plan operated by a third party. They were looking for an advisor to provide direction in their future investments.

There is dispute as to whether Finley and Tom Kamann met several times in the late winter/early spring of 1996 to discuss numerous matters, including the possible purchase of a business operated by Kamann's father. Finley testified that these early meetings occurred while Mr. Kamann denies it. The Panel need not determine whether these meetings occurred. The Panel does, however, accept Finley's testimony that once the Kamanns became clients Tom Kamann called and visited him regularly to discuss his investments and the markets in general. Most of these meetings did not include Mrs. Kamann. There is no dispute as to when the Kamanns became clients of Finley. This occurred in July 1996. The initial meeting occurred July 23, 1996 with the second meeting a week later on July 30, 1996. Finley testified that the initial meeting was for general information gathering and general discussions with respect to investments and the Kamanns' investment goals. It was at the July 30th meeting that the Kamanns opened accounts at Midland with Finley.

The Kamanns transferred their Bank of Montreal RRSPs as well as opening a joint money market account that was set up with monthly deposits of \$400.

This money market account was opened as a margin account. Finley testified that it was a Midland practice to open margin accounts for 98% of its clients. The reason for opening margin accounts for the vast majority of clients was, according to Finley, to allow them to access funds immediately when needed, by way of margin loan, rather than wait for the redemption process. No actual margining took place for another two years. The Panel is satisfied that Finley explained to the Kamanns the stated reason for opening the margin account. The fact, however, that a margin account was opened and eventually used for these clients as well as the method in which Finley developed the account documentation on the Kamanns' file caused the Panel some concerns, which are detailed later in these reasons.

There were a few transactions in the Kamanns' accounts between July, 1996 and April, 1998. Tara Kamann made some contributions to her RRSP account in early 1997 and opened a new RRSP account in December 1997 into which she transferred her Great West Life RRSP of about \$4,900. Tom Kamann's RRSP accounts saw two de-registrations totaling about \$1,500 in January and February, 1998 to meet obligations as well a deposit of some \$12,600 from non-locked in pension funds. Tom also opened a LIRA account with approximately \$33,000 in January 1998. In the margin account there were a couple of sale transactions in 1997 as the Kamanns found necessary for their needs. The \$400 automatic monthly deposits were made until September 1997 when they were terminated.

Save for the manner in which he developed account records, to be detailed later, the Panel does not find any fault with the services provided by Finley during this period. There is no suggestion in the evidence that any of the investments recommended by Finley were unsuitable, or that any unauthorized transactions took place. During this period, the Kamanns testified that they were happy with Finley's services and, in fact, they referred him to others. The issues arising between the Kamanns and Finley developed from and after April 1998.

April 1998 – October 1998

At the end of March 1998, the Kamanns held the following accounts with Finley:

Tom Kaman

- (i) RRSP Account #2U-AAVE-S invested in two mutual funds having a balance of \$14,527.35 including a small amount of cash;
- (ii) LIRA Account #2U-ACAT-S invested in ten mutual funds having a balance of \$35,224.15.

Tara Kaman

- (i) RRSP Account #2U-AAVF-S invested in three mutual funds having a balance of \$5,007.23;

(ii) RRSP Account #2U-ACAU-S invested in seven mutual funds having a balance of \$5,143.11;

Joint Account

(i) Margin Account #T2U-AAVG-E invested in one mutual fund having a balance of \$120.

The Kamanns joint income had been essentially cut in half when Tom left his employment in late 1997. He became a real estate agent in early 1998 but did not anticipate any substantial income for some time. Prior to this, in May 1997, the Kamanns had had a child. Increased expenses and decreased income put pressure on the Kamanns, resulting in the de-registrations from Tom's RRSP account in early 1998. The Kamanns decided to sell their house and reduce expenses by discharging a Bank of Montreal loan which had a balance of about \$26,000. The plan was to rent accommodations for a while and eventually get back into the housing market. What the Kamanns told Finley as to their proposed time line for a buying a new house is also an issue for determination.

