

IN THE MATTER OF: THE SECURITIES ACT

-and-

IN THE MATTER OF: DAVID WAYNE FINLEY

**AMENDED
STATEMENT OF ALLEGATIONS OF STAFF OF THE
MANITOBA SECURITIES COMMISSION**

**STAFF OF THE MANITOBA SECURITIES COMMISSION ALLEGE, AMONG
OTHER THINGS, THAT:**

A. REGISTRATION

1. David Wayne Finley ("Finley") was first registered under The Securities Act (the "Act") as a salesman on May 25, 1982 and has continued to be registered under the Act since as a salesman and/or branch manager.

2. At all material times hereto, Finley was registered under the Act as follows:

(a) from January 1, 1996 to January 23, 1998 as a salesman with Midland Walwyn Capital Inc.;

(b) from January 23, 1998 to August 13, 1998 as a branch manager with Midland Walwyn Capital Inc.;

(c) from August 13, 1998 to September 22, 1998 as a salesman with Midland Walwyn Capital Inc.;

(d) from September 22, 1998 to October 15, 1998 as a branch manager with Midland Walwyn Capital Inc.;

(e) from October 15, 1998 to present as a branch manager with Merrill Lynch Canada Inc., as a result of a merger between Midland Walwyn Capital Inc. and Merrill Lynch Canada Inc., collectively referred to hereafter as "Midland".

3. At all material times, Finley's employer was registered as a Broker & Investment Dealer under the Act.

B. DETAILS

1. In 1996, Tom Kamann ("Tom") and Tara Kamann ("Tara"), (collectively, the "Kamanns") became clients of Finley.

2. Prior to becoming clients, the Kamanns had purchased mutual fund RRSP's through employment payroll deductions.
3. In 1996, Finley opened accounts for the Kamanns one of which was a joint Canadian Account # 2U-AAVG-E, into which monthly deposits of \$400.00 were made and invested into the money market.
4. In 1998, the Kamanns sold their house as they could not afford it. The Kamanns' finances were very tight. They could not afford their current debt payments, any new debt or additional risk.
5. With the proceeds of sale the Kamanns paid some bills and were left with approximately \$23,000.00 (the "sale proceeds"). The Kamanns were not however without debt and in particular still had a significant loan indebtedness to the Bank of Montreal in the approximate outstanding amount of \$26,000.00 (the "B of M loan").
6. Prior to the sale of their home, the Kamanns had informed Finley of the sale transaction and of their intention to purchase another home. Finley told them to come and see him for advice as soon as they received the sale proceeds, which they did.
7. The Kamanns sought advice from Finley as to how they could best use the sale proceeds to manage their debt and to purchase a home in the next few months. The Kamanns had intended to use a portion of the sale proceeds to pay down the B of M loan. At the time, the Kamanns had become a one-income household, with only Tara employed, and were raising a young child. Tara's income was approximately \$ 50,000.
8. Finley was aware of their financial circumstances and objectives.
9. Finley recommended that they not use the sale proceeds to pay off the B of M loan, advising that it would not be often that they would ever come into that kind of cash.
10. Instead, Finley recommended a financial strategy which involved the borrowing of \$25,000.00 from a financial institution, for which the interest payments would be tax deductible and the loan for the house would be paid off.
11. The Kamanns did not fully comprehend the strategy, but were given reassurances by Finley to the effect that the investment transactions he proposed would be safe and that the interest payments would be looked after. The Kamanns will state that it was made very clear to Finley that they could not afford any more debt or payments. Finley reassured them they would not even know the situation existed.
12. From Finley, the Kamanns had understood Finley intended to do the following:
 - (a) invest the sale proceeds into the Money Market Fund (\$23,000);

(b) borrow from a financial institution, Westoba Credit Union ("Westoba"), \$25,000.00 ("new loan proceeds") and invest the new loan proceeds in gas and oil. The interest on the new loan proceeds would be paid from monies generated by the gas and oil investment. Finley would set up a direct payment plan such that the interest payments would be made directly from Midland to Westoba. The gas and oil investment was recommended by Finley and was described as safe and a steady income earner;

(c) the B of M loan would be paid out by Finley with the sale proceeds;

(d) approximately \$12,000.00 would be available for a downpayment on a new home in the near future.

