33rd PIABA Annual Meeting

THE NUTS AND BOLTS OF BRINGING AND WINNING AGAINST RIAS – FROM FORUM SELECTION AND LITIGATION TACTICS TO TRICKS OF THE TRADE IN AAA OR JAMS

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The Nuts and Bolts of Prosecuting Cases against RIAs

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I. Introduction

Representing investors has never been more complicated. Ten years ago, very few investor disputes with financial advisors would be prosecuted anywhere other than via arbitration through FINRA Dispute Resolution. Today, when evaluating a case against a Registered Investment Advisor, beyond the typical concerns over collectability and insurance coverage, the first question needs to be "where do I file my client's case?" There are any number of possibilities, including state or federal court, AAA, JAMs, or some other unknown private arbitration. Each of these venues has its own unique set of procedural rules and costs. If you don't understand the myriad issues and challenges that are presented depending on your forum, you will suffer the consequences.

II. These are NOT FINRA Claims and FINRA Rules and Norms Are Not Relevant

Practitioners that have spent a majority of their careers representing clients in NASD or FINRA arbitrations may find the pivot to prosecuting claims against investment advisors challenging. It should not be. The challenge is eliminating the old FINRA tropes like "suitability" and "net out of pocket" from your lexicon, and refocus your attention to "fiduciary duty."

FINRA Rules like the suitability rule, supervision rule, amongst others, along with all of the regulatory notices, do not mean much in an RIA case. It is simply a different regulatory scheme

[1] This article is incorporated into the 2024 PIABA Annual Meeting materials to accompany the breakout session to be held on Tuesday, September 24, 2024, at 1:05-2:05 PM. which will be moderated by Mr. Wojciechowski, at which time John Burke and Thomas Sporkin, Head of Enforcement from the CFP Board of Standards, will be presenting a detailed presentation explaining their knowledge and experience with RIA cases. Included with the written materials which are attached hereto, are sample complaints filed in the Circuit Court of DuPage County and Cook County, Illinois, and the AAA, sample discovery requests, and a FRCP 30(b)(6) Deposition Notice.

that does not apply to investment advisors. The regulatory scheme that applies to investment advisors exists in two places: 1) The Investment Adviser Act of 1940 and the regulations thereunder; and 2) your state securities act and regulations thereunder.

a. The Investment Advisers Act of 1940 Maintains a Comprehensive Scheme that Applies to All Licensed Investment Advisers.

The Investment Advisers Act of 1940, 15 U.S.C. § 80(b)-1, *et seq.,* is the primary federal law created to monitor and regulate the activities of all investment advisers. It is the primary source of investment adviser regulation and is administered and enforced by the United States Securities and Exchange Commission. Investment Advisers must comply with a wide range of requirements arising out of the Advisers Act. However, an Adviser's compliance responsibilities extend to duties to be aware of information contained in rule releases, policy statements, no action letters, interpretive letters, and enforcement cases.

Reviewing these regulations and rule releases will lead those schooled in prosecuting FINRA-related investor claims to realize they do have some ammunition. For example, with respect to supervision and potential "selling away claims", the Advisers Act defines the Investment Adviser code of ethics which states an Adviser has a duty to supervise its employees and to maintain adequate internal controls, for the purpose of preventing violations of the Adviser Act and ultimately protecting the client, their interests, and their assets. Further, the Code of Ethics, pursuant to SEC Rule 504, Rule 17j-1, and the Advisers Act, section (c)(1)(i), specifies that an Adviser must establish, maintain, and enforce a written code of ethics that meets specified minimum criteria and specifically, "provisions reasonably necessary" to prevent conduct expressly prohibited by the Code of Ethics. 17 CFR § 275.204A-1.

These supervision requirements have existed since the passage of the Investment Advisers Act in 1940. As the investment advice landscape has developed over the decades, so too have regulatory priorities in connection with RIA supervision. On May 1, 2000, the SEC Office of Compliance Inspections and Examinations issued a letter to Registered Investment Advisors to assist them in complying with the Advisers Act, based on SEC examination and inspection findings.[2] One of the areas the SEC identified as being problematic from a compliance perspective were "inadequate internal control and supervisory procedures." The SEC reminded Investment Advisers that "[a] primary responsibility of an investment adviser is the supervision of its employees, to ensure that all of its activities comply with disclosures made to clients and with the provisions of applicable securities laws. The most effective way to fulfill this responsibility is to construct and implement a comprehensive system of internal controls and supervisory procedures."

In December 2003, the SEC issued a Final Rule effective March 2004, for investment adviser compliance programs which required Investment Advisers to "consider their fiduciary and regulatory obligations under [Rule 206(4)-7 of] the Advisers Act and to formalize policies and procedures to address them."[3] As the SEC pointed out, Rule 206(4)-7 under the Advisers Act does not specifically enumerate any list of required elements that advisers must include in their policies and procedures, only that it must be tailored to the Investment Adviser's business and firm's operations, and "designed to prevent violations from occurring, detect violations that have occurred, and correct promptly any violations that have occurred. The SEC did, however,

[2] Securities and Exchange Commission, Lori A. Richards, *Letter from the Office of Compliance Inspections and Examinations: To Registered Investment Advisers, on Areas Reviewed and Violations Found During Inspections,* May 1, 2000 https://www.sec.gov/divisions/ocie/advltr.htm (Last Viewed April 19, 2023)

[3] Securities and Exchange Commission, *Final Rule: Compliance Programs of Investment Companies and Investment Advisers*, December 17, 2003. https://www.sec.gov/rules-regulations/2003/12/compliance-programs-investment-companies-investment-advisers (Last Viewed July 24, 2024)

enumerate ten issues the SEC expects "that an adviser's policies and procedures, at a minimum, should address...". Those ten items identified by the SEC are:

- Portfolio management processes, including allocation of investment opportunities among clients and consistency of portfolios with clients' investment objectives, disclosures by the adviser, and applicable regulatory restrictions;

- Trading practices, including procedures by which the adviser satisfies its best execution obligation, uses client brokerage to obtain research and other services ("soft dollar arrangements"), and allocates aggregated trades among clients;

- Proprietary trading of the adviser and personal trading activities of supervised persons;

- The accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements;

- Safeguarding of client assets from conversion or inappropriate use by advisory personnel;

- The accurate creation of required records and their maintenance in a manner that secures them from unauthorized alteration or use and protects them from untimely destruction;

- Marketing advisory services, including the use of solicitors;

- Processes to value client holdings and assess fees based on those valuations;

- Safeguards for the privacy protection of client records and information; and

- Business continuity plans.

Over the years, the SEC has continued to expand on RIA supervision and compliance issues. Of particular note, in September 2016, the SEC Office of Compliance Inspections and Examinations released a National Exam Program Risk Alert.[4] The SEC specifically identified a "supervision initiative" focused on firms' supervision of high-risk individuals. The SEC noted, in FN 4 of this release, the irrelevance of the legal distinction of the "supervised person" as being an

[4] Securities and Exchange Commission, *National Exam Program Risk Alert,* Volume V, Issue 3 https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-supervision-registered-investment-advisers.pdf

“employee” or “independent contractor.” The reason the SEC was focused on “high risk individuals”, *i.e*., those representatives with disclosure events on their background reports, including prior customer complaints, terminations, or liens, is because studies have established that advisers with disclosure histories are more likely to run afoul of securities rules and regulations in the future. That should come as no surprise.

The SEC is clear that all Registered Investment Advisors are required to reasonably supervise their employees, their agents, and their independent contractors. Recently, the SEC reiterated these compliance requirements in *In the Matter of Horter Investment Management, LLC and Drew K. Horter*, 2022 SEC LEXIS 2976 (November 3, 2022). There, Horter’s investment adviser representative, Kimm Hannan, defrauded Horter’s clients by misappropriating $728,001 through his Outside Business Activity, *i.e.*, stealing investor funds instead of using them for legitimate investment purposes, as represented. Mr. Hannan was convicted of securities fraud and is currently serving a 20-year prison term. The SEC concluded that Horter Investments willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7, and failed to reasonably supervise, within the meaning of Sections 203(e)(6) and 203(f) of the Advisers Act.

It is common in Ponzi-type or selling away claims for the evidence to reveal that supervision consisted of compliance issuing questionnaires or audits to a an adviser, who then fills them out and attests to doing no wrong. Experienced practitioners know this level of supervision does not cut it in the FINRA world and it does not cut it in the RIA world either. “Reliance on the unverified representations of supervised employees can provide a basis for a finding of deficient supervision.” See *In the Matter of Sandra Logay*, Init. Dec. Release No. 159 (Jan. 28, 2000) (finding that the supervisor had not discharged her obligations from a supervisory perspective when she merely quizzed the broker and relied on his unverified assurances); citing *In re John H.*

Gutfreund, 51 S.E.C. at 108; *and Shearson Lehman Hutton, Inc.*, 49 S.E.C. at 1123 (1989). See also *Quest Capital Strategies*, 76 S.E.C. Docket No. 109, Exchange Act Release No. 44935 (October 15, 2001) at 6 (noting that the Commission has "repeatedly stressed that supervisors cannot rely on the unverified representations of their subordinates"); and *Department of Enforcement v. Cantone Research, Inc.*, FINRA No. 2009020383002 (finding it insufficient for the supervisor to accept the broker's "unverified representations about the large dollar deposits and withdrawals").

Just because you are in a different forum and operating under a different standard of care with a different regulatory body, do not forget all of the years spent prosecuting FINRA cases. Many of the same concepts and standards still work and make sense. You might have to simply find them.

b. Dually Registered Agents and Broker/Dealers.

It has become more common for investment advisers and the firms they are registered with to be "dually registered". What this means, simply, is that the adviser and the brokerage firm are licensed and registered as both "brokers" and investment advisers. In many instances, when a potential client complains about the performance of an account, is the victim of a selling away scheme or was sold a financial product that went "bust", the adviser that sold the product or managed the account is both a FINRA registered representative and a licensed investment adviser. In these circumstances, what do you do? You have options.

Your client can certainly bring a FINRA claim if that's where you want the case to proceed. The broker-dealer, regardless of the official status of the account, be it advisory or brokerage, has supervision obligations over the financial advisor and his RIA activities, which are certainly disclosed as an outside business. The question you have to answer is whether FINRA arbitration is the best option for your client? Will litigation serve the client's case more efficiently or effectively. Is there an arbitration provision in the RIA contract that calls for arbitration in another forum and if so, will that forum afford more opportunity at reasonable discovery, or will it be even more restrictive than FINRA? Of course, you also have the option to sue multiple parties in multiple jurisdictions or arbitration forums and let God sort them out!

When reviewing these cases on intake, there are two critically important documents that you have to get. First, you need the contract or investment policy statement that binds your client with the investment adviser. If there is a venue clause or an arbitration clause, it will be in these documents. These contracts also typically contain all sorts of limiting language, choice of law provisions, and other attempts to waive liability contractually. These contracts are critical and will likely form the basis for your opponent's defenses. The "contract" issues are more live in RIA cases than they are in FINRA cases.

The second record you should immediately pull is the Form ADV/Part II for the advisory firm. These publicly available records explain the nuts and bolts of the firm, and includes representations about service and in most instances will disclose the sort of services they provide. Sometimes, these disclosures include the trading strategy they employee and other key disclosures. The rub is, these forms are updated regularly, and at least annually, and historical versions are difficult to dig up online. When you file your RIA case, legacy Form ADVs filed and maintained during the relevant time period are important and should be near the top of your document requests.

If dual-registration is apparent and you have the option to "forum shop" a bit, there are several issues to consider. First and foremost, dismissal on the papers in the FINRA forum is rare and unless you are dealing with a potential eligibility issue, is likely not much of a consideration. However, other arbitration forums are not FINRA and dismissal on the papers is a real threat.

c. Dispositive Motions Under Rule 33 of the AAA Consumer Rules

If your client's RIA used a AAA arbitration clause, you should find your way into the Consumer Rules one way or another. As discussed *infra*, even where the account agreement calls of the AAA commercial rules, AAA will usually allow for investor claims to proceed under the Consumer Rules.

Dispositive motions are governed by Rule 33 in the AAA consumer rules, which states:

> The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

Procedurally, the way R. 33 usually works is, before filing a motion, the movant must make a filing, usually in letter form, which explains its "substantial cause" for seeking dismissal. Practice Point: During the scheduling conference for your case, do not be lulled into waiving R. 33 and consent to motions to dismiss to be filed without seeking the requisite leave. In this practitioner's experience, it is likely the arbitrator will grant leave anyways, but making Respondent elucidate its reasons for filing will give you a heads up in preparing your opposition.

Depending on your Respondent's contract, these motions will either take the form of a more standard motion to dismiss, or, if you've taken depositions, could take the form of a summary judgment motion. These are a lot of work to oppose and there is nothing like it in the FINRA world. Responding to a summary judgment motion in arbitration is not as extensive as doing so in litigation, but is still a laborious task and it is outcome determinative.

As mentioned above, yes, there are scenarios even under the allegedly truncated discovery rules found in R. 22 of the Consumer Rules, where you may take depositions. Sometimes the arbitration clause itself specifically states that parties are entitled to a certain number of depositions. Other times, you can seek leave from the arbitrator and explain why you need to take a deposition and, in many instances, your arbitrator will grant you that leave. Depositions are a powerful tool and should not be overlooked as a very real and useful piece of non-FINRA discovery.

d. Dispositive Motions Under Rule 18 of the JAMS Comprehensive Rules

If your case is in front of a JAMs arbitrator, and it is an investor case, then you are likely proceeding under the JAMS Comprehensive Rules. Rule 18 governs summary disposition and states:

> The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The Request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case.

Similar to AAA consumer Rule 33, JAMS Comp. Rule 18 requires a party to first request leave from the arbitrator to file a motion for summary disposition. The bar for granting leave under Rule 18 is a bit lower than Consumer Rule 33. Likewise, in JAMS, it is far more likely that your case file in JAMS included deposition transcripts and expert reports than a AAA consumer case. These motions are a lot of work to respond to, but once defeated, position your case ideally for hearing because responding to them requires so much work, including parsing deposition transcripts, detailed document review, considerable time spent with your expert, and a lot of legal research, you are well on your way to trying the case.

Obviously, if you file your case in state or federal court, it is almost a certainty that you'll face a motion to dismiss and then a motion for summary judgment. The crucial difference to your client is, any order granting a motion to dismiss or summary judgment disposing of your client's case, is appealable on a *de novo* review. Arbitration affords no such appellate process. Sure, you can file a motion to vacate, but that standard is far higher than the *de novo* standard of review in court. This is an important point to make to your arbitrator when arguing these dispositive motions: the decision is final and if granted will end your client's case.

d. But Wait….My Case is Under the AAA Commercial Rules…

The in-house types that draft arbitration clauses are sometimes familiar with the general concept that they can limit their client's liability by simply inserting an arbitration provision in their contracts that requires adjudication somewhere cost prohibitive. This is particularly true where the arbitration clause calls for adjudication under the AAA Commercial Rules. Commercial cases do not require the company (Respondent) to cover the costs of the arbitration like the consumer rules do. Further, many commercial cases will proceed with three arbitrators as opposed to one, thereby increasing the costs dramatically.

For investor cases, even where the arbitration clause specifically states that the case shall proceed under the AAA commercial rules, the AAA will default the claim to the AAA consumer rules. The AAA, understanding that the form agreements typically at issue are not negotiated and are boilerplate adhesion contracts, requires these disputes to be arbitrated pursuant to the Consumer Rules.

Under R-1(a)(4) of the AAA Consumer Rules, when the parties have agreed to have AAA administer the arbitration, consumer rules must apply when "the arbitration agreement is contained within a consumer agreement, as defined below, that specifies a particular set of rules other than the Consumer Arbitration Rules." As set forth below, there is no question that investment advisory agreements containing the arbitration clause are a consumer agreement as defined by the AAA.

Most RIA contracts are "consumer agreements" as defined by the AAA.

1. The agreement containing the arbitration clause is not an arms-length, commercial agreement negotiated by both parties. Rather it is an obviously "standardized, systematic" drafted and presented by Respondent on a "take it or leave it" basis; and
2. The Investor is an individual consumer who engaged Respondent to provide various financial services for their personal and household use, in connection with their Investment Accounts.

Investment Advisors are in the business of providing consumer financial services, namely investment advisory services, for a fee. Typically, Investment Advisors impose a standard set of terms and conditions – including the arbitration clause – which they naturally require each and every client to adhere to. The only difference for each consumer is the blanks are filled in to change the name, date, and mailing address. This is a hallmark of a standardized agreement. Moreover, and it bears repeating, there is no negotiation of these terms and conditions as they are presented by the RIA as non-negotiable. As such, every single aspect of the relationship between the investor and RIA makes it a consumer transaction, and a consumer agreement as defined by the AAA.

There is also a compelling equitable argument that must be made when arguing your client's case should proceed under the consumer rules. The difference in costs can in many instances be the difference in filing a case and proceeding and not filing at all.

III. Shake off the FINRA Blues – Your Defendant is a Fiduciary as a Matter of Law.

Investor advocates spend a lot of capital arguing whether a fiduciary duty exists in a broker-customer relationship. Even where case law in a specific case says they are fiduciaries, it can be difficult to get a FINRA panel to understand the difference between a fiduciary and a broker, even in the Regulation Best Interest context.

Thankfully, over sixty years ago, the United States Supreme Court made it clear that Section 206 of the Advisers Act of 1940 imposes a fiduciary duty on investment advisers by operation of law. *SEC v. Capital Gaines Research*, 375 U.S. 180 (1963). The issue is not what the standard of care is in RIA cases – it is clearly a fiduciary standard. Rather, the issue is what fiduciary duties are owed by the RIA to your client.

The SEC has interpreted the contours of this fiduciary responsibility over many years. In a post-*Chevron* world, whether these interpretations bind anyone is certainly in doubt. However, at a minimum, these interpretations can still be used as evidence of the standard of care owed. Fundamentally, RIAs owe their clients a duty of utmost good faith to act solely in the best interests of the clients and to make full and fair disclosure of all material facts, particularly where the adviser's interests may conflict with the client's. *Capital Gains*, at 188, 195. The SEC has specifically enumerated the following fiduciary duties over the years:

- A duty to have a reasonable and independent basis for investment advice.[5]
- A duty to obtain best execution for client transactions where the RIA is in a position to direct brokerage transactions.[6]
- A duty to ensure that investment advice is suitable based on the client's objectives, needs, and circumstances.[7]
- A duty to avoid effecting personal securities transactions inconsistent with the client's best interest.[8]

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[5] *In Re Alfred C. Rizzo,* Investment Advisers Act Release No. 897 (Jan. 11 1984)
[6] *In Re Michael L. Smirlock,* Investment Advisers Act Release No. 1393 (Nov. 29, 1993)
[7] *In Re John G. Kinnard and Co.*, SEC No Action Letter, 1973 WL 11848, Fed. Sec. L. Rep. (CCH) ¶ 79,662 (Nov. 30, 1973)
[8] See Investment Advisers Act Release No. 203 (Aug. 11, 1966)

- A duty of loyalty to clients.[9]

As referenced above, there are additional duties to supervise and maintain a compliance apparatus that must also be prosecuted through the fiduciary lens. Many of these duties are familiar. "Reasonable Basis" for a recommendation includes the "due diligence" prong FINRA practitioners are used to utilizing. Similarly, the "suitability" obligation is not one of mere negligence, but is a fiduciary duty in the RIA context.