The most direct method for the Kamanns to achieve their goal would have been to apply the net sale proceeds (approximately \$23,000) to the \$26,000 Bank of Montreal loan leaving a small balance to repay. When the Kamanns discussed the matter with Finley however he advised them that they could make better use of the funds and at the same time greatly increase their investment by adopting an alternate strategy.

Finley advised the Kamanns to deposit their net sales proceeds into the Joint Margin Account. At the same time, he suggested they borrow an additional \$25,000 for the purpose of investing. The plan was that through a combination of investing a substantial sum in mutual funds the investment gains would cover the interest payments of the \$25,000 loan as well as any margin loan. The interest payments would be deductible and sufficient funds could be drawn to pay off the Bank of Montreal loan.

It should be noted that the Panel did not find the evidence setting out all of the mechanics of the strategy to be clear. Nor was there clear evidence as to whether the intended tax benefits of the strategy were in fact realized to any degree.

In April 1998, the \$23,000 in net house proceeds was deposited into the Joint Margin Account. Finley had referred the Kamanns to Westoba Credit Union for the loan and the loan proceeds of \$25,000 were paid into the Joint Margin Account in May bringing the cash balance to \$48,034.64.

The following transactions and events then took place:

1. May 25 – Purchase of units in AIM Global Health Science Fund - \$10,000;
2. May 25 – Purchase of units in AIM Global Technology Fund - \$10,000;
3. May 25 – Purchase of units in AIM European Opportunity Fund – \$5,000;

4. May 27 – Issue of Midland cheque to Kamanns for \$20,000 (subsequently applied against Bank of Montreal loan) At this time, the remaining cash balance in the account was \$3,034.64.
5. May 29 – Purchase of units in Atlas Canadian Large Cap Fund in the amount of \$20,000 of which the majority was borrowed from Midland leaving a balance in the Cash Account of (-\$16,965.36).
6. May 27 – Units in Tom Kamanns' RRSP Fund (2U-AAVE-S) were de-registered and 241 units with a value of \$3,608.98 were transferred to the Joint Margin Account.
7. At the end of May 1998, the Margin Account had a negative cash balance of (-\$16,965.36) and an asset balance of \$47,947.39 the net value of which was \$30,982.03.
8. Although evidence was not clear on this point, it is apparent to the Panel that the transfer of units from Tom Kamanns' RRSP Account to the Margin Account was to provide sufficient assets to the account so that it would remain within the terms of the Margin Agreement on repayment of the \$26,000 to the Bank of Montreal. The final \$6,000 was not paid to the Kamanns for application against the loan until June 10, 1996. As a result of this payment, at the end of June, the Margin Account showed a cash balance of (-\$23,015.12), and \$48,884.33 in assets, netting out at \$25,869.21, still within margin. At this point, the Bank of Montreal loan had been discharged.
9. In July, Tom Kamann advised Finley that the Kamanns owed money to Westoba on account of interest on the \$25,000 loan. On July 7, 1998, a cheque was issued from Midland for \$300.00 and picked up by Mr. Kamann. This was the only transaction in July 1998 and at the end of the month the account was still operating within the bounds of the margin agreement with a net asset value of \$24,611.07 against a cash balance of (-\$23,476.54).
10. In August 1998, a general market correction lasting several months commenced, driving down the values of equity shares and negatively affecting the value of the Kamanns' mutual funds in the Margin Account. The only transaction in the Margin Account in August 1998 was the sale of \$1,000 in mutual funds units to apply against the negative cash balance. This, however, had little effect as depressed units values resulted in the account being offside of the Margin Agreement with a net asset value of \$18,678.68 against a cash balance of (-\$22,646.02).
11. No account transactions occurred during the month of September 1998 and the account continued to operate offside of the Margin Agreement.

12. In October 1998, a margin call resulted in the sale of \$9,000 in Atlas units bringing the account back within margin parameters. The account remained within margin thereafter. In the summer of 1999, the Kamanns cashed in their Margin Account positions and discharged the Westoba loan of \$25,000.