13. The Kamanns will state that there was no discussion about increased risk.

14. The Kamanns will state that Finley never advised them that they would be affected if the markets went down.

15. Based upon the reassurances of Finley, the Kamanns gave Finley the sale proceeds in or about March or April of 1998.

16. On April 27, 1998, Finley deposited the sale proceeds into account # 2U-AAVG-E which had been set up by Finley as a margin account (the "Joint Margin Account"). Prior to the deposit of the sale proceeds, the balance of the Joint Margin Account was \$120.00.

17. The Kamanns will state that Finley never explained that the Joint Margin Account was a margin account, nor did he explain the mechanics of or risks associated with a margin account. The Kamanns were unaware that margining would be used by Finley to implement his financial strategy.

18. On or about April 29, 1998, the Kamanns made an offer to purchase a home with a possession date of August 1, 1998.

19. After turning over the sale proceeds to Finley, the following series of transactions and/or occurrences resulted:

(a) April 27	sale proceeds deposited (to Joint Margin Account: money market)	23,000.00
(b) May 11	Westoba loan proceeds deposited (to Joint Margin Account)	25,000.00
(c) May 25	Finley purchased mutual funds - AIM GLB HLTH SCI - AIM GLB TECH - UNIVL EURO OPP (from Joint Margin Account)	25,000.00

(d) May 27	cheque by Midland (from Joint Margin Account) (purpose: pay part of B of M loan)	20,000.00
(e) May 27	de-registered RRSP investment (purpose: unknown to Kamanns)	3,608.98
(f) May 29	Finley purchased mutuals on margin - ATLAS CDN L/CAP VAL-A (from Joint Margin Account)	20,000.00
(g) May 29	closing cash balance of Joint Margin Account (negative)	16,965.36-

20. In deregistering the pre-existing RRSP investment, the Kamanns say that Finley did so without explaining its purpose, the use to which the proceeds would be put and the ramifications.

21. The Kamanns were unaware that Finley would be purchasing mutual funds on margin and that the mutuals funds purchased would be approximately \$20,000.00 in excess of the amount of proceeds from the new loan. Furthermore, the specific mutual funds purchased were purchased by Finley without the Kamanns instructions or any discussion as to risk.

22. The Kamanns will state that in spite of the fact that they had understood from Finley that he would handle matters such that the B of M loan would promptly be paid with the sale proceeds, this was not done until on or about June 10, 1998, resulting in the Kamanns having to incur ongoing payments, which they could not afford.

23. When payment for the B of M loan was effected by Finley, it was so done through the Joint Margin Account, as follows:

(a) May 27	(referred to above) (from Joint Margin Account)	20,000.00
(b) June 10	cheque issued, to be deposited at B of M – part loan payment (from Joint Margin Account)	6,000.00

with the resulting closing cash balance in the Joint Margin Account as follows:

June 30	closing cash balance of Joint Margin Account (negative).	23,015.12-
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24. In July of 1998, Westoba called the Kamanns to advise them they were in arrears of 2 months of interest payments on the new loan.

25. The Kamanns contacted Finley as to why the automatic payment plan had not been set up. Finley told them to come and pick up a cheque for \$300.00 and that the plan would be set up.

26. The Kamanns will state that upon questioning Finley as to why the plan had not already been set up, he told them it would be and not to worry about it.

27. On July 7, Finley caused a cheque to be issued from the Joint Margin Account in the amount \$300.00.

28. In July of 1998, the Kamanns required the downpayment for their new home, pursuant to the offer made back in April of 1998. The amount required was \$15,000.00.

29. When the Kamanns requested the funds for the downpayment from their account, Finley advised instead that it was to their advantage to deregister their RRSP's.

30. The Kamanns' followed the advice of Finley in deregistering RRSP's for the downpayment on the new home. To obtain the amount of the downpayment, RRSP funds of not only Tom's, but also Tara's, were deregistered by Finley as follows:

(a) July 22	deregistration of \$5,000 of Tom's RRSP	net amount 4,451.50
(b) July 22	deregistration of \$3,850 of Tom's RRSP	net amount 3,416.50
(c) July 23	deregistration of \$4,800 from Tara's RRSP	net amount 4,295.75

31. In or about August or September of 1998, the Kamanns noticed that the value of their Joint Margin Account had dropped below the amount of the new loan proceeds of \$25,000.00 and they contacted Finley for an explanation.