Fundamentally, in an RIA case, you are in the cat-bird seat. There is no question that your defendant owed your client the highest duty of care known to the law. Sometimes that doesn't matter in a FINRA case because arbitrators are so ensconced in the "FINRA Rules" and "broker-dealer" context. The good news about AAA, JAMS, or a court of law, is that retired judges, sitting judges, and practicing consumer lawyers understand fiduciary duty. Then funnel all of your facts through that fiduciary lens and you've got a head start versus a FINRA claim where dealing with what the duty actually is and what standard applies is a never ending issue.

IV. Litigation is a Different Animal than Arbitration, But Don't Be Intimidated.

Many FINRA practitioners rarely, if ever, file cases in court. There is nothing wrong with that. If that is what your practice allows, then so be it. As the landscape continues to change and the broker-dealer to RIA migration expands, it will become increasingly common that those formerly 100% FINRA practitioners end up in a court room.

The first critical difference between litigation and arbitration is the pleading standards and effect of those pleadings. A Statement of Claim filed in FINRA or a Demand for Arbitration filed in the AAA are really not bound by any form or standard. One merely must specify the relevant facts and remedies requested, generally. In court, whether state or federal, pleading with more

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[9] *See* Investment Advisers Act Release No. 40, 1945 WL 5321 (Feb. 5, 1945); Investment Advisers Act Release No. 232, 1968 WL 4015 (Oct. 16, 1968)

particularity is required. Illinois, for example, is a "fact-pleading" state meaning if your complaint has an chance of moving beyond the dismissal stage, you must plead your facts and causes of action with specificity. Similarly, for a securities fraud or common law fraud claim filed in court, you must plead the fraud with specificity under FRCP 9. Pleading with the requisite level of particularity can be painstaking and increases the time and resources spent on the front end of your claim. Get to know your jurisdiction's pleading rules. Generally, a federal court complaint that does not plead fraud is merely a notice pleading, meaning you might get away with fewer details than if you are pleading fraud or in a fact pleading jurisdiction. Go online to find samples of complaints. Utilize PACER for federal court cases where you can find publicly available work product from experienced litigators at virtually no cost.

Another important litigation practice note, beyond simply understanding the procedural rules, is to get to know your court's local rules and any specific standing orders for your judge. These can be really particular and specific, dealing with issues like type of font used in briefing, or how to properly calendar a motion. Failing to follow local rules or a standing order is a great way to let your opponent know you don't know what you are doing and can really aggravate judges or sometimes more importantly, their clerks.

Trying a jury trial versus a FINRA or AAA arbitration is a bit different too. In arbitration, rarely are rules of evidence used. Sometimes, a brokerage firm will file a motion *in limine* to prevent a regulatory action from being introduced, but that tends to be a strategic blunder when it happens because in arbitration, your judge is also your jury. In court, rules of evidence will be strictly adhered to, so brush up on evidentiary objections and responses, and make sure you understand how to introduce a document or avoid leading witnesses on direct. Sometimes the best practice point, if you haven't tried a jury trial in a while (or ever) is to go to your local court house and spend a day watching a jury trial. It's the best way to learn the basics.

Although many PIABA members are almost exclusively arbitration practitioners, many are not. There are many PIABA members who spend a lot of time in courtrooms and are happy to co-counsel a case to help ease the burden of confronting court rules and procedures. PIABA's greatness is in the collective experience of its membership. Do not be afraid to ask!

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JOHN R. ***********	)	
Plaintiffs,	)	
v.	)	Case No. ________________
	)	Amount Claimed: Over $50,000
McNAMARA CAPITAL INVESTMENT GROUP, LLC and JOHN McNAMARA,	)	**TRIAL BY JURY REQUESTED**
Defendants.	)	

VERIFIED COMPLAINT

Plaintiff John R. ***********, through Counsel, complain against Defendants McNamara Capital Investment Group, LLC and John McNamara ("McNamara Capital" and "Mr. McNamara"), as follows:

I. INTRODUCTION

1. Mr. *********** sought competent and professional financial advice from his long-time and trusted investment advisor to invest his retirement funds suitably and in accordance with his investment objectives, risk tolerance, and financial resources.

2. Instead of investing his money in a manner that was suitable for him given his objectives and retired status, Defendants sold them units in funds issued by DeepRoot Funds that has been sued by the Securities and Exchange Commission and has filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code.

4. The Defendants breached their fiduciary duty when McNamara recommended Plaintiff invest $200,000 in the DeepRoot Growth Runs Deep Fund, LLC., which was at all times a speculative, high risk, private fund not subject to the scrutiny of public markets.

5. One year later, Defendants recommended Plaintiff roll another $220,000 in tax-deferred IRA money, into the DeepRoot 575 Fund, LLC.

5. The Defendants recommended Plaintiff invest in this speculative "new private equity investment" despite his risk tolerance being conservative in nature given his retired status. Despite his knowledge of these facts about the Plaintiff, his investment objectives, risk tolerance, and financial resources, Defendants *still* recommended Plaintiffs invest $200,000 investment in the DeepRoot Growth Runs Deep Fund, LLC.

II. PARTIES

5. Plaintiff John *********** is an individual who is currently 68 years of age, and who at all times relevant resided in -----------, Cook County, Illinois. He is retired and attended ---------- where he earned a two-year degree in Police Science. The John *********** IRA is an Individual Retirement Account owned by and for the benefit of John ***********.

6. Defendant McNamara Capital Investment Group, LLC is an Illinois Limited Liability Company with a principal place of business located at 7350 W. College Drive, Suite 101, Palos Heights, Cook County, Illinois 60463. McNamara Capital is licensed with the State of Illinois and Securities and Exchange Commission as a Registered Investment Advisor. Its Central Registration Depository (CRD) number is 156874.

7. Defendant John McNamara is an individual who at all times relevant resided in Evergreen Park, Cook County, Illinois. Mr. McNamara is identified on public filings as the Managing Member, Chief Compliance Officer, and control person of McNamara Capital. It is

also publicly disclosed that Mr. McNamara owns 100% of McNamara Capital. Mr. McNamara is registered as an Investment Advisor Representative with the State of Illinois and Securities and Exchange Commission. His CRD number is 2817331. Mr. McNamara only maintains the Series 65 Uniform Investment Adviser Law license. He does not maintain a Series 7 license to sell securities.

III. JURISDICTION AND VENUE

8. Jurisdiction over Defendants is proper by virtue of 735 ILCS 5/2-209(a) because: (1) Defendants transacted business in the State of Illinois; (2) Defendants committed tortious acts in the State of Illinois; (3) Defendants owns or uses real estate in the State of Illinois; (4) Defendants entered into a contract with Plaintiffs in the State of Illinois; and (5) Defendants breached fiduciary duties and violated statutes in the State of Illinois.

9. Venue is proper in the Cook County by virtue of 735 ILCS 5/2-101(2) because this is the county in which all of the events giving rise to this claim occurred.

IV. FACTUAL ALLEGATIONS

A. Plaintiff Relied on Defendants for Fiduciary Investment Advice.

10. John ***********, ("Mr. ***********") currently 68 years of age, was employed by UPS as a truck driver for 43 years until his retirement in March 2016.

12. Plaintiff began their investment advisory relationship with Mr. McNamara in or about 2012 after responding to a solicitation McNamara sent in the mail. Mr. *********** and his wife ******* went to a meeting at Mr. McNamara's office and were looking for sound, competent financial advice since Mr. *********** was approaching retirement age.

13. Mr. McNamara founded McNamara Capital Investment Group in 2011. One of his favorite marketing tactics was to host "free dinner" seminars, upon information and belief, at

least yearly where he would invite current clients and seek new ones, to discuss investments for retirees. Mr. ************ recalls attending at least one of these dinners at Cooper's Hawk in Orland Park, which was a Christmas dinner McNamara provided for his clients.

14. Mr. McNamara represented himself to the public and to Plaintiff as an "Ed Slott Master Elite IRA Advisor". On his website, www.mcamara.capital.com, Mr. McNamara represented to the Plaintiff and the world at large that his firm's "mission is to provide the families and businesses we serve with innovative financial strategies, solutions, and development that result in financial clarity and safety."

15. Defendants further represented to Plaintiff and the public generally through the McNamara Capital website, that McNamara's "**core beliefs that demonstrate results** through; Tax reduction and preservation of wealth through sound financial strategies. (Emphasis in Original). Defendants go on to represent that "Mr. McNamara is always mindful of his fiduciary duty as **an Independent Registered Investment Advisor;** and is a proud member of the **National Ethics Bureau.** (Emphasis in Original).

16. On the McNamara Capital website, Defendants define "Fiduciary" thusly: "A fiduciary is a trustee who is legally appointed to hold assets for someone. He or she manages the assets for the other person's benefit versus his or her own."

17. The McNamara website further represented to Plaintiff and the public generally that "[o]ur mission is to provide the families and businesses we serve with innovative financial strategies, solutions, and planning that result in financial clarity and security. In the financial services industry, there are generally two ways of obtaining financial advice: one is given by stockbrokers and the other is given by Investment Advisors. While many investors aren't even

aware differences exist one of the main differences is that investment advisors have a fiduciary duty to act in the best interests of their clients at all times."

18. The McNamara website goes on to represent to Plaintiff and the public generally, that "[a]s a fee based advisory firm, we charge our clients a fee instead of earning commission to help ensure that the appropriate products are chosen based on the client's best interest and not based on the commission generated."

19. The McNamara Capital Form ADV Part 2A Firm Brochure states on page one that McNamara Capital "is a fee based financial planning and investment management firm. The firm does not sell annuities, insurance, bonds, mutual funds, limited partnerships, or other commissioned products." The facts alleged herein establish this representation to be false.

20. The same Form ADV Part 2A Firm Brochure states on page 4 that McNamara Capital "does not receive any external compensation for the sale of securities to clients, nor do any of the investment advisor representatives of McNamara Capital." The facts alleged herein establish this representation to be false.

21. The same Form ADV Part 2A Firm Brochure states on page 13 that "neither McNamara Capital nor any affiliated persons has had any bankruptcy petitions in the past ten years." The facts alleged herein establish this representation to be false.

22. According to Mr. McNamara's IARD Report, he filed for Chapter 13 bankruptcy on January 16, 2017 with a final disposition entered on July 31, 2017. Further, according to public filings, Mr. McNamara filed for Chapter 7 bankruptcy protection in 2001.

23. On or about August 17, 2017, Plaintiff Mr. *********** and his wife *********** had a meeting with Mr. McNamara at his office in Palos Heights. During this

meeting, they discussed Mr. and Mrs. ***********'s investments, financial plans, budgets, and expectations going forward.

24. During this meeting, Mr. McNamara presented Plaintiff and his wife with an investment offered by a company called DeepRoot. Mr. McNamara had a diagram of the company and how it worked on his white board. He represented to Plaintiff that DeepRoot invested in life insurance policies and that the investment was stable because it guaranteed by these highly rated insurance companies.

25. During the meeting at Mr. McNamara's office where he discussed DeepRoot with Mr. *********** and his wife, Mr. McNamara did not disclose any risks to Mr. *********** of investing in DeepRoot. Instead, he touted the secured nature of the funds being invested in life insurance policies, usually referred to as life settlement contracts, as being a sound business model and that DeepRoot owner and Principal Robert Mueller had the experience to execute this investment plan.

30. Mr. McNamara represented to the Plaintiff that the DeepRoot Growth Runs Deep Fund, LLC would provide secured interest payments of 5% per month, annualized. This is not a high rate of return, and is comparable to highly rated corporate bonds and lower rated municipal bonds.

31. The second option offered by the 575 Fund was to "reinvest" the interest and receive a lump sum in the amount of the principal investment plus interest accrued over five years at 7%, or $326,000. Mr. *********** chose this second option based on Mr. McNamara's recommendation.

32. Although 7% is a higher rate of return than 5%, it is not an amount that would be sufficient to justify investing in a private company with no proven revenue, business model, or

financial disclosures. Because of the 575 Fund securities fraud and bankruptcy, Mr. *********** will not receive his promised $326,000 in September 2022.

32. Of course, the reason Mr. McNamara sold DeepRoot Funds to the Plaintiff and many of his clients, was the massive “finder’s fee” he received for doing so. Contrary to the representations made in his Form ADV, the $14,000 “finder’s fee” he “earned” for selling DeepRoot to the Plaintiff was a direct conflict of interest which resulted in McNamara putting his financial interests ahead of the Plaintiff’s.

33. During this August 17, 2017 meeting, Mr. McNamara had all of the papers drawn up and prepared for Plaintiff to complete and sign. The application included a risk tolerance and investment objective section which listed Plaintiff as a “moderate” and Growth/Income/Tax-deferred Growth investor. The “very aggressive”, “aggressive”, or just “growth” options were not checked, a clear indication there was a mismatch between the recommendation to invest in DeepRoot and the Plaintiff’s investment objectives and risk tolerance.

34. Mr. McNamara also assisted Plaintiff in completing a financial statement listing their assets and liabilities. Of their disclosed total net worth of approximately $2 million, McNamara included the $450,000 death benefit on Plaintiff’s life insurance, their $650,000 residence (which is to be excluded from net worth calculations to determine whether an investor is accredited), and a fixed annuity in the amount of $443,651. These assets are not liquid and Plaintiff’s liquid net worth fell well below the $1 million threshold considered to qualify an investor as “accredited”.

35. Based on the representations made by Mr. McNamara and McNamara Capital about the DeepRoot, on August 17, 2017, Plaintiff invested $200,000 in the DeepRoot 575 Fund, LLC. The Plaintiff reasonably believed that Mr. McNamara used care in selecting this

investment for them, that he had their best interests in mind when making this recommendation, and that the investment was being offered legally in accordance with Illinois law.

39. As an Investment Adviser Representative to a registered investment advisory firm, Mr. McNamara is and was at all relevant times a fiduciary who owed the highest duty of loyalty to those on whose behalf he acts.

40. At all times, Mr. McNamara had a duty to recommend investments that were suitable for Plaintiffs based on their stated investment objectives and risk tolerance, as well as a fiduciary duty to make investment recommendations that were in their best interest. These duties required that Mr. McNamara conduct proper due diligence on each investment prior to recommending them to Plaintiff, and to use reasonable care to ensure that these investments were suitable for him based on his stated age, financial resources, investment experience, investment objectives, and risk tolerance.

B. DeepRoot Turns Out to be Nothing More than a Ponzi Scheme

43. On August 20, 2021, the United States Securities and Exchange Commission (SEC) filed a civil complaint against Robert J. Mueller, DeepRoot Funds, LLC and Policy Services, Inc., alleging that Mueller and DeepRoot defrauded investors out of approximately $58 million.

44. According to the SEC complaint, Mueller and DeepRoot were investment advisers to two pooled investment funds created by Mueller in 2014 called the DeepRoot 575 Fund, LLC and the DeepRoot Growth Runs Deep Fund, LLC.

45. The DeepRoot Growth Runs Deep Fund, LLC (“Growth Fund”), represented to investors that in exchange for committing capital to the fund for five years, investors would

receive either 7% simple interest accrued annually to be paid out at the end of the five year term, or 5% simple interest annually, paid out on a monthly basis.

46. DeepRoot and Mueller represented to the 575 Fund investors that the majority of fund assets would be invested in life insurance policies. However, instead, Mueller invested most 575 Fund capital in the Growth Runs Deep fund, which in turn invested most of its investor capital in life insurance policies. To facilitate these life insurance transactions, Mueller used another affiliated entity, Policy Services, Inc., to actually purchase these life insurance policies. Mueller and DeepRoot further represented to investors that it would also invest less than half of the fund portfolio in "affiliated businesses."

47. According to the SEC, although raising a total of $58 million from investors, less than $10 million was spent to purchase life insurance policies for the two Funds. No new insurance policies were purchased after September 2017.

48. Instead of using investor funds as promised, DeepRoot and Mueller used investor capital as a piggy bank, funneling the money to numerous affiliated businesses in transactions that were not at arms-length.

49. Since 2015, neither the purported life insurance policies nor the investments in these myriad affiliated entities, yielded any real revenue or return for investors.

50. Mueller also commingled investor funds throughout both funds, and through affiliated entities. He also took at least $1.5 million of fund assets to pay for personal expenses, even though he made statements indicating he took no compensation from the Funds and paid himself another $1.6 million in salary payments.

51. The SEC alleges that Mueller used investor funds to pay his daughter's private school tuition, vacations, a second wedding and second divorce, a third wedding, jewelry which

included engagement rings and wedding bands for wedding two and three, and to purchase a condo in Kauai, Hawaii.

52. Bank records indicate that most of the money paid out to investors in alleged "interest" payments were actually a return of investor capital, or paid by funds from new investors, a classic Ponzi set-up. Other sources of investor interest or redemption payments included using borrowed funds and used the Funds collateral to secure those loans.

C. The Plaintiffs Suffered Investment Losses as a Result of Mr. McNamara's Misconduct

57. Unbeknownst to the Plaintiffs, the DeepRoot security was unsuitable for them in that it was a high risk, illiquid investment in which the Plaintiffs could suffer substantial principal losses. This investment recommendation was completely inconsistent with their stated desire to generate growth and income with very conservative investments. As a result of this unsuitable investment recommendation, Mr. McNamara breached the fiduciary duties that he owed the Plaintiffs.

58. In addition, Mr. McNamara failed to conduct proper due diligence on the DeepRoot security. Had Mr. McNamara conducted proper or even minimal due diligence, he would have known that the 575 Fund had no proven track record; that dependence on one person for success or failure was untenable; that the lack of audited financial statements was disqualifying on its face; that the lack of any access to financial records for the company was disqualifying, and that the DeepRoot security was a grossly unsuitable investment to recommend to retirees with conservative investment objectives and a low risk tolerance. Mr. McNamara was conscious of his guilt when on August 24, 2021, he recommended that Plaintiff seek legal counsel.

59. At all relevant times, the Plaintiffs reasonably relied on Mr. McNamara and were not aware of the risks to which they were being exposed by virtue of the unsuitable investment recommendation and Mr. McNamara's failure to conduct due diligence on the DeepRoot investment. As a direct and proximate result of the misconduct described above, the Plaintiffs have suffered substantial investment losses, and are now stuck with securities in DeepRoot that have been rendered virtually worthless.