13. Additional cheques were issued by Midland from the Margin Account for the purpose of covering accumulated interest on the Westoba loan over the months following May 1998. Cheques were in various amounts and were issued at the request of the Kamanns. Although the Kamanns stopped dealing with Finley in the fall of 1998, they continued for several months thereafter to maintain their accounts at Midland. In March 1999, the Kamanns provided a letter to Midland authorizing a monthly deduction of \$180 payable to Westoba on the first of each month to cover interest. The payment continued in this manner until the summer of 1999 when the Kamanns transferred the bulk of their accounts from Midland.

14. Prior to the margin call sale, Finley had requested cash from the Kamanns to cover the margin spread. The Kamanns did not respond. Evidence from Mr. Rod Zenk, a financial advisor from whom the Kamanns sought independent advice in the fall of 1998, was that he advised them against providing the funds. The fact is apparent, however, that the Kamanns simply did not have the funds available to right the account in advance of the margin call.

15. Even had the Kamanns, in September/October of 1998 wished to de-register out of their RRSPs to cover the shortfall in their margin account they would have been unable so to do. The Kamanns had purchased another house shortly after the sale of their first house. The new house was one of slightly lesser value than the original home. The cash to mortgage requirement resulted in de-registrations from RRSPs of both Tom and Tara in the approximate sum of \$13,700. There were insufficient funds remaining in their RRSP accounts to meet the margin call had that been the Kamanns' intent.

The events set out above, led the Kamanns to register a complaint with the Commission and resulted in the allegations put forward by Commission staff as the basis for this hearing. At the end of the day, the Kamanns Bank of Montreal and Westoba loans were paid off. The growth on the Kamanns' investments in the margin account did cover the Westoba interest payments and the margin loan interest. The Kamanns' RRSPs were diminished by between \$17,000 and \$18,000, but these funds were not simply lost, they in fact, for the most part became equity in the new home. In November 1998 there had been a reduction in the Kamanns overall assets but despite a lack of evidence as to a specific amount of reduction or loss suffered by the Kamanns, it does not appear to the Panel to be a significant amount.

III. Credibility

The amount of loss is not, of course, determinative of the issues at hand. There are numerous allegations against Finley. The major allegations are that the investments were unsuitable,

disclosure by Finley as to the investments was inadequate and in a number of instances transactions were not authorized.

The only witnesses privy to the discussions surrounding the investments were the parties themselves. The evidence is generally conflicting. In order to decide which evidence should be accepted or preferred the Panel must make a determination as to credibility.

The Kamanns

Tara and Tom Kamann gave very similar evidence to the extent that they were novice investors and had no real understanding or appreciation of investing and investments. They testified that they relied solely upon the advice of Finley. They indicated they did not monitor their investments nor were they given (or did they seek) sufficient or any information as to the specific investments they purchased. Their evidence was consistent in that they testified they engaged Finley to pick investments for them and that, in fact, the acquisition of the \$45,000 of mutual funds in May 1998 was made by Finley on his own without authorization or even consultation. Similarly, the sale of units was, they testified, carried out by Finley without consultation or explanation.

The evidence of the Kamanns was that they did not understand the concept of margining nor was it properly explained to them and that they were unfamiliar with the terms of their Margin Account Agreement with Midland. Documents were signed by not read or explained. They testified that they didn't really know that their house proceeds were being deposited for investment purposes. In addition, they both testified that they did not realize that the proceeds of their loan with Westoba were to be used for investment purposes. Mr. Kamann in fact indicated on more than one occasion that he didn't realize he had even taken out a loan.

When pressed on cross examination on their testimony, both the Kamanns often suggested that their memory of specific events was not clear and more often that due to their lack personal knowledge they relied on Finley to do that which needed to be done and they could not really provide any additional information about specific events or documents.

Mr. Hansell, counsel for Finley, suggested that the Kamanns academic and career achievements belied their claim to lack of understanding. Both Kamanns are intelligent and have met success in their chosen endeavors. Tara Kamann earned high enough marks at the undergraduate level in University to gain admission to a professional faculty and in fact practices as a pharmacist. Tom Kamann, after graduating from high school, rose through the ranks at the Manitoba Public Insurance Corporation to a management position. While acknowledging that success in other areas does not in and of itself suggest an understanding of the complicated and specialized area of investing, the Panel in considering the evidence of the Kamanns does so in light of the fact that these are intelligent and capable individuals.