32. As at the end of August, the total value of the Joint Margin Account was \$18,678.68, comprised of \$41,324.70 in mutuals but with a negative cash balance of \$22,646.02.

33. Finley advised the Kamanns that the market had crashed, no one could have predicted the crash, and the market would come back up.

34. The Kamanns will state that they expressed concern to Finley, reminded him of their financially strapped situation, questioned the safety of their investments, and asked whether they should get out of the investments. Finley responded by telling them not to worry - the investments were safe and the account would look after the debts.

35. The Kamanns relied on the assurances of Finley.

36. In late August of 1998, approximately \$1,000 was sold from their investments, without the Kamanns prior authorization or knowledge or understanding as to why. The Kamanns asked for an explanation from Finley who confirmed that the money had been needed for interest payments to the bank.

37. On August 24, 1998, \$1,000 of AIM GLB HLTH SCI had been sold from the Joint Margin Account, bringing the negative balance up to a negative 22,646.02.

38. In late September of 1998, the Kamanns were again contacted by Westoba for immediate payment of arrears which had not been paid.
39. As of late September 1998, the arrangements for automatic payment had still not been completed.
40. In early October of 1998, the Kamanns were contacted by Finley who demanded further money in the amount of \$2,100.00 for the Joint Margin Account. At this point, the Kamanns still did not have an appreciation of what a margin account was, what a margin call was, or why they were being told to put more money in the Joint Margin Account.
41. A few days later, during Finley's absence from work, the Kamanns were contacted by Dennis Collingwood of Midland demanding further monies. Collingwood advised that the monies were required for a "margin call".
42. In October of 1998, Collingwood advised the Kamanns that \$9,000.00 had had to be sold to cover the call.
43. In mid-October of 1998, the Kamanns discovered that Finley still had not attended to the outstanding Westoba payments.
44. As a result of their dealings with Finley, the Kamanns sought advice elsewhere as to what had happened to their finances and investments and the ramifications.

C. ALLEGATIONS

1. Staff of the Commission allege that:
 - (a) Finley engaged in discretionary trading in the handling of the Kamanns' account;
 - (b) Finley did not provide the Kamanns with adequate disclosure as to the strategy he was implementing, including failing to advise the Kamanns that in handling their investments a margin account would be utilized through which mutual funds would be purchased with sale proceeds, borrowed funds, and/or on margin;
 - (c) Finley did not advise the Kamanns of the risks, volatility, and ramifications associated with a margin account;
 - (d) Finley did not provide the Kamanns with adequate disclosure of the risks, volatility, and ramifications associated with the investment strategy he implemented, including the use of a margin account and leveraging;
 - (e) Finley provided investment advice ~~for~~ and/or implemented investment advice which was ~~unnecessary~~ unsuitable in all of the circumstances of the

Kamanns including their investment objectives, knowledge, and experience and financial capabilities;

(f) Finley failed to make recommendations following the Know Your Client Rule thereby exposing the Kamanns to unsuitable risk;

(g) In the purchase of mutual funds, Finley made specific investments for the Kamanns which were unauthorized and which were unsuitable in all of the circumstances of the Kamanns including their investment objectives, knowledge, and experience, and financial capabilities;

(h) Finley provided advice to the Kamanns and handled their investments in a manner contrary to their best interests, resulting in unnecessary interest expenses and payments for loans, interest expenses on a margin account, redemption and other fees, and unfavorable income tax ramifications;

(i) Finley failed to follow the instructions of the Kamanns on a timely basis or at all in respect of the creation of an automatic payment plan with Westoba and in respect of prompt payment of the B of M loan, resulting in unnecessary debt payments and interest expenses to the Kamanns;

(j) Finley conducted unauthorized trades in the Joint Margin Account in the purchase of mutual funds on margin;

(k) Finley sold \$1,000.00 of mutual funds without authorization;

(l) Having sold \$1,000.00 of mutual funds, Finley failed to inform the Kamanns of the use to which the proceeds had been put, namely, reduction in the negative cash balance of the margin account;

(m) Finley acted contrary to the best interests of his clients the Kamanns;

and that due to these allegations, Finley should be suspended as a salesman, branch manager, or otherwise under the Act.

2. Such further and other matters as counsel may advise and the Commission may permit.

DATED at Winnipeg, Manitoba this ~~14th~~ 29th day of ~~August~~ October, 1999.

Director

TO: DAVID WAYNE FINLEY