COUNT I
Breach of Fiduciary Duty
(Plaintiff against Defendant Mr. McNamara)

60. Plaintiffs repeat and reallege paragraphs 1 through 59 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 60.

61. As an Investment Advisor Mr. McNamara had superior knowledge, expertise, and skills applicable to investing and investment advice, which were skills Plaintiffs did not possess.

62. Plaintiffs reposed complete trust and confidence in Mr. McNamara that he would act in their best interests.

63. Through that trust and confidence, Mr. McNamara gained influence and superiority over Plaintiffs relative to their retirement or investment accounts and the use of those retirement or investment funds therein.

64. As an investment advisor representative, Mr. McNamara owed fiduciary duties to the Plaintiffs including the highest duty of utmost loyalty, good faith, full and fair disclosure, and the duty to:

A. Provide investment advice that was in Plaintiffs' best interests;

B. Refrain from engaging in activity that conflicts with Plaintiffs' interests;

C. Make full, frank, and honest disclosures of the risks and characteristics of the DeepRoot Fund;

d. Adequately investigate and perform due diligence on DeepRoot Wealth.

65. Mr. McNamara breached the fiduciary duties owed to the Plaintiffs by:

A. Failing to understand DeepRoot and its business prior to recommending it for sale to Plaintiffs;

B. Failing to recognize and understand Plaintiffs' financial resources prior to soliciting them to invest in a speculative private placement;

C. Failing to disclose material facts about DeepRoot including that the lack of audited financial statements and no financial transparency or access was a serious issue any of which any reasonable investor should take notice.

D. Failing to make an investment recommendation that comported with Plaintiff's investment objectives and risk tolerance.

E. Failing to recognize red flags about DeepRoot including:

i. That DeepRoot did not disclose audited financial statements.

ii. That DeepRoot did not disclose how it acquired life insurance policies.

iii. That DeepRoot did not have adequate controls in place to prevent the conversion of investor funds for personal purchases and spending binges by Mueller.

iv. That DeepRoot failed to retain any professional auditors, accountants, or lawyers to oversee the Funds' operations.

v. That DeepRoot had no documents or information related to what interests investors received from DeepRoot's investments in related businesses.

66. Mr. McNamara's breaches of fiduciary duty caused injury to the Plaintiff.

67. Mr. McNamara unjustly profited from his breaches of duty, in that he, acting through Defendant McNamara Capital, received a commission of between 6.875% of Plaintiff's total investment, far higher than any management fee he could charge for advisory services.

68. As a direct and proximate result of breach of fiduciary duty by Mr. McNamara, Plaintiff was damaged in an amount to be determined according to proof.

WHEREFORE, Plaintiff prays for judgment against Mr. McNamara for:

A. All actual and compensatory damages caused by Mr. McNamara's breach including loss of interest and reasonable costs;

B. Well-Managed damages;

C. Any and all further relief that this Court deems just and appropriate.

COUNT II
Violation of 815 ILCS 5/12 (Misrepresentation and Omission of Material Facts)
(Plaintiff against Defendant Mr. McNamara)

77. Plaintiff repeats and realleges paragraphs 1 through 59 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 77.

78. At all times relevant, there existed in the State of Illinois, a statute entitled the Illinois Securities Law of 1953, 815 ILCS 5/1 et seq. ("ISL").

79. Interests in the DeepRoot 575 Fund that are the subject of this Complaint are "securities" as defined in Section 2.1 of the ISL.

80. Pursuant to Section 12 of the ISL, 815 ILCS 5/12, it is unlawful for any person to:

A. offer or sell in Illinois any security except in accordance with the provisions of this Act;

B. Engage in any transaction, practice or course of business in connection with the purchase or sale of any security which works or tends to work a fraud or deceit upon the purchaser thereof;

C. Obtain money through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

D. While acting as an investment advisor representative, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

81. On or about August 17, 2017, Mr. McNamara did offer, as that term is defined in Section 2.5a of the ISL, an investment in the DeepRoot 575 Fund to Plaintiff, by an oral solicitation.

82. Mr. McNamara's oral solicitation to Plaintiff to invest in the DeepRoot 575 Fund contained materially false and untrue statements including:

A. That the DeepRoot investment was suitable for Plaintiff's conservative investment objectives.

B. That the investment in DeepRoot was guaranteed and secured.

C. That DeepRoot was able to pay 5% interest to its investors because the company purchased life insurance policies the proceeds of which were used to pay investors.

D. That the DeepRoot investment was safe because it was secured by life insurance policies.

83. Mr. McNamara's oral solicitation to Plaintiff to invest in the DeepRoot 575 Fund omitted to state the following material facts that were required to make the statement contained in Mr. McNamara's oral solicitation not misleading:

A. That the DeepRoot investment was a speculative play in an unsecured security.

B. That the DeepRoot 575 Fund did not have audited financial statements.

C. That the DeepRoot 575 Fund did not provide any financial disclosures about its business, revenue, or underlying investments. In short, DeepRoot was totally opaque.

E. That Defendants' due diligence into DeepRoot consisted of reviewing advertising materials provided by DeepRoot at a seminar.

F. That Mr. McNamara received "finders fees" for selling Plaintiff DeepRoot, despite representations on his website and Form ADV to the contrary.

G. That McNamara was not professionally qualified to analyze, review, perform due diligence upon, and to offer a private placement security to Plaintiff, because he lacked the requisite professional securities license to do so, the Series 7.

H. That Mr. McNamara did not know how DeepRoot obtained purported life insurance policies or whether the company could do so successfully.

I. That DeepRoot intended to invest substantially in numerous related entities without adequate disclosure.

84. Mr. McNamara unjustly profited from his breach of duty in that he received sales commissions by selling DeepRoot 575 Fund to Plaintiff.

85. Mr. McNamara's conduct was willful, knowing, and malicious and violated Plaintiff's trust and confidence.

86. Plaintiff was justified in relying on Mr. McNamara when he accepted his advice to invest in the DeepRoot 575 Fund because:

A. At all times Mr. McNamara was a licensed investment advisor;

B. Plaintiffs had been Mr. McNamara's advisory clients since 2010;

C. Mr. McNamara represented on his firm's website that he was an "Ed Slott Master Elite IRA Advisor".

D. Mr. McNamara represented on his firm's website that his firm's missions is to "provide families and businesses we serve with innovative financial strategies, solutions, and development that result in financial clarity and safety."

E. Mr. McNamara represented on his firm's website that his "core beliefs that demonstrate results through: tax reduction and preservation of wealth through sound financial strategies."

F. Mr. McNamara represented on his firm's website that he is "always mindful of his fiduciary duty as an Independent Registered Investment Advisor; and is a proud member of the National Ethics Bureau."

87. At all times relevant, Regulation 130.850 of the Illinois Securities Law stated: "No dealer or salesperson shall effect transactions for any customer's account which are excessive in size or frequency or unsuitable in view of the financial resources of the customer." 14 Ill. Adm. Code 130.285 provides further that "[t]he failure of any dealer or salesperson to comply with Sections 130.810…130.850, and 130.851 is deemed to be a fraudulent business."

88. By soliciting the Plaintiff to invest retirement money in the DeepRoot 575 Fund, Mr. McNamara violated Regulation 130.850 of the Illinois Securities Law and as such committed a fraudulent business practice.

89. As a result of the reliance on Mr. McNamara, Plaintiff has suffered financial losses totaling at least $200,000.

91. Pursuant to Section 13 of the ISL, 815, ILCS 5/13(A), Plaintiff, as a purchaser of securities, may rescind any securities transaction effected in violation of Section 12 of the ISL.

92. Section 13 of the ISL, 815 ILCS 5/13, imposes joint and several liability upon the issuer, controlling person, and dealer; and each dealer or salesperson who participated or aided in any way in making the sale.

93. In compliance with the notice provision of the Illinois Securities Law located in 815 ILCS 5/13(B), Plaintiff caused to be delivered to Counsel for Defendants a letter dated November 30, 2021, informing Defendants of Plaintiff's intent to make claims against them and to seek the remedy outlined under the Illinois Securities Law, including rescission. Defendants

acknowledged receipt of this letter, which triggered the execution of a Tolling Agreement, but nothing more.

94. Mr. McNamara is liable to Plaintiff because he is the control person of McNamara Capital and because he was the salesperson who solicited the sale of DeepRoot 575 Fund to the Plaintiff.

95. Pursuant to 815 ILCS 5/13(A), Plaintiff are entitled to void their transaction in DeepRoot 575 Fund in the amount of $200,000 with Mr. McNamara due to his violations of section 12 of the ISL, 815 ILCS 5/12.

WHEREFORE, Plaintiff prays for judgment against Mr. McNamara for:

A. Rescission;

B. Interest of 10% per annum from the date of the investment, pursuant to 815 ILCS 5/13(A)(1), in the amount of $96,000, as of June 20, 2022 and increasing $263.02 per diem;

C. Costs together with reasonable attorney' s fees and expenses pursuant to 815 ILCS 5/13(A); and

D. Any and all further relief that this court deems just and appropriate.

COUNT III
Breach of Fiduciary Duty
(Plaintiff against Defendant McNamara Capital Investment Group, LLC)

112. Plaintiff repeats and realleges paragraphs 1 through 59 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 112.

113. As an Investment Advisory firm McNamara Capital Investment Group, LLC ("McNamara Capital") owed fiduciary duties to its clients, including Plaintiff. These duties

include, but are not limited to, the duties of utmost loyalty, good faith, and full and fair disclosure.

114. Plaintiff was a client of McNamara Capital at all times relevant.

115. As clients of McNamara Capital, Plaintiff reposed complete trust and confidence in McNamara Capital that it would act in his best interests at all times.

116. Through that trust and confidence, McNamara Capital gained influence, superiority over Plaintiff relative to his retirement accounts and the use of the investment funds contained therein.

117. McNamara Capital owed fiduciary duties to Plaintiff, including the duty to:

A. Provide investment advice that was in Plaintiff's best interests;

B. Refrain from engaging in activity that conflicts with Plaintiff's interests;

C. Make full, frank, and honest disclosures of the risks and characteristics of the DeepRoot Fund;

d. Adequately investigate and perform due diligence on DeepRoot;

e. Adequately supervise the conduct of its agents and employees in connection with providing financial and investment advice.

118. McNamara Capital breached the fiduciary duties owed to the Plaintiff by:

A. Failing to understand DeepRoot and its business prior to recommending it for sale to Plaintiff;

B. Failing to disclose material facts about DeepRoot including that the lack of audited financial statements and no financial transparency or access was a serious issue any of which any reasonable investor should take notice.

C. Failing to make an investment recommendation that comported with Plaintiffs' investment objectives and risk tolerance.

D. Failing to recognize red flags about DeepRoot including:

i. That DeepRoot did not disclose audited financial statements.

ii. That DeepRoot did not disclose how it acquired life insurance policies.

iii. That DeepRoot did not have adequate controls in place to prevent the conversion of investor funds for personal purchases and spending binges by Mueller.

iv. That DeepRoot failed to retain any professional auditors, accountants, or lawyers to oversee the Funds' operations.

v. That DeepRoot had no documents or information related to what interests investors received from DeepRoot's investments in related businesses.

119. McNamara Capital's breaches of fiduciary duty caused injury to the Plaintiff.

120. McNamara Capital unjustly profited from these breaches of duty, in that McNamara Capital received a commission nearly 7% of Plaintiff's total investment.

121. As a direct and proximate result of the breach of fiduciary duty by McNamara Capital, Plaintiff was damaged in an amount to be determined according to proof.

WHEREFORE, Plaintiffs pray for judgment against McNamara Capital for:

A. All actual and compensatory damages caused by Mr. McNamara's breach including loss of interest and reasonable costs;

B. Well-Managed damages;

C. Any and all further relief that this Court deems just and appropriate

COUNT IV
Violation of 815 ILCS 5/12 (Omission or Material Fact)
(Plaintiffs against Defendant McNamara Capital Investment Group)

130. Plaintiffs repeat and reallege paragraphs 1 through 59 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 130.

131. At all times relevant, there existed in the State of Illinois, a statute entitled the Illinois Securities Law of 1953, 815 ILCS 5/1 et seq. ("ISL")

132. Interests in the DeepRoot 575 Fund that are the subject of this Complaint are "securities" as defined in Section 2.1 of the ISL.

133. Pursuant to Section 12 of the ISL, 815 ILCS 5/12, it is unlawful for any person to:

A. offer or sell in Illinois any security except in accordance with the provisions of this Act.

B. Engage in any transaction, practice or course of business in connection with the purchase or sale of any security which works or tends to work a fraud or deceit upon the purchaser thereof;

C. Obtain money through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

D. While acting as an investment advisor representative, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

134. On or about August 17, 20217, McNamara Capital did offer, as that term is defined in Section 2.5a of the ISL, an investment in the DeepRoot 575 Fund to Plaintiff, by an oral solicitation by its principal, Mr. McNamara.

135. Mr. McNamara's oral solicitation to Plaintiff to invest in the DeepRoot 575 Fund was performed in the course and scope of Mr. McNamara's employment as an agent, control person, and owner of McNamara Capital.

136. This solicitation contained materially false and untrue statements including:

A. That the DeepRoot investment was suitable for Plaintiff's conservative investment objectives.

B. That the investment in DeepRoot was guaranteed and secured.

C. That DeepRoot was able to pay 5% interest to its investors because the company purchased life insurance policies the proceeds of which were used to pay investors.

D. That the DeepRoot investment was safe because it was secured by life insurance policies.

137. McNamara Capital's oral solicitation (through its agent Mr. McNamara) to Plaintiff to invest in the DeepRoot 575 Fund omitted to state the following material facts that were required to make the statement contained in McNamara Capital's oral solicitation not misleading:

A. That the DeepRoot investment was a speculative play in an unsecured security.

B. That the DeepRoot 575 Fund did not have audited financial statements.

C. That the DeepRoot 575 Fund did not provide any financial disclosures about its business, revenue, or underlying investments. In short, DeepRoot was totally opaque.

D. That Defendants' due diligence into DeepRoot consisted of reviewing advertising materials provided by DeepRoot at a seminar.

E. That Mr. McNamara received "finders fees" for selling Plaintiff DeepRoot, despite representations on his website and Form ADV to the contrary.

F. That McNamara was not professionally qualified to analyze, review, perform due diligence upon, and to offer a private placement security to Plaintiffs, because he lacked the requisite professional securities license to do so, the Series 7.

G. That Mr. McNamara did not know how DeepRoot obtained purported life insurance policies or whether the company could do so successfully.

H. That DeepRoot intended to invest substantially in numerous related entities without adequate disclosure.

139. As a Registered Investment Advisor, McNamara Capital had superior knowledge, expertise, and skill in investing, which were skills Plaintiff did not have.

140. Plaintiff reposed complete trust and confidence in McNamara Capital that it would act in their best interests, only make suitable investment objectives, and perform due diligence on investments prior to offering them for sale to Plaintiff.

141. Through this trust and confidence, McNamara Capital gained influence and superiority over Plaintiff relative to his retirement and/or investment accounts and the use of the investment funds contained therein.

146. McNamara Capital unjustly profited from its breach of duty in that it received sales commissions by selling DeepRoot 575 Fund to Plaintiff.

147. McNamara Capital's conduct was willful, knowing, and malicious and violated Plaintiff's trust and confidence.

148. Plaintiff was justified in relying on McNamara Capital when they accepted the investment advice to invest in the DeepRoot 575 Fund because:

A. At all times McNamara Capital was a licensed investment advisory firm;

B. Plaintiff had been clients of McNamara Capital since inception in 2011;

C. McNamara Capital represented on its website that Mr. McNamara was an "Ed Slott Master Elite IRA Advisor".

D. McNamara Capital represented on its website that McNamara Capital's mission is to "provide families and businesses we serve with innovative financial strategies, solutions, and development that result in financial clarity and safety."

E. McNamara Capital represented on its website that Mr. McNamara's "core beliefs that demonstrate results through: tax reduction and preservation of wealth through sound financial strategies."

F. McNamara Capital represented on its website that Mr. McNamara is "always mindful of his fiduciary duty as an Independent Registered

Investment Advisor; and is a proud member of the National Ethics Bureau."

149. At all times relevant, Regulation 130.850 of the Illinois Securities Law stated: "No dealer or salesperson shall effect transactions for any customer's account which are excessive in size or frequency or unsuitable in view of the financial resources of the customer." 14 Ill. Adm. Code 130.285 provides further that "[t]he failure of any dealer or salesperson to comply with Sections 130.810…130.850, and 130.851 is deemed to be a fraudulent business."

150. By soliciting the Plaintiff to invest in the DeepRoot 575 Fund, McNamara Capital, through its Principal and Agent, Defendant Mr. McNamara, violated Regulation 130.850 of the Illinois Securities Law and as such committed a fraudulent business practice.

150. As a result of the reliance on McNamara Capital, Plaintiff has suffered financial losses totaling at least $200,000.

151. Pursuant to Section 13 of the ISL, 815, ILCS 5/13(A), Plaintiff, as purchasers of securities, may rescind any securities transaction effected in violation of Section 12 of the ISL.

152. Section 13 of the ISL, 815 ILCS 5/13, imposed joint and several liability upon the issuer, controlling person, and dealer; and each dealer or salesperson who participated or aided in any way in making the sale.

153. In compliance with the notice provision of the Illinois Securities Law located in 815 ILCS 5/13(B), Plaintiffs caused to be delivered to Counsel for Defendants a letter dated November 30, 2021 informing Defendants of Plaintiff's intent to make claims against them and to seek the remedy outlined under the Illinois Securities Law, including rescission. Defendants did not respond to the letter.

154. McNamara Capital is liable to Plaintiff because Mr. McNamara, at all times, acted as an agent of McNamara Capital.

155. Pursuant to 815 ILCS 5/13(A), Plaintiff is entitled to void his transaction in DeepRoot 575 Fund in the amount of $200,000 with Mr. McNamara due to his violations of section 12 of the ISL, 815 ILCS 5/12.

WHEREFORE, Plaintiff prays for judgment against McNamara Capital for:

A. Rescission;

B. Interest of 10% per annum from the date of the investment, pursuant to 815 ILCS 5/13(A)(1), in the amount of $96,000, as of June 20, 2022 and increasing $263.02 per diem;

B. Costs together with reasonable attorney' s fees and expenses pursuant to 815 ILCS 5/13(A); and

C. Any and all further relief that this court deems just and appropriate.

Dated this June 20, 2022

/s/ *Joseph R. Wojciechowski*
Joseph Wojciechowski

Stoltmann Law Offices, P.C. (Firm # 43671)
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Attorneys for Plaintiff

VERIFICATION

Under penalties as provided by law pursuant to Section 5/1-109 of the Illinois Code of Civil Procedure, the undersigned hereby certifies that the statements set forth in the **VERIFIED COMPLAINT** are true and correct, except as to matters therein stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that he/she verily believes the same to be true.