The Panel also accepts that memories dim with the passage of time. The passage of time between the events in the summer of 1998 was not, however, overly long being about 18 months.

There are also certain points in evidence that tend to cast some doubt on some of the Kamanns assertions. These include:

1. The Kamanns stated that their reliance on Finley was such that they did not even monitor the performance of their investments. Evidence shows, however (Exhibit 41 - Tab 34) that in April 1998 they applied for and received from Midland, internet access to their accounts which allowed them to track up to date performance of their mutual funds at any time. They reapplied for the same service in September 1998 when Midland became Merrill Lynch (Exhibit 4 - Tab 51). The Panel is faced with the apparent contradiction between the evidence of the Kamanns that they did not check on the status of their investments and the fact that they twice applied for a service on the internet intended to do just that.
2. Both Kamanns testified that they did not really review the monthly statements sent to them by Midland for their various accounts and, as such, were unaware of the various transactions that were noted in those monthly statements and which subsequently became the subject of their complaint. Mrs. Kamann also testified, however, that each month she closely scrutinized her banking and other financial statements. The anomaly between the apparent treatment by the Kamanns of the different financial records strikes the Panel as somewhat curious.
3. More importantly, the evidence of the Kamanns was contradicted directly by two third party witnesses in one material respect. The Kamanns both testified that they were unaware that the \$25,000 loan they had taken out with Westoba was to be used for the purpose of investing. Mr. Brian Keown, the loans officer for Westoba, who met with the Kamanns and completed the loan documentations gave contradictory evidence. He stated that not only did the documents indicate the purpose of the loan but that he so advised the Kamanns. He testified that he gave Mr. and Mrs. Kamann the same information that he gave the numerous other clients who were referred to Westoba for investment loans and that is that the loan proceeds were to be deposited with Midland and that they were intended for investment in securities. Mr. Keown was satisfied that he made this clear to the Kamanns and that they appeared to understand.

Also, Mr. Zenk, who was called as a witness by Commission counsel, testified that he met with Kamanns in early October 1998 to review their Midland accounts. He testified that as a result of his discussions with the Kamanns it was his understanding that they had borrowed money from Westoba for the purpose of investing.

The points above caused the Panel concern about the Kamanns' forthrightness. In addition, the Panel was concerned from the overall tenor of the evidence given by the Kamanns that they tended to overstate their naivete in investment matters and their lack of understanding with respect to their own investments.

It should be noted that the Panel viewed the evidence of Mrs. Kamann more favourably than that of Mr. Kamann in that she was the more assertive and certain as to the events that had transpired. Ms. Laycock for Commission staff also noted this in argument. Nonetheless, the comments with respect to credibility apply to the evidence of both of the Kamanns.

Finley

At the same time, the Panel was not wholly satisfied with Finley's evidence. His testimony was clear and forthright in most instances but was sketchy in certain areas including the reason for the manner in which he created account documentation and the details of the 1998 investment strategy he devised for the Kamanns. He did, however, clearly acknowledge matters that were not favourable to him including the disorganized manner in which he developed account documentation. More importantly, his testimony was much clearer as to specific matters such as meetings and conversations and his evidence was not contradicted in any material particular by a third party witness.

It is fair to say that Mr. Finley had a certain advantage in providing testimony in these proceedings to the extent that he is familiar with the investment industry and the industry processes and requirements and has developed a set of practices he applies to all clients which clearly assisted him in recounting what took place between himself and the Kamanns. Nonetheless, for the reasons stated, the Panel tends to favour Finley's evidence over that of the Kamanns in areas where they are in conflict.

IV. Findings on the Evidence

The Amended Statement of Allegations contains some thirteen separate allegations against Finley. They can generally be placed under three broad heads being suitability, disclosure and discretionary trading as follows:

A) Suitability

i) Investments

The mutual funds Finley put the Kamanns into were unsuitable for them.

ii) Investment Strategy

The strategy employed by Finley using margining and leveraging was clearly unsuitable for the Kamanns.