/s/*John R.* ***********
JOHN R. ***********

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

[redacted] Plaintiff, v. [redacted] [redacted] [redacted] [redacted]	)	Case No. ________________

COMPLAINT AT LAW

Plaintiffs, [redacted] through their counsel JSB LAW, LLC and

Stoltman Law, P.C., complain against Defendants [redacted], as follows:

I. INTRODUCTION

1. PLAINTIFFS were clients of the investment advisory firm [redacted] and were each not suitable for investment advisory management in speculative trading in high volatility securities, were each steered by misrepresentation and omission of fact by DEFENDANTS into an investment model that was high risk and not suitable for any investor. PLAINTIFFS placed their trust in DEFENDANTS who placed all PLAINTIFFS investments in this investment model through the abuse of the discretionary trading authority over PLAINTIFFS investment accounts.

II. PARTIES

2. Plaintiff [redacted]

[redacted]

[redacted]

5. [redacted]

10. Plaintiffs [redacted] [redacted] are hereinafter jointly referred to collectively as PLAINTIFFS where the allegations are common to each of them individually.

11. Defendant [redacted]., is an Illinois corporation with a principal place of business located at [redacted] [redacted] [redacted] is licensed with the State of Illinois and Securities and Exchange Commission as a Registered Investment Advisor. Its Central Registration Depository (CRD) number for registration with filing requirements of the U.S. securities industry and its regulators is [redacted].

12. Defendant [redacted] is an individual who at all times resided in the State of Illinois. [redacted] as an investment advisory firm, was its president, secretary and director at all times relevant, and held himself out as its chief executive officer and chief compliance officer. [redacted] is currently registered with [redacted]

13. [redacted] is registered as an investment advisor representative with [redacted] through the State of Illinois and the SEC. His CRD number is [redacted] currently holds a Series 65 Uniform Investment Advisor Law license. At all times relevant he was the investment adviser of PLAINTIFFS accounts.

14. Defendant [redacted] is an individual who resided in the State of North Carolina. At all times relevant [redacted] was employed by [redacted] as an investment adviser representative and was held out as its chief investment officer with responsibility for managing its "[redacted]". At all times relevant, [redacted] he managed was under the direct supervision and of [redacted]..

15. At all times relevant, [redacted] is registered as an investment advisor representative with [redacted] through the State of Illinois and the Securities and Exchange Commission ("SEC"). His CRD number is [redacted] [redacted] currently holds the Series 65 Uniform Investment Adviser Law license.

16. Defendant [redacted] are hereinafter jointly referred to collectively as DEFENDANTS where the allegations are common to each of them individually.

17. [redacted]

[redacted].

18. [redacted].

19. [redacted].

20. [redacted]

21. [redacted].

22. [redacted],

[redacted]

FACTUAL ALLEGATIONS

A. [redacted] establish [redacted] an Investment advisory firm

23. Beginning in August 2016, [redacted] joined the registered investment advisory firm [redacted] and registered as an investment adviser and shortly thereafter caused [redacted] to be formed on or about September 15, 2016 for purpose of conducting his investment advisory business.

24. Thereafter, [redacted] registered as an investment adviser with [redacted]l and began operating as an investment adviser with [redacted] under the name [redacted].

25. In October 2018, [redacted] founded [redacted] as an independent registered investment advisory firm and he registered with [redacted]

26. In January 2019, [redacted] as investment advisors with [redacted].

27. As a registered investment advisory firm [redacted] was registered with the SEC and State of Illinois.

28. At all times relevant, [redacted] owed a fiduciary duty to its clients as a matter of law and fact to act in the best financial interests of their clients and to disclose any potential conflicts of interest.

29. At all times relevant, [redacted] was required to follow the federal fiduciary standard of a registered investment advisor, and owed a duty of care and a duty of loyalty to its clients and could not place its own interests ahead of the interests of its clients.

30. At all times relevant [redacted] fiduciary duty of care required it to provide investment advice in the best interest of its clients based on the clients' objectives.

31. At all times relevant, [redacted] fiduciary duty of loyalty required it to eliminate or make full disclosure of all conflicts of interest which might incline an investment adviser consciously or unconsciously to render advice which is not disinterested such that a client can provide informed consent to any conflict.

32. At all times relevant, [redacted] acted through [redacted] and [redacted], who were its investment adviser representatives acting as fiduciaries to its clients.

33. At all times relevant [redacted] investment advisory representatives including [redacted] held a position of trust and confidence resulting in influence and superiority over their clients including PLAINTIFFS that gave rise to a fiduciary duty owed as a matter of fact to [redacted] clients including PLAINTIFFS, as a result of their:

a) having superior knowledge of investing, and investment advisory consultation;

b) having and exercising discretionary control over the financial accounts of [redacted] clients including PLAINTIFFS;

c) selecting, buying and selling at their discretion a variety of investments that they deemed to be suitable for [redacted] clients including PLAINTIFFS;

d) determining unilaterally the amount of their advisory fee to be charged quarterly;

e) causing the advisory fee to be withdrawn from [redacted] client accounts including PLAINTIFFS' accounts; and

f) disposing otherwise of client assets in their brokerage accounts at the sole discretion of [redacted].

34. At all times relevant, [redacted] chief executive officer ("CEO") and chief compliance officer ("CCO").

35. At all times relevant, [redacted] was an investment advisor representative of [redacted] and the chief investment officer ("CIO") of [redacted] who managed the [redacted].

36. On information and belief, [redacted] an additional fee for managing the [redacted] Model.

37. At all times relevant [redacted] was responsible for supervision of [redacted] investment advisers including [redacted], it's client accounts, including PLAINTIFFS accounts, and [redacted] portfolio models including the [redacted] Model managed by [redacted], to ensure compliance with the investment advisers fiduciary duties to clients, and federal and state securities laws and regulations.

38. [redacted] responsibility for supervision of [redacted] investment advisers included review of internal transactions, security holding reports, electronic and physical correspondence, and other internal reports as mandated by [redacted] and regulatory authorities including the SEC and the Illinois Department of Securities.

39. [redacted] and [redacted] advisory agreements with clients including PLAINTIFFS provided that [redacted] into the advisory agreement on behalf of [redacted] and was responsible for the investment advisory client accounts including PLAINTIFFS.

40. The PLAINTIFFS advisory agreements with [redacted] provided that [redacted] was a signatory only as to the fee being charged.

41. [redacted] assigned [redacted] as the [redacted] investment adviser representative acting on DEFENDANTS behalf to manage PLAINTIFFS accounts.

42. At all times relevant, [redacted] engaged in an aggressive investment strategy in all of PLAINTIFFS accounts that was characterized by, amongst other items:

a.) aggressive short term trading of concentrated portfolios of high technology stocks;

b.) aggressive short term trading based on the high volatility of securities;

c.) aggressive short term trading in the same securities in each of PLAINTIFFS accounts that were bought and sold multiple times PLAINTIFFS accounts;

d.) aggressive short term trading that resulted in unnecessary high turnover of portfolios in PLAINTIFFS accounts;

e.) as managing portfolios whose volatility was extremely high in comparison to the market;

f.) charging excessively high advisory fees well above what is charged by the industry without informing the PLAINTIFFS that their advisory fees were well out range from what is customary;

g) charging fees based on the gross amount of securities in the account and not informing PLAINTIFFS that advisory fees would be charged on leveraged portfolios to the full extent of the securities in the account;

h.) charging PLAINTIFFS advisory fees in heavily leveraged margin accounts that exceeded 9.00% of the PLAINTIFFS assets;

i.) using margin in PLAINTIFFS accounts despite representing that [redacted] did not employe excessive leverage in the portfolio management;

j.) managing portfolios with excessive high-cost ratios that were well above 11%;

k.) managing portfolios that produced little if any income; and

l.) managing portfolios that resulted in large losses.

43. At all times relevant, [redacted] referred to the investment strategy as [redacted] Model" and claimed that he and all of his clients were invested in the same stocks in the model portfolio.

44. The "[redacted] Model" was an aggressive risk investment that was not suitable for all investors that was managed by [redacted] under the supervision of [redacted] for [redacted], and in practice sought short term gains from a strategy of speculation on the volatility of high beta securities, and especially in high technology stocks.

PLAINTIFFS were Investors seeking portfolio management that was suitable for their investment objectives.

45. The PLAINTIFFS were investors whose investment objectives were not compatible with having all of their investments with [redacted] invested in a strategy seeking short term gains from speculation on the volatility of high beta securities such as high technology stocks.

46. DEFENDANTS managed PLAINTIFFS portfolio in speculative high risk short term trading strategy in a manner that was not suitable for any of the PLAINTIFFS.

47. A speculative high risk short term trading strategy was not suitable for the accounts of [redacted] and [redacted] because, amongst other reasons:

a.) the [redacted] were both retired and not likely to be able to reenter the workforce;

b.) the [redacted] needed to make periodic withdrawal of funds from their investment portfolios to meet their retirement income needs;

c.) the [redacted] needed to make periodic withdrawal of funds from their investment portfolios to assist the financial needs of their children and grandchildren;

d.) the [redacted] needed to make periodic withdrawal of funds from their investment portfolios to meet their goals of traveling in their retirement;

e.) the [redacted] needed to make periodic withdrawal of funds from their investment portfolios to meet their objectives of investing in a real estate opportunity that would protect their own property;

f.) the [redacted] were concerned about their own mortality and the amount of time that they had to enjoy their retirement, and were thus not suitable for long term investment time horizons;

g.) the D[redacted] were risk averse and would express their concerns over market volatility and losses causing sleepless nights to [redacted]N;

h.) the [redacted] did not need aggressive growth in that their retirement funds were suitable for their retirement needs.

48. [redacted] and [redacted] knew or should have known that a suitable investment portfolio for [redacted] was not an investment portfolio in highly speculative short term trading but instead a portfolio that emphasized income and growth with low risk and volatility that would protect the [redacted] principal from market losses that would endanger the financial security of their retirement.

49. A speculative high risk short term trading strategy was not suitable for the accounts of [redacted] because, amongst other reasons:

a.) [redacted] had no prior investment experience in the stock market;

b.) [redacted] had little if any understanding of the market risks being employed in their accounts by [redacted];

c.) [redacted] could not afford market losses from [redacted] high risk short term trading strategy because when they met [redacted] they were in the process of purchasing a house and needed funds from their savings to purchase the house, and thereafter needed the safety of having funds to meet the needs of their mortgage obligation;

d.) [redacted] could not afford market losses from [redacted] high risk short term trading strategy and the market losses associated with it because when they were the parents of three young children who would require simultaneous education expenses over the following twelve years or more and thus needed preservation of their principal to meet the education expenses of their children;

e.) [redacted] were small business owners whose business capital was in the account of [redacted] needed the funds in the account to cover the business risks with operating a small business, including the risks associated with Covid-19 shuttering their business for an extended time;

f.) [redacted] were interested in using their capital and savings to invest in the purchase of other small business;

g.) [redacted] relied upon one income outside of the restaurant C & L PIZZA and lost that income for a time because of layoffs related to Covid-19;

h.) [redacted] did not need to be concentrated in aggressive growth their retirement, savings and business accounts because they were investing in their own opportunities.

50. [redacted] knew or should have known that a suitable investment portfolio for [redacted] and [redacted] would not include high risk of losing their limited savings and high volatility because they had no investment knowledge and sophistication to understand investing in the equity markets, the risk of doing so, the risk of concentrating all of their savings in the same high risk technology stocks, and the aggressive use of leverage in a speculation in short term trading strategy of the same high technology stocks.

51. A speculative high risk short term trading strategy was not suitable for the accounts of [redacted] because amongst other reasons:

a.) the [redacted] Pledged account was securing a bank loan and thus required by its terms preservation of principal;

b.) that [redacted] retirement accounts were not suitable for high risk speculation in high tech stock in a short term trading strategy that was not suitable for her because she was saving for retirement and unlikely to replenish the account losses;

c.) that [redacted] retirement accounts were not suitable for high risk account in a speculative high tech stock in a short term trading strategy because she was in need of liquidity to make withdrawals from the account;

d.) that [redacted] was not suitable for high risk account in a speculative high tech stock in a short term trading strategy because he was minor;

e). that [redacted] account were not suitable for being concentrated in the speculative high risk short term trading employed by [redacted] in all their accounts because they were saving for retirement .

52. [redacted] knew or should have known that a suitable investment portfolio for [redacted] was not speculative high risk trading of high technology stocks but instead a portfolio that provided growth with preservation of capital for their financial obligations and retirement, and protection of principal securing financial obligations to third parties.

PLAINTIFF Opened investment accounts with [redacted]

53. At all times relevant, [redacted] had their assets in two accounts that were managed by [redacted] pursuant to an investment advisory agreement with signature date December 28, 2020, (a copy of which is attached hereto and marked as Exhibit A) known as [redacted]

account [redacted]

54. At all times relevant, [redacted] had their assets in three accounts that were managed by [redacted] pursuant to an investment advisory agreement with signature date December 28, 2020, (a copy of which is attached hereto and marked as Exhibit B) known as [redacted]

[redacted].

55. At all times relevant, [redacted] had their assets in six accounts that were managed by [redacted] pursuant to an investment advisory agreement with signature date December 28, 2020, (a copy of which is attached hereto and marked as Exhibit C) known as [redacted]

56. At all times relevant, [redacted] had his assets in one account that were managed by [redacted] that had no investment advisory agreement entered into between [redacted] and [redacted] and that was known as [redacted]

B. DEFENDANTS Misrepresented their
<u>Business Practices, Fees, Investment Strategies and Use of Margin.</u>

57. Investment advisory firms like [redacted] are required by federal and state securities laws, rules and regulations to file a Form ADV with a Form ADV Part 2A, also referred

to as the Firm Brochure, which served as a disclosure document for investors like PLAINTIFFS of the key information about investment advisory firms' business practices, fees, conflicts of interests and discipline that it faced in the past.

58. [redacted] filed a FORM ADV with FORM ADV Part 2A (hereinafter referred to as "[redacted] Firm Brochure"), at least annually and was required to distribute it to [redacted] clients.

59. [redacted] Firm Brochure is an essential document detailing a SEC and Illinois registered investment advisers investment strategies, fees, and risks as required by the rules and regulations of federal securities law and state securities law, and so states as follows:

> This Firm Brochure is our disclosure document prepared according to regulatory requirements and rules. Consistent with the rules, we will ensure that you receive a summary of any material changes to this and subsequent Brochures within 120 days of the close of our business fiscal year.

(See [redacted] Part 2A of Form ADV Firm Brochure, dated December 18, 2020, a copy of which is attached hereto made a part hereof and marked as Exhibit D, hereinafter [redacted] Firm Brochure).

DEFENDANTS misrepresented that they provided individualized portfolio management to PLAINTIFFS

60. The [redacted] Firm Brochure represented that [redacted]K provided individualized portfolio management services, rather than group portfolio management services, which was tailored to the individual investment objectives of each of its clients, like each PLAINTIFF, including:

a) [redacted] offers ongoing portfolio management services based on the individual goals, objectives, time horizon, and risk tolerance of each client;

b) [redacted] manages each client's account on the basis of the client's financial situation and investment objectives;

c) [redacted] creates an investment policy statement for each client, which outlines the client's current situation (income, tax levels, and risk tolerance levels);

d) [redacted] advisory services and portfolio management services include, but are not limited to, the following:
   a. Investment strategy,
   b. Asset management,
   c. asset allocation,
   d. risk tolerance,
   e. personal investment policy,
   f. asset selection,
   g. regular portfolio monitoring; and

e) [redacted] evaluates the current investments of each client with respect to their risk tolerance levels and horizon.

61. [redacted] claim of providing individualized portfolio management to its clients, including PLAINTIFFS, was a misrepresentation of fact by DEFENDANTS, in that DEFENDANTS did not do so, and instead:

a) disregarded the individual goals, objectives, time horizon, and risk tolerance of clients including PLAINTIFFS and prepared investment policy statements that contained investment objectives, risk tolerance, and investment experience characteristics that were not individualized to each PLAINTIFF but instead were selected by [redacted] to further DEFENDANTS' intent to engage in an aggressive investment style that was not suitable for the PLAINTIFFS' individual goals, objectives time horizon, and risk tolerance;

b) failed to manage client's account on the basis of the financial situation and investment objectives of the PLAINTIFFS, but instead engaged in aggressive short term trading of PLAINTIFFS' accounts, in accordance with DEFENDANTS' financial interests in generating higher fees through by engaging in speculative short term trading;

c) failed to create individual investment policy statement for each PLAINTIFF based on the PLAINTIFF'S income, tax levels, and risk tolerance levels, but instead [redacted] standardized common investment policy statements for each PLAINTIFF that conformed to the risk tolerance, investment objectives and basis that supported DEFENDANTS' aggressive trading strategy;

d) failed to provide client specific individual investment strategy, asset management, asset allocation, risk tolerance, personal investment policy, asset selection, and regular portfolio monitoring of PLAINTIFF accounts, but instead, [redacted] persuaded and solicited PLAINTIFFS to engage in and maintain an investment strategy, asset management, asset allocation, risk tolerance, investment policy statement, asset allocation that was unsuitable for the client's investment objectives but conformed to DEFENDANTS' aggressive trading strategy to generate higher fees, and, further, failed to monitor portfolios when his strategy resulted in margin calls and sizeable losses;

e) failed to evaluate PLAINTIFFS' investments with respect to their risk tolerance levels and time horizon, and instead misrepresented PLAINTIFFS risk tolerance and time horizon to conform with DEFENDANTS' intention to engage in aggressive trading strategy.

62. The failure to provide individualized portfolio management by DEFENDANTS resulted in the PLAINTIFFS portfolio's being managed in a manner by DEFENDANTS that was unsuitable for their risk tolerance and investment objectives, and resulted in them incurring excessive losses from incurring unsuitable risk.

DEFENDANTS misrepresented Client Investment and Risk Profiles

63. At all times relevant, DEFENDANTS' held themselves out as providing individual portfolio management.

64. The primary document used in the providing of individual portfolio management was the Individual Client Investment and Risk Profile attached as Exhibit A to the Investment Advisory Agreements between [redacted] and PLAINTIFFS (hereinafter "ICI&RP").

65. DEFENDANTS managed PLAINTIFFS investment portfolios in a strategy of high risk short term trading in volatile high technology stocks without consulting with the PLAINTIFFS about their investment objectives or risk tolerance.

66. The ICI&RPs were used as a pretense for substantiating the suitability of the trading strategy in PLAINTIFFS accounts because:

a.) Neither [redacted] consulted with any of the PLAINTIFFS about their investment objectives or risk tolerance, but instead dictated the investment objectives and risk tolerance that would substantiate [redacted] engaging in the high risk trading strategy;

b.) [redacted] on behalf of DEFENDANTS sent ICI&RPs to the PLAINTIFFS with instruction to DOCUSIGN the document without any prior consultation with the PLAINTIFFS as to the content and representations made in the ICI&RP;

c.) DEFENDANTS began trading in their high risk short term trading strategy in PLAINTIFFS accounts months prior to DEFENDANTS preparing the ICI&RP for each PLAINTIFF;

d.) [redacted] on behalf of DEFENDANTS represented to PLAINTIFFS that he and all of his clients engage in the high risk short term trading strategy that he called "[redacted] Model";

e.) [redacted] on behalf of DEFENDANTS represented to the PLAINTIFFS that he and all of clients buy and sell the same securities in the [redacted] Model;

f.) [redacted] held out the [redacted] Model as being "an aggressive risk investment and not suitable for all investors";

g.) Despite [redacted] holding the [redacted] Model out as not being suitable for all investors, [redacted] through [redacted] told PLAINTIFFS that all of the clients were invested in the [redacted] Model;

h.) DEFENDANTS misrepresented PLAINTIFFS investment objectives contained in the ICI&RP to conform the objectives to the investment objectives and risk tolerance necessary for [redacted] to engage in the aggressive risk investment and thus was prepared to substantiate his making the unsuitable investments in PLAINTIFFS accounts; and

i) [redacted] selected the [redacted] Model for PLAINTIFFS accounts because in addition to the excessive fees paid to [redacted] pursuant to the investment advisory agreements, [redacted] representatives [redacted] received separate compensation from managing PLAINTIFFS accounts.

67. DEFENDANTS began trading in [redacted] accounts prior to sending an already prepared and completed ICI&RP to [redacted] without discussion with PLAINTIFFS about the content and selections made therein, but instead sent the investment advisory contracts to PLAINTIFFS with instruction to just DocuSign where indicated.

68. DEFENDANTS began trading in [redacted] accounts almost six months prior to [redacted] sending an already prepared and completed ICI&RP to [redacted] with instruction to DocuSign and send it back.

69. DEFENDANTS never obtained a ICI&RP for [redacted] account.

70. DEFENDANTS prepared and sent an ICI&RP to [redacted] that misrepresented their investment objectives, risk tolerance and even the income needs that had been being drawn from the account for their living expenses, that failed to explain the selections made by DEFENDANTS and that instructed them to just DocuSign it.

71. DEFENDANTS prepared false ICI&RP for the PLAINTIFFS to substantiate DEFENDANTS unsuitable trading of aggressive risk in the [redacted] Model and so that DEFENDANTS could receive large fees.

72. The ICI&RP DEFENDANTS prepared without consultation with the PLAINTIFFS contained identical representations for each PLAINTIFF, and did not reflect the PLAINTIFFS objectives but instead conformed with DEFENDANTS' intent to engage in an aggressive trading strategy.

73. The ICI&RPs DEFENDANTS prepared and sent to PLAINTIFFS made the following nearly identical representations in each ICI&RP to substantiate DEFENDANTS engaging in high risk trading model, including the following:

a) that the PLAINTIFFS "follow the recommendation of [their] Financial Advisor all of the time";

b) that the PLAINTIFFS all had Liquidity Needs of only "$10,000--$20,000";

c) that the PLAINTIFFS Investment Objectives were all "Growth-focus is on generating long-term capital growth";

d) that the PLAINTIFFS Risk Tolerance were all willing to accept high risk, including high volatility, and understood they could lose a substantial amount of their investment;

e) that the PLAINTIFFS were willing to tolerate a loss of "50% or more" of their portfolio if a financial or market crisis struck;

f) that the PLAINTIFFS were each prepared to wait over three years to recover from a downward fluctuation in their portfolio; and

g) that PLAINTIFFS each, in contradiction to other representations, checked off the inconsistent statement "If you selected a period of three years or less, you are prepared to substantially reduce your goals as a result of not be willing to accept risk."

74. DEFENDANTS made material misrepresentations of fact on ICI&RP prepared for PLAINTIFFS and instructed PLAINTIFFS to sign by DocuSign, including but not limited to:

a) misrepresenting that [redacted] had withdrawal needs of only \$10,000-\$20,000 per year despite DEFENDANTS providing regular withdrawals in excess of \$49,000 per year from the [redacted] account;

b) misrepresenting that [redacted] had withdrawal needs of only \$10,000-\$20,000 when they had imminent obligation to withdraw three times that amount for the purchase of a house in the weeks after being instructed by DEFENDANTS to just DocuSign the prepared Schedule A;

c) misrepresenting that [redacted] had withdrawal needs of only \$10,000-\$20,000 when his account was pledged to cover a loan and could be withdrawn to cover loan obligations at any time;

d) misrepresenting that [redacted] were willing to engage in high risk, high volatility investments that could result in substantial loss of their investments when both [redacted] were retired, yet still the primary source of financial support of other family members including educational needs of grandchildren, were over 65 years of age and unable to return to the work place for health reasons;

e) misrepresenting that [redacted] were willing to engage in high risk, high volatility investments that could result in substantial loss when [redacted] expressed concern about volatility and when the account assets transferred to [redacted] was pledged to secure a loan and the account value could not be allowed to drop below pledged loan amount;

f) misrepresenting that [redacted] were experienced investors, and claiming they had ten (10) years' experience investing in various types of investments including even limited partnerships and private placements when in fact they had never had a brokerage account of any kind prior to being introduced to [redacted] and had no investment experience or knowledge of investing;

g) misrepresenting that [redacted] had knowledge beyond basic products and understanding of diversification and other financial and investing terminology and strategy, when they had little and no prior knowledge;

h) misrepresenting that [redacted] were willing to sustain large losses in pursuit of gains in a most aggressive strategy when they were unsophisticated investors, making their first investments while shopping for a house for themselves and their three young children, and while having present and future needs including educational expenses, and having a business expenses related to expansion of their business; and

i) misrepresenting that the [redacted] account was an aggressive investment account able to incur substantial losses and volatility when the account held the business capital needed for expansion, and thus was unsuitable for risk and volatility that would prevent the funds from being available when needed.

75. The investment advisory agreements were each initialed prior to being sent to PLAINTIFFS and signed by [redacted] on December 29, 2020 for [redacted] for the limited purpose of acknowledging the fee rates on December 30, 2020 before being sent to the PLAINTIFFS with the ICI&RPs.

76. Despite DEFENDANTS representations of providing individualized portfolio management by DEFENDANTS, none received individualized portfolio management services from DEFENDANTS.

DEFENDANTS made misrepresentation and omission of material facts pertaining to its advisory fee.

77. The [redacted] Firm Brochure claimed that it did not incentivize compensation at the clients expense, and specifically stated the method of compensation for portfolio management services that [redacted] charged as follows:

a) The advisory fees which is subject to the portfolio management agreement between the client and [redacted], is calculated using the value of the assets in the Account on the last business day of the prior billing period; and

b) [redacted] does not charge performance based fees and therefore has no economic incentive to manage client portfolios in any way other than what is in the clients best interest.

78. [redacted] misrepresented that it did not incentivize compensation because [redacted] and [redacted] charged excessive advisory fees that were substantially and significantly above that charged by other registered investment advisers in the same industry in violation of their fiduciary duty owed to Plaintiffs to disclose that the advisory fee was substantially above the industry norm.

79. [redacted] further misrepresented that [redacted] Model obtained returns over 30%

80. [redacted] misrepresented that [redacted]'S services as manager of the [redacted] Model were in high demand by institutional investors and as a result [redacted]'S advisory fee was justified.

81. [redacted] made material misrepresentations and omissions of fact pertaining to the amount of the advisory fee charged to [redacted] accounts that employed leverage margin that [redacted] claimed it did not regularly do but did, and that resulted in advisory fees exceeding 9.00% annualized of the net value of the PLAINTIFFS accounts.

82. In both leveraged margin accounts and non-margined accounts that DEFENDANTS managed for PLAINTIFF were managed in the same strategy of aggressive short

term trading of volatile high tech stocks in order to speculate on short term profits that would increase the advisory fees of DEFENDANTS.

83. DEFENDANTS omitted material facts from PLAINTIFFS by failing to inform them that DEFENDANTS selection of the [redacted] Model for PLAINTIFFS' accounts would result in additional fees being paid to [redacted].

84. DEFENDANTS' misrepresented the effective rate of the advisory fees charged omitted to disclose additional fees being paid to DEFENDANTS from their management of the PLAINTIFFS accounts, and acted in conflict of PLAINTIFFS interest in managing their accounts contrary to their investment objectives to increase DEFENDANTS' advisory fees, was a breach by DEFENDANTS of their fiduciary duty owed to PLAINTIFFS through their acting in their own self-interests and failing to disclose conflicts to PLAINTIFFS.

[redacted] Firm Brochure made representation of the method of analysis and investment strategies employed by [redacted].

85. The [redacted] Firm Brochure represented the method of analysis and investment strategies employed by DEFENDANTS in their portfolio management services for their clients including PLAINTIFFS, as follows:

a) [redacted] uses a variety of sources of data to conduct its economic, investment and market analysis which may include economic, investment and market analysis, which may include economic and market research materials prepared by others, conference calls hosted by individual companies or mutual funds, corporate rating services, annual reports, prospectuses, and company press releases, and financial newspapers and magazines;

b) [redacted] and its investment adviser representatives are responsible for identifying and implementing the methods of analysis used in formulating investment recommendations to clients. The methods of analysis may include quantitative methods for optimizing client portfolios, computer-based risk/return analysis, technical analysis, and statistical and/or computer models utilizing long-term economic criteria; and

c) Optimization involves the use of mathematical algorithms to determine the appropriate mix of assets given the firm's current capital market rate assessment and a particular client's risk tolerance.

86. [redacted] Firm Brochure disclosed various Model Portfolios including a Multi-Asset ETF model, Income ETF model, a [redacted], and the [redacted] Model.

87. Each of the Model Portfolios stated that they invested in exchange traded funds except for the [redacted] Model which instead used non-standard and deceptive term "exchange-traded equities" to describe its primary investment.

88. The [redacted] Firm Brochure defined Exchange Traded Funds ("ETF"), Exchange Traded Notes ("ETN"), and Leveraged ETNs, and Inverse ETNs, but did not define the ambiguous term "exchange-traded equities" which the Firm Brochure used in describing the [redacted] Model.

89. [redacted] use of the term "exchange-traded equities" misrepresented to investors like PLAINTIFFS the true nature of the [redacted] Model, because it did not use the term again when further describing "Equity Securities" in the Firm Brochure, thus suggesting that "exchanged-traded equities" differed from Equity Securities, and were similar to the more common and less volatile and risky "exchange traded funds" and "exchange traded notes" .

90. The use of the undefined and unusual term "exchange traded equities" was confusing and deceptive, and led a reasonable investor to believe that the [redacted] Model was using investments similar to the defined "exchange traded funds" used by the other Model Portfolios.

91. The [redacted] Firm Brochure made disclosure about the material risks in Equity Securities, but failed to reference "exchange-traded equities":

> Investing in individual companies involves inherent risk. The major risks relate to the company's capitalization, quality of the company's management, quality and cost of the company's services, the company's ability to manage costs, efficiencies in the manufacturing or service delivery process, management of litigation risk, and the company's ability to create shareholder value (i.e., increase the value of the company's stock price).

92. As a result, [redacted]'S Firm Brochure was misleading as to the investments used by the [redacted] Model and a reasonable investor like PLAINTIFFS could reasonably expect that DEFENDANTS' were investing in safer and diversified ETFs and not Equity Securities.

93. The [redacted] Firm Brochure made false representations concerning its general business practice, including its general business practice in respect to short-term trading, a practice that was used extensively in all of the PLAINTIFFS accounts by DEFENDANTS:

> Although [redacted] as a general business practice, does not utilize short-term trading, there may be instances in which short-term trading may be necessary or an appropriate strategy. In this regard, please read the following: There is an inherent risk for clients who trade frequently in that high-frequency trading creates substantial transaction costs that in the aggregate could negatively impact account performance.

94. DEFENDANTS misrepresented their business practice because they used extensive short term trading in PLAINTIFFS accounts and exposed PLAINTIFFS to the inherent risk that high-frequency trading, like that done in PLAINTIFFS accounts created substantial costs that negatively impacted PLAINTIFFS accounts.

95. The [redacted] Firm Brochure made representations concerning the concentration of securities in one industry or sector as follows:

> There is an inherent risk for clients who have their investment portfolios heavily weighted in one security, one industry or industry sector, one geographic location, one investment manager, one type of investment instrument (equities versus fixed income). Clients who have diversified portfolios, as a general rule, incur less volatility and therefore less fluctuation in portfolio value than those who have concentrated holdings. Concentrated holdings may offer the potential for higher

gain, but also offer the potential for significant loss.

96. DEFENDANTS exposed PLAINTIFFS to the risks associated with heavily concentrating their investments in one sector, the high technology sector, causing them to incur greater volatility and significant loss associated with that practice.

97. DEFENDANTS concentration of all PLAINTIFFS' accounts into one sector was unreasonably risky and not suitable for any investor including PLAINTIFFS.

98. The [redacted] Firm Brochure made false representations concerning its general business practice in respect to utilizing margin leverage, a practice that was used extensively in accounts of each of the PLAINTIFFS by DEFENDANTS:

> Although [redacted], as a general business practice, does not utilize leverage, there may be instances in which exchange-traded funds, other separate account managers and, in very limited circumstances, [redacted] will utilize leverage. . . The use of margin leverage entails borrowing which results in additional interest costs to the Investor. . . . In addition, when leverage is utilized and the client needs to withdraw cash, the client must sell a disproportionate amount of collateral securities to release enough cash to satisfy the withdrawal amount based upon similar reasoning as cited above.

99. [redacted] Firm Brochure made material misrepresentations of fact in respect to [redacted] not utilizing margin leverage because DEFENDANTS employed excessive levels of margin leverage in PLAINTIFFS accounts exposing PLAINTIFFS to enormous risk above what was already caused by selecting highly volatile securities without asset diversification, and causing loss of all, or nearly all of the clients, including PLAINTIFFS account value, and incurring excessive cost of margin interest, adverse tax consequences, and using margin in PLAINTIFFS' accounts to increase the advisory fees taken by [redacted] from PLAINTIFFS' accounts.

100. When PLAINTIFFS expressed concern about the level of margin leverage used in their accounts DEFENDANTS and [redacted] would endeavor to convince them to not lower the

margin debt, or would ignore PLAINTIFFS instructions and make discretionary trades that increased the margin leverage in the accounts to PLAINTIFFS' detriment and financial loss.

E. DEFENDANTS Failed to Provide
<u>Individualized Portfolio Management for Plaintiffs.</u>

101. DEFENDANTS provided the same or similar investment management for each of the PLAINTIFFS accounts by maintaining portfolios concentrated in the highly volatile, high growth technology sector, which was highly volatile, subject to higher risk than other types of stocks, and more likely to be effected by economic downturns and other factors.

102. DEFENDANTS invested in these higher risks stocks in all the accounts despite the PLAINTIFFS having investment objectives that would not be suitable for such an investment, such as the Pledged account of [redacted] that was securing a bank loan and thus could not lose value below the amount of the loan that it secured, or [redacted] retirement account and savings accounts where the principal was irreplaceable and needed to fund not only the [redacted] retirement but also support [redacted] family members, or the investments on behalf of the [redacted] who had no prior experience in the market, were unsophisticated investors, and early savers still building their savings, retirement and family business.

103. DEFENDANTS' use of the [redacted] Model and/or similar investment each of PLAINTIFFS accounts demonstrates that DEFENDANTS failed to provide individualized portfolio management but instead where acting in their own benefit in conflict of the fiduciary duty owed to PLAINTIFFS.

104. DEFENDANTS acted in conflict of their fiduciary duty to PLAINTIFFS in their portfolio management of [redacted] 2, [redacted], which all used leverage through margin

despite representations by [redacted] that the use of leverage margin was not their normal business practice.

105. [redacted] used margin in the PLAINTIFFS accounts to increase their fees at the expense of the PLAINTIFFS in conflict with their fiduciary duty to PLAINTIFFS.

106. [redacted] breached their fiduciary duty to PLAINTIFFS resulting in PLAINTIFFS account where margin leverage was applied and resulting in:

a) negative rate of returns for each PLAINTIFF of over 27% to 85%;

b) account cost ratios that included the advisory fees, interest expenses and other fees such as [redacted] delivery by Federal Express of margin calls, exceeding 11% to 15% of PLAINTIFFS account value;

c.) turnover rates of the portfolio that exceeded 3 to almost 6 times the portfolio value;

d) exceedingly high volatility rates that were more than three times the volatility of the market as measured by common indexes.

107. [redacted] managed the PLAINTIFFS account to maximize the fees that he earned by increasing the purchases on margin at the end of the month that advisory fees were calculated, thus having the largest base possible for application of the advisory fee percentage.

108. DEFENDANTS mismanaged PLAINTIFFS accounts to maximize their advisory fees resulting in each PLAINTIFF incurring excessive advisory fees, margin interest and other costs, including over $1,050,000 in advisory fees and margin interest charged to [redacted], almost $30,000 charged to the [redacted] modest joint account, and nearly $36,000 to their [redacted] business account, and almost $40,000 to [redacted] account whose principal value came from the liquidation of her annuity at [redacted]'S instruction.

109. DEFENDANTS mismanaged PLAINTIFFS non-leveraged accounts, including [redacted], resulting in similar loses to those in the leveraged account, including negative rate of returns, high turnovers in the select securities that DEFENDANTS repeatedly traded for no other reason than short term speculation.

110. DEFENDANTS breached their fiduciary duty by misrepresenting the suitability of the management of the accounts for Plaintiffs resulting in losses as a direct result of the misrepresentation in the investment advisory agreements.

COUNT I
Breach of Fiduciary Duty
(PLAINTIFFS against Defendant [redacted]

111. PLAINTIFFS repeat and reallege paragraphs 1 through 110 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 111.

112. As an Investment Advisor [redacted] had superior knowledge, expertise, and skills applicable to investing and investment advice, which were skills PLAINTIFFS did not possess.

113. PLAINTIFFS reposed complete trust and confidence in [redacted] that he would act in their best interests.

114. Through that trust and confidence, [redacted] gained influence and superiority over PLAINTIFFS relative to their retirement or investment accounts and the use of those retirement or investment funds therein.

115. As an investment advisor representative, [redacted] owed fiduciary duties to the PLAINTIFFS including the highest duty of utmost loyalty, good faith, full and fair disclosure, and the duty to:

A. Provide investment advice that was in PLAINTIFFS' best interests;

B. Refrain from engaging in activity that conflicts with PLAINTIFFS' interests;

C. Make full, frank, and honest disclosures of the risks and characteristics of DEFENDANTS' trading scheme;

D. To provide PLAINTIFFS with personalized investment recommendations and advice;

E. Adequately investigate and perform due diligence on the legitimacy of the trading scheme being offered to ensure it was something more than DEFENDANTS short term gambling on market volatility with PLAINTIFFS' investment funds.