B) Disclosure

Finley failed to provide adequate disclosure with respect to the investments he recommended to the Kamanns and in particular with respect to the risk associated with the investment strategy he devised for them utilizing leveraging and margining.

C) Discretionary Trading

Finley carried out unauthorized trades, both in the acquisition of mutual funds in the Kamanns accounts and in the sale or de-registration of certain funds.

The allegations also state that Finley failed to carry out his client's instructions in that he failed to set up an automatic interest payment plan to cover the monthly interest payments to Westoba.

The findings of the Panel are as follows:

A) Suitability

i) Investments

The allegation that the individual mutual funds acquired by the Kamanns through Finley were wholly or in part unsuitable for them is not supported by the evidence. The Kamanns were unsophisticated investors with few assets and were not prone to taking significant risks. While the Panel was given the name of the Funds acquired in May 1998 no evidence as to the Funds' holdings or investment strategy was provided. Ms. Laycock, for Commission staff, invited the Panel to infer the investments were unsuitable on the basis of the Fund names some of which were obviously technology funds. The Panel is not willing to make this inference based only on Fund names. This allegation is dismissed.

With respect to any mutual fund investments made by the Kamanns prior to May 1998, the Panel has already made a finding that no fault is attributed to Finley's services during that period.

ii) Investment Strategy

The Panel finds that the investment strategy devised by Finley which included leveraging and margining was clearly unsuitable for the Kamanns. Leveraging and margining are strategies that should be avoided when dealing with investors who do not have the wherewithal to withstand market downturns. The Kamanns did not have adequate financial resources for this strategy and this became clear when the margin call was issued. It should have been clear to Finley from the outset that the Kamanns could not withstand moderate market downturns. Finley's testimony that he saw no inherent risk in putting the Kamanns in an investment strategy utilizing leveraging and margining caused the Panel serious concerns.

As soon as the market entered a period of correction in August 1998 the value of the Kamanns holdings fell below their margin requirements. The Kamanns were also in violation of the terms of their investment loan with Westoba at this time and had Finley advised Westoba of this, as Westoba considered to be his obligation, there could have been additional consequences to the Kamanns.

Finley's evidence was that his average client had assets valued at \$300,000 to \$350,000. The strategy devised by him may well have been suitable for many people with assets in that range but it was too risky and clearly unsuitable for the Kamanns. It appears to the Panel that Finley employed the same strategy for the Kamanns as he had done for other clients without due consideration of the Kamanns actual financial situation.

There was a conflict in the evidence over whether the Kamanns advised Finley they were buying a new home before they completed the mutual fund purchase transactions in May 1998. The Kamanns testified that they did advise him and Finley states that they did not. Finley testified that he believed, from conversations with the Kamanns, that they would not be buying a new home for a couple of years. He further testified that had he known the Kamanns would need cash for a new home within two or three months of selling their former property he would not have recommended the buying strategy that he did recommend. Because of the size of the mutual fund purchases in May 1998, the Kamanns had to use the bulk of their combined RRSP funds to put down on the new house, which left them with no assets to cover the eventual margin call.

In a case of conflicting evidence, the Panel has indicated that it prefers that of Finley. In addition, he testified at the Hearing that he was not given and his file did not contain a copy of the Kamanns' Offer to Purchase. In the opinion of the Panel, had Finley recommended the purchases made in light of the imminent need for significant funds for a real estate acquisition, it would have amounted to a simple disregard for his clients' interests. The Panel accepts that Finley was not aware that the Kamanns purchased a new home in the short term and in fact had been advised otherwise when he recommended the investment strategy. Regardless, the strategy was, even in the best light, unsuitable for the Kamanns.

B) Disclosure

The Kamanns testified that Finley provided no disclosure or information about their investments. They say Finley told them what to purchase and they did so without any understanding of what in fact they were acquiring. More importantly, they said that Finley did not explain to them the investment strategy he devised and did not explain the risks or even the concept of leveraging or buying on margin. Finley testified to the opposite. He stated that he advised the Kamanns fully about the nature of each investment he recommended and fully explained the concepts of borrowing to invest and margining. He testified that these were matters which he explained to various clients on a regular basis.