116. [redacted] breached the fiduciary duties owed to the PLAINTIFFS by:

A. Failing to disclose the speculative risk of the trading scheme employed in managing their accounts accurately and adequately.

B. Failing to provide PLAINTIFFS with the individualized investment plan as promised.

C. Failing to disclose material facts about the trading scheme including that the success of the scheme was dependent on DEFENDANTS' ability to accurately time the market.

D. Misrepresenting that outlandish rate of return like 30%-40% annualized were attainable and not disclosing seeking such high returns would increase the amount of risk the PLAINTIFFS were taking exponentially.

E. Failing to act in PLAINTIFFS' best interest when he invested 100% of PLAINTIFF' retirement and investment accounts in speculative short term trading strategy on volatility of high tech stocks;

F. Failing to act in PLAINTIFFS' best interest when DEFENDANTS actively traded the stocks in a short term trading strategy contra-indicated by DEFENDANTS representations of business practices;

G. Trading on margin in PLAINTIFFS accounts in contradiction to [redacted]'S representations as to its intent to use margin leverage;

H. Using margin leverage in PLAINTIFFS' accounts to increase the value of the investment portfolio temporarily so that when [redacted] assessed its advisory fee based on that investment portfolio value it was inflated by the increased margin purchases.

I. Charging PLAINTIFFS an advisory fee that was significantly above and beyond any industry normal standard for advisory fees charged by investment advisors without disclosing that the excessive fee was above industry norms.

117. [redacted]'S breaches of fiduciary duty caused injury to PLAINTIFFS.

118. [redacted] unjustly profited from his breaches of duty, in that he, acting through Defendant [redacted], received management fees of 2%-3.0%, for himself and [redacted] while PLAINTIFFS incurred fees that were effectively higher.

119. As a direct and proximate result of breach of fiduciary duty by [redacted], PLAINTIFFS were damaged in an amount to be determined according to proof.

WHEREFORE, PLAINTIFFS pray for judgment against [redacted] for:

A. All actual and compensatory damages caused by [redacted]'S breaches;

B. Any and all further relief that this Court deems just and appropriate.

<u>COUNT II</u>
Violation of 815 ILCS 5/12 (Misrepresentation and Omission of Material Facts)
<u>(PLAINTIFFS against Defendant [redacted])</u>

120. PLAINTIFFS repeats and realleges paragraphs 1 through 110 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 120.

121. At all times relevant, there existed in the State of Illinois a statute entitled the Illinois Securities Law of 1953, 815 ILCS 5/1 et seq. ("ISL").

122. The common stock invested in by DEFENDANTS through their [redacted] Model trading scheme that are the subject of this Complaint are "securities" as defined in Section 2.1 of the ISL.

123. Pursuant to Section 12 of the ISL, 815 ILCS 5/12, it is unlawful for any person to:

A. offer or sell in Illinois any security except in accordance with the provisions of this Act;

B. Engage in any transaction, practice or course of business in connection with the purchase or sale of any security which works or tends to work a fraud or deceit upon the purchaser thereof;

C. Obtain money through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

D. While acting as an investment advisor representative, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

124. [redacted] did offer, as that term is defined in Section 2.5a of the ISL, an investment in his trading scheme to PLAINTIFFS by solicitation.

125. This oral solicitation resulted in the execution of an excessive number of short term transactions in the purchase and sale of securities for each of PLAINTIFFS accounts.

126. [redacted]S solicitation to PLAINTIFFS to invest in the trading scheme contained materially false and untrue statements including:

A. That the trading scheme was in the PLAINTIFFS' best interests.

B. That the trading scheme investment offered rates of return of 30% annually for taxable accounts and 40% annually for retirement accounts.

C. That the trading scheme investment offered produced higher returns but with lower risk.

D. That DEFENDANTS had a proven track record of "finding the next Apple or Amazon" before it happened.

E. That DEFENDANTS were providing individualized portfolio management that was suitable for PLAINTIFFS in light of their individual investment objectives, investment experience, risk tolerance and financial goals.

F. That DEFENDANTS were providing investment advice that conformed to the representations of [redacted]K, including not engaging in margin leverage and short term trading as a business practice.

127. [redacted]S solicitation to PLAINTIFFS to invest in the trading scheme omitted to state the following material facts that were required to make the statements contained in DEFENDANTS' solicitation not misleading:

A. That the trading scheme was speculation that DEFENDANTS could pick the right stocks to invest in at the right time and sell at the right time;

B. That the success of DEFENDANTS' trading scheme depended on short term gambles on market timing, which has been proven through decades of studies, including Modern Portfolio Theory, to be impossible;

C. That the trading scheme DEFENDANTS purported to execute could result in losses to the PLAINTIFFS of over 50% of their accounts in a short amount of time;

[redacted]

[redacted] [redacted] were paid additional compensation by [redacted] for utilizing margin in PLAINTIFFS' investment accounts;

G. That DEFENDANTS utilized margin in PLAINTIFFS accounts to multiply the amount of fees DEFENDANTS received from PLAINTIFFS;

H. That DEFENDANTS lacked any specific experience or skill in successfully running a trading scheme on a macro-level for multiple accounts and parties over the long term;

I. That DEFENDANTS could not predict what the next Apple or Amazon would be; and

I. That DEFENDANTS did not utilize an algorithm to tell them when to buy and sell securities.

128. [redacted] unjustly profited from his breach of duty in that he received management fees and margin fees by selling his trading scheme to Plaintiffs.

129. [redacted]'S conduct was willful, knowing, and malicious and violated PLAINTIFFS' trust and confidence.

130. PLAINTIFFS were justified in relying on [redacted] when they accepted management and decisions to invest in the trading scheme because:

A. At all times [redacted] was a licensed investment advisor;

B. At all times [redacted] was a fiduciary to Plaintiffs as a matter of state and federal law;

C. At all times [redacted] and DEFENDANTS represented that they had success in investing such that DEFENDANTS services were sought out and in demand of institutional investors to invest their portfolios;

D. That DEFENDANTS' [redacted] Model portfolio was managed be a manager with over 30 years of experience selecting securities with success;

E. That DEFENDANTS selected securities to invest in based on his consultation with the CEOs of the business whose securities he was buying and selling.

131. At all times relevant, Regulation 130.853 of the Illinois Securities Law stated: "Effecting or causing to be effected by or for any client's account, any transactions of purchase

or sale which are excessive in size or frequency or unsuitable in view of the financial resources and character of the account, shall constitute an act, practice, or course of business on the part of the registered investment adviser or its representative effecting such transactions or causing the transactions to be effected that is fraudulent, deceptive or manipulative."

132. 14 Ill. Adm. Code 130.285 provides further that "[t]he failure of any investment adviser to comply with Sections 130.840…130.853, and 130.854 of this Part shall constitute an inequitable practice in the sale of securities and a fraudulent business practice."

133. By soliciting the PLAINTIFFS to invest their retirement and investment accounts in the trading scheme, [redacted] and DEFENDANTS violated Regulation 130.853 of the Illinois Securities Law and as such committed an inequitable and fraudulent business practice.

134. As a result of [redacted] and DEFENDANTS' violations of the ISL, PLAINTIFFS have suffered financial losses totaling in excess of $8,000,000.00.

135. Pursuant to Section 13 of the ISL, 815, ILCS 5/13(A), PLAINTIFFS, as purchasers of securities, may rescind any securities transaction effected in violation of Section 12 of the ISL.

136. Section 13 of the ISL, 815 ILCS 5/13, imposes joint and several liability upon the issuer, controlling person, and dealer; and each dealer or salesperson who participated or aided in any way in making the sale.

137. In compliance with the notice provision of the Illinois Securities Law located in 815 ILCS 5/13(B), PLAINTIFFS caused to be delivered to DEFENDANT a letter enclosing a draft of this Complaint, informing DEFENDANTS of PLAINTIFFS' intent to make claims against them and to seek the remedy outlined under the Illinois Securities Law, including rescission.

138. [redacted] is liable to PLAINTIFFS because he is the salesperson who solicited the sale of the trading scheme to the PLAINTIFFS.

139. Pursuant to 815 ILCS 5/13(A), PLAINTIFFS are entitled to void their transactions in the trading scheme with [redacted] and DEFENDANTS due to his violations of section 12 of the ISL, 815 ILCS 5/12.

WHEREFORE, PLAINTIFFS pray for judgment against [redacted] for:

A. Rescission;

B. Interest of 10% per annum from the date of each stock purchase in PLAINTIFFS accounts, pursuant to 815 ILCS 5/13(A)(1);

C. Costs together with reasonable attorney' s fees and expenses pursuant to 815 ILCS 5/13(A); and

D. Any and all further relief that this court deems just and appropriate.

<u>COUNT III</u>
Breach of Fiduciary Duty
<u>(PLAINTIFFS against Defendant [redacted])</u>

140. PLAINTIFFS repeat and reallege paragraphs 1 through 110 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 140.

141. As an Investment Advisor [redacted] had superior knowledge, expertise, and skills applicable to investing and investment advice, which were skills PLAINTIFFS did not possess.

142. PLAINTIFFS reposed complete trust and confidence in [redacted] that he would act in their best interests.

143. Through that trust and confidence, [redacted] gained influence and superiority over PLAINTIFFS relative to their retirement or investment accounts and the use of those retirement or investment funds therein.

144. As an investment advisor representative, [redacted] owed fiduciary duties to the PLAINTIFFS including the highest duty of utmost loyalty, good faith, full and fair disclosure, and the duty to:

A. Provide investment advice that was in PLAINTIFFS' best interests;

B. Refrain from engaging in activity that conflicts with PLAINTIFFS' interests;

C. Make full, frank, and honest disclosures of the risks and characteristics of DEFENDANTS' trading scheme;

D. To provide PLAINTIFFS with personalized investment recommendations and advice;

E. Adequately investigate and perform due diligence on the legitimacy of the trading scheme being offered to ensure it was something more than DEFENDANTS short term gambling on market volatility with PLAINTIFFS' investment funds.

145. [redacted] breached the fiduciary duties owed to the PLAINTIFFS by:

A. Failing to disclose the speculative risk of the trading scheme employed in managing their accounts accurately and adequately.

B. Failing to provide PLAINTIFFS with the individualized investment plan as promised.

C. Failing to disclose material facts about the trading scheme including that the success of the scheme was dependent on DEFENDANTS' ability to accurately time the market.

D. Misrepresenting that outlandish rate of return like 30%-40% annualized were attainable and not disclosing seeking such high returns would increase the amount of risk the PLAINTIFFS were taking exponentially.

E. Failing to act in PLAINTIFFS' best interest when he invested 100% of PLAINTIFF' retirement and investment accounts in speculative short term trading strategy on volatility of high tech stocks;

F. Failing to act in PLAINTIFFS' best interest when DEFENDANTS actively traded the stocks in a short term trading strategy contra-indicated by DEFENDANTS representations of business practices;

G Trading on margin in PLAINTIFFS accounts in contradiction to [redacted]'S representations as to its intent to use margin leverage;

H. Using margin leverage in PLAINTIFFS' accounts to increase the value of the investment portfolio temporarily so that when [redacted] assessed its advisory fee based on that investment portfolio value it was inflated by the increased margin purchases.

II. Charging PLAINTIFFS an advisory fee that was significantly above and beyond any industry normal standard for advisory fees charged by investment advisors without disclosing that the excessive fee was above industry norms.

146. [redacted]'S breaches of fiduciary duty caused injury to PLAINTIFFS.

147. [redacted] unjustly profited from his breaches of duty, in that he, acting through Defendant [redacted], received management fees of 2%-3.0%, for himself and [redacted] while PLAINTIFFS incurred fees that were effectively higher.

148. As a direct and proximate result of breach of fiduciary duty by [redacted], PLAINTIFFS were damaged in an amount to be determined according to proof.

WHEREFORE, PLAINTIFFS pray for judgment against [redacted] for:

A. All actual and compensatory damages caused by [redacted]'S breaches;

B. Any and all further relief that this Court deems just and appropriate.

COUNT IV

Violation of 815 ILCS 5/12 (Misrepresentation and Omission of Material Facts)

(PLAINTIFFS against Defendant [redacted])

149. PLAINTIFFS repeats and realleges paragraphs 1 through 110 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 149.

150. At all times relevant, there existed in the State of Illinois a statute entitled the Illinois Securities Law of 1953, 815 ILCS 5/1 et seq. ("ISL").

151. The common stock invested in by DEFENDANTS through the [redacted] Model trading scheme that are the subject of this Complaint are "securities" as defined in Section 2.1 of the ISL.

152. Pursuant to Section 12 of the ISL, 815 ILCS 5/12, it is unlawful for any person to:

A. offer or sell in Illinois any security except in accordance with the provisions of this Act;

B. Engage in any transaction, practice or course of business in connection with the purchase or sale of any security which works or tends to work a fraud or deceit upon the purchaser thereof;

C. Obtain money through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

D. While acting as an investment advisor representative, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

153. [redacted] did offer, as that term is defined in Section 2.5a of the ISL, an investment in his trading scheme to PLAINTIFFS by solicitation.

154. This oral solicitation resulted in the execution of an excessive number of short term transactions in the purchase and sale of securities for each of PLAINTIFFS accounts.

155. [redacted]'S solicitation to PLAINTIFFS to invest in the trading scheme contained materially false and untrue statements including:

C. That the trading scheme was in the PLAINTIFFS' best interests.

D. That the trading scheme investment offered rates of return of 30% annually for taxable accounts and 40% annually for retirement accounts.

C. That the trading scheme investment offered produced higher returns but with lower risk.

D. That DEFENDANTS had a proven track record of "finding the next Apple or Amazon" before it happened.

E. That DEFENDANTS were providing individualized portfolio management that was suitable for PLAINTIFFS in light of their individual investment objectives, investment experience, risk tolerance and financial goals.

F. That DEFENDANTS were providing investment advice that conformed to the representations of [redacted], including not engaging in margin leverage and short term trading as a business practice.

156. [redacted]'S solicitation to PLAINTIFFS to invest in the trading scheme omitted to state the following material facts that were required to make the statements contained in DEFENDANTS' solicitation not misleading:

A. That the trading scheme was speculation that DEFENDANTS could pick the right stocks to invest in at the right time and sell at the right time;

B. That the success of DEFENDANTS' trading scheme depended on short term gambles on market timing, which has been proven through decades of studies, including Modern Portfolio Theory, to be impossible;

C. That the trading scheme DEFENDANTS purported to execute could result in losses to the PLAINTIFFS of over 50% of their accounts in a short amount of time;

E.

F. That DEFENDANTS were paid additional compensation by [redacted] for utilizing margin in PLAINTIFFS' investment accounts;

G. That DEFENDANTS utilized margin in PLAINTIFFS accounts to multiply the amount of fees DEFENDANTS received from PLAINTIFFS;

H. That DEFENDANTS lacked any specific experience or skill in successfully running a trading scheme on a macro-level for multiple accounts and parties over the long term;

I. That DEFENDANTS could not predict what the next Apple or Amazon would be; and

I. That DEFENDANTS did not utilize an algorithm to tell them when to buy and sell securities.

157. [redacted] unjustly profited from his breach of duty in that he received management fees and margin fees by selling his trading scheme to Plaintiffs.

158. [redacted]'S conduct was willful, knowing, and malicious and violated PLAINTIFFS' trust and confidence.

159. PLAINTIFFS were justified in relying on [redacted] when they accepted management and decisions to invest in the trading scheme because:

A. At all times [redacted] was a licensed investment advisor;

B. At all times [redacted] was a fiduciary to Plaintiffs as a matter of state and federal law;

C. At all times [redacted] and DEFENDANTS represented that they had success in investing such that DEFENDANTS services were sought out and in demand of institutional investors to invest their portfolios;

D. That DEFENDANTS' [redacted] Model portfolio was managed be a manager with over 30 years of experience selecting securities with success;

E. That DEFENDANTS selected securities to invest in based on his consultation with the CEOs of the business whose securities he was buying and selling.

160. At all times relevant, Regulation 130.853 of the Illinois Securities Law stated: "Effecting or causing to be effected by or for any client's account, any transactions of purchase or sale which are excessive in size or frequency or unsuitable in view of the financial resources and character of the account, shall constitute an act, practice, or course of business on the part of the registered investment adviser or its representative effecting such transactions or causing the transactions to be effected that is fraudulent, deceptive or manipulative."

161. 14 Ill. Adm. Code 130.285 provides further that "[t]he failure of any investment adviser to comply with Sections 130.840…130.853, and 130.854 of this Part shall constitute an inequitable practice in the sale of securities and a fraudulent business practice."

162. By soliciting the PLAINTIFFS to invest their retirement and investment accounts in the trading scheme, [redacted] and DEFENDANTS violated Regulation 130.853 of the Illinois Securities Law and as such committed an inequitable and fraudulent business practice.

163. As a result of [redacted] and DEFENDANTS' violations of the ISL, PLAINTIFFS have suffered financial losses totaling in excess of $8,000,000.00.

164. Pursuant to Section 13 of the ISL, 815, ILCS 5/13(A), PLAINTIFFS, as purchasers of securities, may rescind any securities transaction effected in violation of Section 12 of the ISL.

165. Section 13 of the ISL, 815 ILCS 5/13, imposes joint and several liability upon the issuer, controlling person, and dealer; and each dealer or salesperson who participated or aided in any way in making the sale.

166. In compliance with the notice provision of the Illinois Securities Law located in 815 ILCS 5/13(B), PLAINTIFFS caused to be delivered to DEFENDANT a letter enclosing a draft of this Complaint, informing DEFENDANTS of PLAINTIFFS' intent to make claims against them and to seek the remedy outlined under the Illinois Securities Law, including rescission.

167. [redacted] is liable to PLAINTIFFS because he is the salesperson who solicited the sale of the trading scheme to the PLAINTIFFS.

168. Pursuant to 815 ILCS 5/13(A), PLAINTIFFS are entitled to void their transactions in the trading scheme with [redacted] and DEFENDANTS due to his violations of section 12 of the ISL, 815 ILCS 5/12.

WHEREFORE, PLAINTIFFS pray for judgment against [redacted] for:

E. Rescission;

F. Interest of 10% per annum from the date of each stock purchase in PLAINTIFFS accounts, pursuant to 815 ILCS 5/13(A)(1);

G. Costs together with reasonable attorney' s fees and expenses pursuant to 815 ILCS 5/13(A); and

H. Any and all further relief that this court deems just and appropriate.

COUNT V
Breach of Fiduciary Duty
(PLAINTIFFS against Defendant [redacted], INC.)