Finley testified that he believed the Kamanns understood what he had advised them and in fact they so indicated. He further testified that as unsophisticated investors he understood the Kamanns need more in the way of explanation than other more experienced investors. He said that with the Kamanns he employed a tactic that he tended to use with less sophisticated investors being to have them repeat to him his explanation after it had been given.

There is a margin agreement in Kamanns' file. While it seems apparent that Finley did not review the details of margining when the account was first opened in 1996, he states that he reviewed the terms with Kamanns and advised them of the risks prior to beginning purchasing on margin in May 1998. Some notes in his file suggest that Finley advised the Kamanns of the downside of what he referred to as "double dipping". (Exhibit 41 – Tab 162).

Again, given the findings on the issue of credibility, the Panel tends to prefer Finley's evidence on this point. At the same time, the evidence in Finley's favour is not completely satisfactory. The Panel is of the view that the Kamanns in fact did not fully understand margining and the investment strategy employed even though they may have advised Finley that they did. The evidence of Mr. Zenk, who provided some advice to the Kamanns early in October 1998, tends to confirm this.

According to IDA rules, the registered representative is required to explain the risks of margining, the rules for extension of credit and the rights of the firm if proper settlement is not made. Finley claims to have done this, yet the clients did not understand. The registered representative has a positive duty to explain, but having done so should not be held responsible for the ultimate requirement that the client in fact understand, particularly when the clients have suggested that they do understand.

While the evidence is not so clear as to erase all lingering doubt in this matter, the Panel is unwilling to find that Finley breached his duty to disclose as to individual investments or the various aspects of the investment strategy he devised for the Kamanns.

C) Discretionary Trading

The Amended Statement of Allegations contains a general allegation against Finley of discretionary trading as well as the following specific allegations: i) unauthorized purchases of mutual funds; and ii) unauthorized sale of \$1,000 of mutual funds as well as unauthorized use of the proceeds.

As the Panel has determined there was no wrongdoing on Finley's part prior to April 1998, the purchase transactions for consideration are those occurring in the Margin Account. The Panel accepts Finley's testimony that the four transactions occurring on May 25 and May 29, 1998 were discussed with the Kamanns before completion. The discussions were primarily with Tom Kamann who attended at Finley's office on a regular basis. There is evidence such as notes on Finley's file or documents signed by at least one of the Kamanns on the days in question to convince the Panel that one or both of the Kamanns were present at Finley's office on the dates the purchases were made.

With respect to the \$1,000 sale of units from the Joint Margin Account, it is clear that the monies were applied against the margin loan. The Kamanns stated they had no knowledge of the fact that the units were sold or where the funds were applied. Finley testifies that the sale and the application of funds were authorized by the Kamanns and that specifically Tom Kamann instructed Finley to take the \$1,000 in profits accruing on a particular fund. There is a note on

Finley's file verifying these instructions (Exhibit 41 – Tab 159) and the Panel finds that Finley did not conduct the trade or apply the proceeds without authorization.

The Kamanns testified that the arrangement they had made with Finley was that the interest payments for the Westoba loan were to be made automatically by Midland to Westoba on a monthly basis. This did not happen at the outset and in fact for several months. Cheques for the interest were issued by Midland only when the Kamanns contacted Finley because the payments were due or in arrears. The Kamanns have stated that the failure of Finley to immediately set up the automatic interest payment resulted in additional costs to them. The actual amount claimed was not disclosed in evidence.

Finley testified that Midland required written authorization from the Kamanns in order to set up an automatic payment from the margin account and that this authorization was not forthcoming in the short term. In fact, written authorization was eventually provided by the Kamanns to Midland on March 18, 1999 (Exhibit 41 – Tab 61). Once authorization was provided, it is noted that the monthly interest payment was automatically issued by Midland for as long as the account remained with that firm. The Panel accepts Finley's evidence on this point.