169. PLAINTIFFS repeat and reallege paragraphs 1 through 95 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 169.

170. As an Investment Advisory firm [redacted] owed fiduciary duties to its clients, including PLAINTIFFS. These duties include, but are not limited to, the duties of utmost loyalty, good faith, and full and fair disclosure.

171. PLAINTIFFS were clients of [redacted] at all times relevant.

172. As clients of [redacted] PLAINTIFFS reposed complete trust and confidence in [redacted] that it would act in their best interests at all times.

173. Through that trust and confidence, [redacted] gained influence, and superiority over PLAINTIFFS relative to their retirement and investment accounts and the use of the investment funds contained therein.

174. [redacted] owed fiduciary duties to PLAINTIFFS, including the duty to:

A. Provide investment advice that was in PLAINTIFFS' best interests;

B. Refrain from engaging in activity that conflicts with PLAINTIFFS' interests;

C. Make full, frank, and honest disclosures of the risks and characteristics of the Trading Scheme;

D. To provide PLAINTIFFS with personalized investment recommendations and advice;

E. Adequately investigate and perform due diligence on the legitimacy of the trading scheme being offered to ensure it was something more than DEFENDANTS short term gambling on market volatility with PLAINTIFFS' investment funds.

F. Adequately supervise the conduct of its agents and employees in connection with providing financial and investment advice.

175. [redacted] breached the fiduciary duties owed to the PLAINTIFFS by:

A. Failing to disclose the speculative risk of his trading scheme accurately and adequately.

B. Failing to provide PLAINTIFFS with the individualized investment plan as promised.

C. Failing to disclose material facts about the trading scheme including that the success of the scheme was dependent on DEFENDANTS' ability to accurately time the market.

E. Misrepresenting that outlandish rate of return like 30%-40% annualized were attainable and not disclosing that seeking such high returns would exponentially increase the amount of risk the PLAINTIFFS were taking.

E. Failing to act in PLAINTIFFS' best interest when DEFENDANTS invested 100% of Plaintiffs' retirement and investment accounts speculative short term trading strategy on volatility of high tech stocks ;

F. Failing to act in PLAINTIFFS' best interest when DEFENDANTS actively traded the stocks in a short term trading strategy contra-indicated by DEFENDANTS representations of business practices;

F. Trading on margin in PLAINTIFFS accounts in contradiction to [redacted]'S representations as to its intent to use margin leverage;

G. Using margin leverage in PLAINTIFFS' accounts to increase the value of the investment portfolio temporarily so that when [redacted] assessed its advisory fee based on that investment portfolio value it was inflated by the increased margin purchases; and

I. Charging PLAINTIFFS an advisory fee that was significantly above and beyond any industry normal standard for advisory fees charged by investment advisors without disclosing that the excessive fee was above industry norms.

178. [redacted] breaches of fiduciary duty caused injury to the PLAINTIFFS.

179. [redacted] unjustly profited from these breaches of duty, in that [redacted] received management fees in the amount of 2% to 3.0% of PLAINTIFFS' total assets under management.

180. As a direct and proximate result of the breach of fiduciary duty by [redacted] PLAINTIFFS were damaged in an amount to be determined according to proof.

WHEREFORE, Plaintiffs pray for judgment against [redacted] for:

A. All actual and compensatory damages caused by [redacted]'S breach including loss of interest and reasonable costs;

B. Any and all further relief that this Court deems just and appropriate

COUNT VI
Violation of 815 ILCS 5/12 (Omission or Material Fact)
(PLAINTIFFS against Defendant [redacted])

181. PLAINTIFFS repeat and reallege paragraphs 1 through 110 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 181.

182. At all times relevant, there existed in the State of Illinois, a statute entitled the Illinois Securities Law of 1953, 815 ILCS 5/1 et seq. ("ISL")

187. The Trading Scheme that is the subject of this Complaint traded in the common stock of hundreds of publicly-listed companies, which are "securities" as defined in Section 2.1 of the ISL.

188. Pursuant to Section 12 of the ISL, 815 ILCS 5/12, it is unlawful for any person to:

A. offer or sell in Illinois any security except in accordance with the provisions of this Act.

B. Engage in any transaction, practice or course of business in connection with the purchase or sale of any security which works or tends to work a fraud or deceit upon the purchaser thereof;

C. Obtain money through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

D. While acting as an investment advisor representative, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

189. [redacted] offer, as that term is defined in Section 2.5a of the ISL, an investment in the [redacted] Model trading scheme to PLAINTIFFS by an solicitation by [redacted].

190. This solicitation resulted in the execution of excessive number of transactions including the purchase and sale of securities for each of PLAINTIFFS' accounts.

191. DEFENDANTS' solicitation to PLAINTIFFS to invest in the [redacted] Model trading scheme was performed in the course and scope of DEFENDANTS advisory business through its agents, control persons, and owner of [redacted].

192. This solicitation contained materially false and untrue statements including:

A. That the trading scheme was in the PLAINTIFFS' best interests.

B. That the trading scheme investment offered rates of return of 30% annually for taxable accounts and 40% annually for retirement accounts.

C. That the trading scheme investment he offered produced higher returns but with lower risk.

D. That DEFENDANTS had a proven track record of "finding the next Apple or Amazon" before it happened.

E. That [redacted] its agents provided individualized portfolio management that was suitable for PLAINTIFFS in light of their individual investment objectives, investment experience, risk tolerance and financial goals.

F. That DEFENDANTS were providing investment advice that conformed to the representations of [redacted], including not engaging in margin leverage and short-term trading as a business practice.

G. [redacted] would supervise the conduct of its Agents and Principals, [redacted].

193. [redacted] solicitation through its agents and principals to PLAINTIFFS to invest in the trading scheme omitted to state the following material facts that were required to make the statement contained in [redacted] solicitation not misleading:

A. That the trading scheme was speculation that he could pick the right stocks to invest in at the right time and sell at the right time.

B. That the success of his trading scheme depended on accurate market timing, which has been proven through decades of studies, including Modern Portfolio Theory, to be impossible.

C. That the trading scheme DEFENDANTS purported to execute could result in losses to the Plaintiffs of over 50% of their accounts in a short amount of time.

E.

F. That DEFENDANTS were paid additional compensation by [redacted] for utilizing margin in PLAINTIFFS investment accounts.

G. That DEFENDANTS utilized margin in PLAINTIFFS accounts to multiply the amount of fees [redacted] received from PLAINTIFFS accounts;

H. That DEFENDANTS lacked any specific experience in successfully running a trading scheme on a macro-level for multiple accounts and parties over the long term.

I. That DEFENDANTS could not predict what the next Apple or Amazon would be.

J. That DEFENDANTS did not utilize an algorithm to tell them when to buy and sell securities

K. That [redacted] lacked the means and compliance apparatus to perform any reasonable supervision over [redacted] who at all times worked in a remote office in North Carolina.

194. As a Registered Investment Advisor, [redacted] had superior knowledge, expertise, and skill in investing, which were skills PLAINTIFFS did not have.

195. PLAINTIFFS reposed complete trust and confidence in [redacted] that it would act in their best interests.

196. Through this trust and confidence, [redacted] gained influence and superiority over PLAINTIFFS relative to their retirement and/or investment accounts and the use of the investment funds contained therein.

197. [redacted] unjustly profited from its breach of duty in that it received management fees and margin fees.

198. [redacted] conduct was willful, knowing, and malicious and violated PLAINTIFFS' trust and confidence.

199. PLAINTIFFS were justified in relying on [redacted] when they accepted the investment advice to invest in the Trading Scheme because:

A. At all times [redacted] was a licensed investment advisory firm;

B. [redacted] was at all times a fiduciary to Plaintiffs and was bound to act in their best interests at all times under state and federal law;

C. [redacted] represented to PLAINTIFFS that it was a fiduciary and was acting in their individual best interest;

D. That [redacted] principal and chief investment officer [redacted] claimed to have had success in investing such that he was in demand from institutional investors to invest their portfolios;

D. That [redacted] principal and chief investment officer [redacted] had over 30 years of experience selecting securities with success;

E. That [redacted] principal and chief investment officer [redacted] selected securities to invest in based on his consultation with the CEOs of the business whose securities he was buying and selling.

200. At all times relevant, Regulation 130.853 of the Illinois Securities Law stated: "Effecting or causing to be effected by or for any client's account, any transactions of purchase or sale which are excessive in size or frequency or unsuitable in view of the financial resources and character of the account, shall constitute an act, practice, or course of business on the part of the registered investment adviser or its representative effecting such transactions or causing the transactions to be effected that is fraudulent, deceptive or manipulative."

201. 14 Ill. Adm. Code 130.285 provides further that "[t]he failure of any investment adviser to comply with Sections 130.840…130.853, and 130.854 of this Part shall constitute an inequitable practice in the sale of securities and a fraudulent business practice."

202. By soliciting the PLAINTIFFS to invest their retirement and investment funds in the [redacted] Model trading scheme, [redacted], through its Principals and Agents, violated Regulation 130.853 of the Illinois Securities Law and as such committed an inequitable and fraudulent business practice.

203. As a result of [redacted] violations of the ISL, PLAINTIFFS have suffered financial losses in excess of $8,000,000.00.

204. Pursuant to Section 13 of the ISL, 815, ILCS 5/13(A), PLAINTIFFS, as purchasers of securities, may rescind any securities transaction effected in violation of Section 12 of the ISL.

205. Section 13 of the ISL, 815 ILCS 5/13, imposed joint and several liability upon the issuer, controlling person, and dealer; and each dealer or salesperson who participated or aided in any way in making the sale.

206. In compliance with the notice provision of the Illinois Securities Law located in 815 ILCS 5/13(B), PLAINTIFFS caused to be delivered to DEFENDANTS a letter informing DEFENDANTS of PLAINTIFFS' intent to make claims against them and to seek the remedy outlined under the Illinois Securities Law, including rescission.

207. [redacted] is liable to PLAINTIFFS because [redacted], at all times, acted as an agent of [redacted].

208. Pursuant to 815 ILCS 5/13(A), PLAINTIFFS are entitled to void their transactions in the Trading Scheme with [redacted] due to his violations of section 12 of the ISL, 815 ILCS 5/12.

<u>COUNT VII</u>
Breach of Fiduciary Duty to Supervise
<u>(PLAINTIFFS against Defendant [redacted]</u>

209. PLAINTIFFS repeat and reallege paragraphs 1 through 110 and incorporates each and every allegation contained therein as though fully set forth herein in Paragraph 209.

210. At all times relevant, [redacted] was [redacted], Chief Executive Officer, and Chief Compliance Officer, owing a fiduciary duty to PLAINTIFFS.

211. At all times relevant, and pursuant to [redacted] Part 2A of Form ADV, [redacted] was responsible for reviewing PLAINTIFFS' accounts, no less frequently than annually. Additionally, more frequent reviews were if there was a change in the client's investment objectives, tax considerations, large deposits or withdrawals, large purchases or sales, loss of confidence in the underlying investment, or changes in the macro-economic climate.

212. At all times relevant there existed a statute in the State of Illinois, the Illinois Securities Law, 815 ILCS 5/8(E)(f), which obligated an investment adviser to "reasonably supervise the advisory activities of any of its investment adviser representatives or employees and the failure has permitted or facilitated a violation of Section 12 of this Act."

213. At all times relevant there existed a federal statute entitled the Investment Advisers Act of 1940, 15 U.S.C. § 80(b)-1, *et seq.*, and SEC Rule 504, Rule 17j—1 promulgated thereunder, required [redacted], through its Chief Compliance Officer, to establish, maintain, and enforce a written code of ethics that meets specific minimum criteria and specifically, provisions that are reasonably necessary to prevent conduct expressly prohibited under the Code of Ethics.

214. As the Chief Compliance Officer for [redacted] was charged with the responsibility of supervising the conduct of [redacted], who was at all times relevant was an investment adviser representative.

215. [redacted] failed to supervise the conduct of [redacted] by, at all times relevant, failing to:

a) Review the PLAINTIFFS' accounts with an eye towards determining whether they were being invested in a way that was contrary to representations made in [redacted] Form ADV;

b) Review PLAINTIFFS' accounts to ensure that they were not paying exorbitant costs and fees;

c) Review PLAINTIFFS' accounts to ensure that each was receiving the customized investment advice promised;

d) Contact PLAINTIFFS to ensure that their investment objectives were being met;

e) Review [redacted] trading across all client accounts to ensure that [redacted] was not trading all client accounts in a similar or uniform manner;

f) Design trading alerts and compliance systems that would automatically issue compliance alerts from excessive trading, high fees, speculation, and investment losses and then use those reports to meet with PLAINTIFFS to ensure their objectives were being met; and

g) Confront [redacted] and question the trading he was executing in PLAINTIFFS' accounts, on an adversarial basis.

216. [redacted] did not supervise the activities of [redacted] in connection with this management of PLAINTIFFS' accounts

WHEREFORE, Plaintiffs pray for judgment against [redacted] for:

A. All actual and compensatory damages caused by [redacted]'S breaches;

B. Any and all further relief that this Court deems just and appropriate.

Count

BEFORE THE
AMERICAN ARBITRATION
ASSOCIATION CONSUMER RULES

[redacted] and [redacted], Individually and on Behalf of their Individual Retirement Accounts, Claimants, v. [redacted] Advisors, Inc., Respondent.	**CASE NO:** **NOTICE OF ARBITRATION AND STATEMENT OF CLAIM**

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

Claimants [redacted] and [redacted], Individually and on Behalf of their Individual Retirement Accounts, by and through undersigned counsel, file this arbitration claim against Respondent [redacted] Advisors, Inc., and allege as follows.

I.
INTRODUCTION

1. This case is about the gross misconduct of Respondent in connection with the investments of the Claimants' retirement savings into the LJM Preservation and Growth Fund (the "LJM Fund" or the "Fund") – an exotic, highly leveraged mutual fund that sought to generate a return by investing in "short volatility" through buying and writing uncovered options on S&P futures contracts – which has been compared to picking up nickels and dimes in front of a steamroller.

2. As investment advisers with full discretion over the Claimants' accounts, Respondent was charged with acting at all times in the best interests of the Claimants and exercising due care in conducting due diligence on the LJM Fund and ensuring that it was consistent with Claimants' moderate investment objectives.

3. In the Investment Policy Statement written for Claimants dated March 27, 2012, which was created at the outset of [redacted] investment advisory relationship with Claimants, Respondent recognized Claimants' core investment objective was to "grow the account in a manner that outpace[d] inflation while avoiding unnecessary market risk and volatility." Notwithstanding this stated objective, beginning in 2014, Respondent began investing Claimants' hard-earned nest egg, on a discretionary basis, in the LJM Fund, an investment that clearly could blow up in a volatile market.

4. In early February 2018, the LJM Fund dropped more than 80% over the course of just two days during a spike in the volatility index (VIX), losing more than $600 million for investors like the Claimants. Although the LJM Fund and its principals are the subject of class action litigation for allegedly misleading investors about the risks involved in its strategy by creating the impression that it was a true preservation and growth fund, a cursory analysis of the fund prospectus and annual reports reveal that the fund indeed disclosed that it was a highly leveraged, high risk/low return investment which carried an expense ratio far greater than other balanced mutual funds (which would only drop 80% or more in the event of a cataclysmic event, like a nuclear holocaust).

5. Respondent cannot disclaim the fiduciary duties owed to the Claimants and must be held responsible for the inadequate due diligence, negligence, and unsuitable investment selections which directly and proximately caused the Claimants to lose $363,073 in two trading

session s.

II.
JURISDICTION AND VENUE

6. The Claimants are entitled to arbitrate their dispute before the American Arbitra ion Associatıon under the Consumer Arbitration Rules in a location to be determined in Denver, Colorado.

7. The Investment Advisory Agreement executed by the Claimants is attached as Exhibit A. Page 7, Clause 13 of this agreement contains the following arbitration clause, which states as follows in pertinent part:

13. **ARBITRATION.**

This Agreement contains a provision, which requires that all claims arising out of transactions or activities affecting the provision of services by Advisor to Client (collectively referred to as "the parties") be resolved through arbitration in Denver County, Colorado. The parties acknowledge, understand and agree that:

(i) Arbitration is final and binding on the parties.
(ii) The parties are waiving their right to seek remedies in court, including the right to jury trial.
(iii) Pre-arbitration discovery is generally more limited than and potentially different in form and scope from court proceedings.
(iv) The Arbitration Award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of a ruling by the arbitrators is strictly limited.
(v) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

To the extent permitted by law, all controversies which may arise between the parties or any of their affiliated companies concerning any transaction arising out of or relating to this Agreement, or the construction, performance, or breach of this or any other agreement between Advisor whether entered into prior to, on or subsequent to the date hereto, shall be submitted to arbitration conducted under the Rules of the American Arbitration Association.

8. The American Arbitration Association as jurisdiction over this arbitration. By filing t is Statement of Claim, the Claimants hereby give notice tha this dispute shall be resolve l by arbitrat on under the arbitration agreement between th parties, and elect to proceed under the applicabl consumer arbitration rules of the Administrator then in effect.

9. As ( ) the arbitration agreement has provided for arbitration by the American

Arbitration Association; (ii) the nature of this arbitration relates to a consumer finance agreement; and (iii) that no particular set of arbitration rules is specified in the arbitration agreement, the Claimants request that the AAA Consumer Arbitration Rules apply as required under AAA Consumer Rule R-1(a).

III.
PARTIES

10. Claimant [redacted] is an individual consumer who at all relevant times was a resident of Castle Rock, Colorado. [redacted] is 65 years old, and spent his career as a general dentist.

11. Claimant [redacted] is an individual consumer who at all relevant times was a resident of Castle Rock, Colorado. [redacted] is 63 years old and worked as a homemaker as well as an office assistant in [redacted] dental practice.

12. Respondent [redacted] is an SEC registered investment advisory firm with its principal place of business in Denver, Colorado. It is a business entity that renders investment advice to individual consumers for a fee.

IV.
RELEVANT NON-PARTY

13. [redacted] (“[redacted] or “Mr. [redacted] is Managing Director, control person, and owner of 75% or more of [redacted] Mr. [redacted] was the Claimants’ investment advisor representative at all times relevant. Mr. [redacted] owed the Claimants a fiduciary duty and was required to act in the Claimants’ best interest when selecting investments for them. Mr. [redacted] was also personally responsible for conducting thorough due diligence on the LJM Preservation and Growth Fund (“LJM Fund”) to ensure that he understood the LJM Fund and its appropriateness for the Claimants.

V.
BACKGROUND

14. Mr. [redacted]'s father was the pediatrician for the Claimant's children, and Claimants were generally acquainted with Mr. [redacted] for over 20 years. As they trusted Mr. [redacted]'s father with their children's health, they too trusted Mr. [redacted] with their hard earned retirement funds. The Claimants had previously allowed Mr. [redacted] to manage some of their pre-tax investment funds while he was associated with AXA Advisors. However, based on the trust and confidence they placed in Mr. [redacted] as they approached retirement, the Claimants elected to allow him to manage their retirement nest egg. As a result, they Claimants opened three accounts with Mr. Simon's firm, [redacted] in June 2012, with Mr. and [redacted] each opening an IRA and [redacted] opening a non-qualified investment account.