It is important that the Panel comment on the manner in which Finley developed and maintained the Kamanns' account documentation. The New Account Application Form (NAF) is intended to provide the bases for understanding and acting in the client's best interests. The information should be accurately recorded and updated as events require. This did not happen in the Kamanns' case.

Ms. Laycock clearly pointed out the numerous deficiencies in the manner in which Finley created the account documentation. Finley was candid in acknowledging that his service in this area was deficient. Finley's handling of the account opening documents was more than simply deficient, it was downright sloppy and suggests a lack of regard for accurate detail. Some of the errors in completing the account opening documents are set out below:

- a) The RRSP accounts when opened were checked off as "margin accounts". Finley testified that this was something he simply missed.
- b) The amounts put in as net worth on the NAFs are grossly overstated. They bear no relation to the asset information the Kamanns provided Finley at his request. The NAFs developed through Finley suggest net worth of \$120,000. This is overstated by at least \$100,000. Finley could provide no plausible reason for ignoring the information provided by his clients.
- c) The NAFs suggest that the Kamanns looked to speculate with 10% of their assets. Finley states that he must have believed that they would want to speculate in the future. That may be the case but the account opening documentation must be accurate based on current information and the Kamanns did not indicate to Finley that they had plans to enter into speculative investments when the accounts were opened in 1996.

d) The joint margin account was opened for the purpose of obtaining the release of funds as needed more quickly than through redemptions. The fine points of the Margining Agreement were not explained to the Kamanns beyond this limited use when they signed it. Finley stated that he intended to explain margining if and when the Kamanns decided to utilize this strategy. The Panel has found that he did so. Nonetheless, Finley should have fully explained all of the documents at the time he presented them for signature. While not dealing with this as an instance of failure to disclose, the Panel considers it another instance of sloppy practice by Finley in completion of account documents.

e) Without going into greater detail, the NAFs were riddled with errors. In addition, they were never updated as required even though there were significant changes in the Kamanns' financial picture including a virtual halving of their joint income and the birth of a child.

The Panel, over the course of the hearing, developed the opinion that Finley does not, or at least in this case did not, consider documentation development anything but a mere formality. The need for accuracy was not apparently a consideration.

Finley testified that he generally shares responsibility of completing NAFs with an assistant. He takes some information, the assistant takes some and quite often Finley is not even in the room when the NAF information is completed. This method of operation goes a long way toward explaining the many inaccuracies in the various NAFs completed for the Kamanns. The rules of Finley's Association (IDA) require that the client information be recorded accurately. The signature of the registered representative on the NAF confirms this. The information obtained is to form the basis of the registered representative's "know your client" obligation. The information obtained was far from accurate. Some simple due diligence on the part of Finley would have remedied the problem but it was wanting. Finley breached the requirements of his Association by his actions and in so doing breached an obligation to the Kamanns.

Mr. Hansel argued that despite the inaccuracies in the NAFs, Finley did in fact "know" his clients and operated accordingly such that the faulty account documentation was a non-factor. The Panel does not agree. The Kamanns were not Finley's typical clients. He had no need to take on these clients and probably shouldn't have. He likely would not have taken on the Kamanns were it not for the request of his sister. Obviously, once he accepted these people as clients, however, he had a duty to act in their best interests. Had the client information been recorded accurately and updated as necessary perhaps Finley would not have proposed an investment strategy that was more suited to his average clients. It certainly was not suited to the Kamanns.

V. Decision

The Panel finds that Finley breached his Association's rules in his duty to the Kamanns to "know" their situation and needs and to provide suitable advice in two key areas: i) in the shoddy development and maintenance of account information, and ii) in proposing an investment strategy that was unsuitable for the Kamanns.

The remaining allegations are dismissed.

At the request of counsel for Finley, the Panel deferred argument on penalty and costs until the initial determination as to fault was issued. The Panel will accept written submissions or set a date for oral submissions on these areas as may be agreed to by counsel.

"D. G. Murray"

D. G. Murray

Chairman

"R. G. McEwen"

R.G. McEwen

Member

"W. J. A. Bulman"

W. J. A. Bulman

Member