15. [redacted] by and through its agent, Managing Director, control person, and majority owner, [redacted] assured the Claimants that [redacted] would manage their assets in a manner consistent with their stated investment objectives and risk tolerance. As a result of these representations, the Claimants placed their trust and confidence in [redacted] and [redacted] and agreed to have [redacted] and [redacted] manage their retirement assets on a fully discretionary basis – meaning that [redacted] and [redacted] could make investment decisions for the Claimants without their consent or approval.

16. In June 2012, [redacted] and [redacted] began managing the Claimants' retirement funds. This fiduciary management began with the drafting of an Investment Policy Statement (IPS). The IPS states, in pertinent part:

> A. In recent years, [[redacted]] has **moderated his tolerance for risk given** his change in circumstances and the realization of the impact of stock market volatility on a larger portfolio.

B. The overall objective of the investment is to **grow the account in a manner that outpaces inflation while avoiding unnecessary market risk and volatility**.

C. During our discussions regarding risk tolerance…we have determined that [[redacted]] is a **moderate to growth investor** (defined as holding approximately a 60/40 stock/bond asset allocation).

D. The asset allocation should be well-diversified to avoid undue exposure to any single economic sector, market capitalization, industry group, **or individual security**. ([redacted] Advisors, Investment Policy Statement, [redacted] and [redacted], dated June 12, 2012) (Emphasis Added).

17. By virtue of the fiduciary duty that [redacted] and [redacted] owed the Claimants by being an SEC registered investment adviser and managing the Claimant's accounts on a fully discretionary basis, in addition to adhering to the Claimants' written instructions as memorialized in the Investment Policy Statement, [redacted] and Mr. [redacted] owed multiple other duties to the Claimants, including but not limited to:

1) A duty to always act in good faith and with the best interests of Claimants in mind;
2) A duty to conduct thorough due diligence on each investment purchased for the Claimants;
3) A duty to fully understand each investment purchased for the Claimants;
4) A duty to ensure that each investment purchased for the Claimants was consistent with their investment objectives and risk tolerance; and
5) A duty or to provide full and fair disclosure of all material facts about an investment to the Claimants.

18. [redacted] and Mr. [redacted] exercised their discretionary authority to make the following purchases of the LJM Preservation and Growth Fund ("LJM Fund") for the Claimants' accounts:

a. [redacted] Individual Account: $200,025 on 09/25/2014;

b. [redacted] IRA: $15,027 on 08/25/2015;

c. [redacted] IRA: $60,954 on 8/25/15;

d. [redacted] IRA: $39,022 on 06/21/2016;

e. [redacted] Individual Account: $49,191 on 06/21/2016; and

f. [redacted] IRA: $9,631 on 06/21/2016;

Mr. [redacted] did not consult with Claimants prior to purchasing shares in LJM Fund.

20. The LJM Fund was launched in January 2013 and sold in three different share classes (ticker symbols LJMAX, LJMCX, LJMIX). According to its latest annual report, the Fund had net assets of $768 million as of October 31, 2017. The fund's investment objective was generally to seek "capital appreciation and capital preservation with low correlation to the broader U.S. equity market." The LJM Fund sought to achieve this objective by engaging in uncovered short volatility trading, which it described as follows:

> "The Fund seeks to achieve its investment objectives by capturing gains on options sold on S&P futures contracts that can be purchased ("closed") at a later date for a lower price than the price realized when originally sold.... In the aggregate, the Fund is typically "net short" in the portfolio of contracts that it holds, which means that the Fund holds more uncovered option contracts than covered."[1]

In lay terms, the fund's "short volatility" investment strategy used to generate returns for investors was the equivalent of picking up nickels and dimes in front of a steamroller.[2]

21. In order to execute on its "short volatility" investment strategy, the Fund

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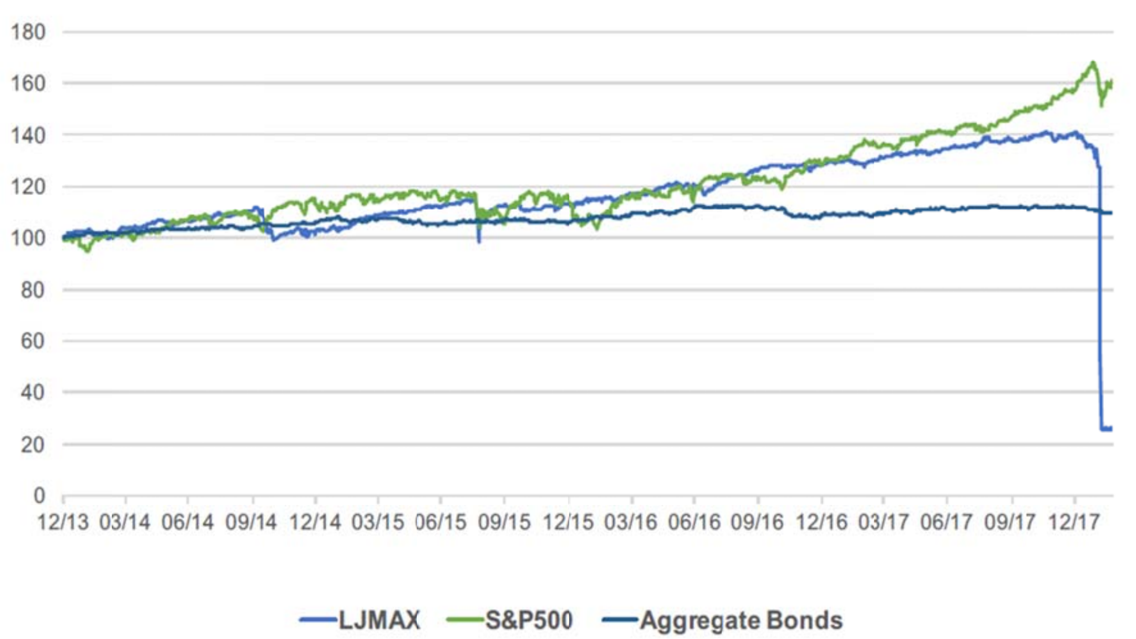
[1] The prospectus defines an uncovered option as one in which the underlying asset is not actually held by the investor or - more precisely - the short option is not offset by a corresponding long stock, option or futures position.

[2] 'Short volatility' strategies like the one employed by LJM bet on future stock market swings being more muted than current expectations would suggest. In essence, these strategies pocket the 'risk premium' from selling insurance to cautious investors. One of the longest and most tranquil periods of stock market expansion had helped these types of strategies reap rich rewards. However, these strategies generally overly rely on leverage to amplify returns to make the strategy worthwhile for retail investors.

implemented an options trading scheme called a “short strangle” – which is an options trading strategy widely known to have an unlimited downside (meaning no preservation) and limited upside (meaning no real growth). As a result, the name of the fund – LJM Preservation and Growth Fund – was misleading in that its true strategy exposed investors to potentially unlimited losses, with little upside growth potential. Any licensed investment advisor selling a fund the employs an options strategy like this is duty-bound to understand how the strategy works.

22. These basic facts about the LJM Fund were all available to [redacted] and Mr. [redacted] prior to purchasing the fund for the Claimants. Moreover, a cursory review of the fund’s performance from 2013 to the various dates of purchase would have revealed to [redacted] and Mr. [redacted] that while the fund’s returns for the same time-period were smoother than the S&P 500, the LJM Fund suffered large losses in 2014 and 2015 when the S&P 500 dropped. As such, the non-correlation objective was obviously not being met. Therefore, prior to purchasing the Fund for the Claimants, [redacted] and Mr. [redacted] knew or should have known that this fund had a lower return than the S&P 500, but carried far more risk and had historically failed to meet its non-correlation objective.

Figure 1: LJM Preservation and Growth Fund Class I, Stocks and Bonds, 2014-2018



23. In addition to the high risk/low return proposition that the fund offered, it was a very expensive fund for Respondent to recommend to clients given the high expense ratio the I shares carried (2.43%). Since the I shares had only returned 4.51% since 2013, the Claimants would need a pre-expense ratio return of 6.94% on the LJM Fund just to net a return comparable to a true balanced mutual fund – which indeed offered preservation and growth. In other words, the fund needed growth fund performance to net its investors a balanced fund return after expenses.

24. Moreover, using its inception to date performance, after the investment advisory fee charged by [redacted] [redacted] and Mr. [redacted] (at least 1% annualized), the Claimants could only reasonably have expected to earn a net return of 3.51% over the next five years in total, which is lower than the standard rate of inflation of approximately 2% per year. That means the Claimants were essentially paying a total fee of 3.43% per year for a highly leveraged, exotic, high risk/low return mutual fund that exposed them to an unlimited downside, while historically failing to even

keep pace with inflation on an annualized basis. By investing Claimants' retirement funds in the LJM Fund, not only did [redacted] and Mr. [redacted] ignore a primary objective of the accounts, which was to outpace inflation according to the Investment Policy Statement, the speculative risk carried by the LJM Fund was contrary to their stated "moderate" risk tolerance, and represented concentration risk.

25. The expenses and historical performance indicated the fund simply did not adequately compensate investors for the risks of the esoteric options "strangle" strategy employed by LJM Fund. When investors knowingly invest in a speculative investment, like low rated junk bonds for example, they do so with the understanding that the high interest rate or yield paid by the bond is correlated to the risk that the issuer will be able to continue to make the interest payments and repay the principal once the bond comes due. Similarly, if an investor invests in a small capitalization tech stock that historically has a high standard deviation (a measurement of the historical volatility of the share price), an informed investor understands that, while there is a chance the stock price goes up 30%, it is just as likely it goes down 30%.

26. But in both of these cases, whether it is high yield junk bonds or small cap tech stocks, the informed investor is being compensated for the risk they are taking with their money by being paid higher interest in the case of the bonds, or the chance for substantial returns in the case of the small cap tech stock. By way of comparison, if [redacted] and Mr. [redacted] had Claimants' best interest in mind, they would have simply purchased a low-cost, balanced mutual fund yielding between 6-8% with an expense ratio of less than 50 basis points, which would only drop 80% or more in two days in the event of a cataclysmic event, like a nuclear holocaust.

27. The high risk/low return nature of the LJM Fund could have been identified by Respondent through the simple exercise of reasonable care by reviewing the prospectuses

published by the Fund and having the intellectual curiosity to understand the options strategy employed by LJM Fund. Even if the principals of the LJM Fund allegedly misled investors about the preservation and growth aspect of the Fund that they touted, the Respondent and Mr. [redacted] still knew or should have known that this Fund was inappropriate for the Claimants given their moderate investment objectives and risk tolerance compared to the unlimited downside risk of the LJM Fund.

28. At an absolute minimum, Respondent and Mr. [redacted] reviewed the prospectus and annual reports for LJM Fund prior to investing Claimants' retirement money in it. As such, Respondent and Mr. [redacted] had, at all times relevant, actual or constructive knowledge of the above facts.

29. All of these facts regarding the LJM Fund are relevant to Respondent and Mr. [redacted]'s decision to invest Mr. and Mrs. [redacted] retirement assets in the LJM Fund. Had [redacted] or Mr. [redacted] disclosed the high expenses, limited returns, and unlimited downside of the LJM Fund to the Claimants, they would have never authorized these purchases. These omissions by Respondent were material, and each failure to disclose them, regardless of discretionary authority, constituted a separate breach of duty.

30. After the LJM Fund collapsed, instead of taking responsibility for recklessly the Claimants received an email from Mr. [redacted] stating that there was an issue with the LJM Fund, and that substantial losses were suffered. [redacted] went on to further say that LJM Fund "gave no indication that something like this was remotely possible during our multiple inquiries and conversations with them" despite the fact that the LJM Fund clearly disclosed that it was an expensive high risk/low return investment that was inconsistent with the Claimants stated investment objectives and risk tolerance. Ultimately, Respondent liquidated the Claimants

position in the LJM Fund and realized the massive losses they had suffered in this investment.

31. As a direct and proximate result of the foregoing misconduct, the Claimants suffered $363,073 in damages in two trading days.

VI. CAUSES OF ACTION

A. Breach of Fiduciary Duty

32. Section 202(a)(ll) of the Investment Advisers Act of 1940 ("Advisers Act") defines the term "Investment Adviser" as, "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities . . ." 15 U.S.C. § 80b-l, *et seq.* It is well established that an Investment Adviser is a fiduciary to its clients. *See, e.g., Securities and Exchange Commission v. Capital Gains Research Bureau, Inc. et al.,* 375 U.S. 180 (1963).

33. It is undisputed that Respondent served as a fiduciary to the Claimants in managing their retirement funds. As a fiduciary Investment Adviser, Respondent owed the Claimants a duty of loyalty requiring both the full and fair disclosure of all material facts and informed consent.[3]

34. According to Professor Poser:

> A fiduciary, in turn, is subject to duties that go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests. A fiduciary owes his principal an obligation of diligent and faithful service similar to that of a trustee. Like a trustee, he is held to rigorous duties of loyalty and care; he must avoid acts that put his interests in conflict with the beneficiary's; his duties must be exercised with the utmost good faith and integrity and he must employ such skill and judgment as might reasonably be expected of persons skilled in his calling. *See*, Broker Dealer Law and Regulation (3rd Edition 2002 Supplement).

[3] See U.S. Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2011) at 112-13.

35. The obligation to perform due diligence on an investment prior to offering it to a client for sale is a fundamental responsibility of any investment adviser, and stems from the fiduciary duty of care. An RIA must have a reasonable, independent basis for its recommendations. *In the matter of Alfred* C. *Rizzo,* Advisors Act Release No. 897, 1984 WL 470013 (Jan. 11, 1984). The duty of care flows from the "delicate fiduciary nature of an investment advisory relationship," requiring that the advisor provide clients with personal and competent "advice regarding the sound management of their investments." *Id.* citing *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191 (1963). **An RIA must also corroborate the issuer's statements from independent sources rather than carelessly disseminate investment recommendations**. *Id.* (Emphasis Added).

36. Respondent and Mr. [redacted] had a fiduciary duty to carefully scrutinize the LJM Fund prospectuses and other materials before electing to purchase it for the Claimants. In *SEC v. Blavin,* the federal district court summed it up nicely, stating, "[A] reader of an investment newsletter has a right to expect the investment adviser do more than merely reprint glowing financial news gleaned from financial reports or conversations with companies or officers." 557 F. Supp.1304, 1314 (E.D. Mich. 1983). Respondent did just that by relying on the representations of LJM Fund's principals instead of the obvious risks disclosed in the prospectuses.

37. This fundamental obligation to perform reasonable due diligence into investments prior to offering them also applies to mere stock brokers, who only owe suitability obligations, not fiduciary duties in most instances. See *Hanly v. SEC,* 415 F.2d 589, 595- 96 (2d. Cir. 1969); *SEC v. Great Lake Equities Co.,* 1990 U.S. Dist. LEXIS 19819 at *16-17 (E.D. Mich. 1990); *SEC v. North American Research and Development*

Corp., 424 F.2d 63, 84 (2d Cir. 1970). See also *SEC v. Current Financial Services, Inc.,* 100 F. Supp. 2d 1, 14-15 (D.D.C. 2000).

38. This fundamental duty emanates from the adviser's "special relationship" to the customer, and from the fact that in recommending the security, the adviser represents to the customer "that a reasonable investigation has been made and that [its] recommendation rests on the conclusions based on such investigation." *Hanly* at 597. Failure to comply with this duty can constitute a violation of the antifraud provisions of the federal securities laws and, particularly, Section l7(a) of the Securities Act, Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder. *Id.*

B. Violation of the Colorado Securities Act

39. Claimants re-allege and incorporates by reference the paragraphs above.

37. It is a violation of the Colorado Securities Act:

(1) To employ any device, scheme, or artifice to defraud;

(2) To make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

See C.R.S. § 11-51-501 (2014). Any person who recklessly, knowingly, or with intent to defraud violates § 11-51-501:

> is liable to the person buying or selling such security or receiving such services in connection with the violation for such legal or equitable relief that the court deems appropriate, including rescission, actual damages, interest at the statutory rate, costs, and reasonable attorney fees. *See* C.R.S. § 11-51-604(3) (emphasis added).

38. The aforesaid acts, misrepresentations and omissions by [redacted] and Mr. [redacted] who was its agent, Managing Director, and majority owner at all times relevant, in connection with the purchases of the LJM Fund at issue were made in violation of the Colorado Securities Act ("CSA"). Because Mr. [redacted] was acting in the scope of his authority as an agent, control person, and majority owner of [redacted] both Mr. [redacted] and [redacted] are jointly and severally liable for damages.

39. As described above, Mr. [redacted] failed to disclose certain material facts and risks of the LJM Fund to the Claimants. Had Mr. [redacted] disclosed these material facts and risks to the Claimants, Mr. and [redacted] would have never agreed to purchase the LJM Fund. As a result, Mr. [redacted] is liable for the damages suffered by the Claimants flowing from these material omissions.

40. [redacted] is liable to the Claimants as a "control person" of Mr. [redacted] under C.R.S. § 11-51-604(3) of the Colorado Securities Act, which states that:

> Every person who directly or indirectly controls a person liable under subsections (1), (2), (2.5), or (3) of this section is liable jointly and severally with and to the same extent as the controlled person, unless such controlling person sustains the burden of proof that such person acted in good faith and did not, directly or indirectly, in duce the act or acts constituting the violation or cause of action.

41. As such, [redacted] is jointly and severally liable for any and all damages suffered by the Claimants as a result of [redacted] misconduct.

42. The Claimants have been damaged by the Respondent's omissions of material fact as they related to the LJM Fund and are entitled to relief as provided for under the Colorado Securities Act. As such, the Claimants are entitled to a full recovery of their damages, interest at the statutory rate, costs, and reasonable attorneys' fees as a matter of Colorado state law.

C. **Gross Negligence**

43. Claimant re-alleges and incorporates by reference the paragraphs above.

44. Separate and distinct from the fiduciary obligations owed by Respondent, Respondent acted in bad faith and failed to exercise the necessary degree of care with regard to the purchases of the LJM Fund with the Claimants' retirement funds, and recklessly failed to exercise the degree of care with regard to whether the purchase of the LJM Fund was in the Claimants' best interest.

45. Respondent failed to exercise the same degree of care that an ordinary, reasonably prudent investment adviser would exercise under like circumstances, and failed to act in a manner reasonably required, and with sufficient care to prevent damage to Claimants. But for the negligent conduct of Respondent and Mr. [redacted] with regard to the highly unsuitable purchases of the LJM Funds, Claimants would not have lost $363,073 in two days.

46. To the extent that Mr. [redacted] negligently violated and/or disregarded [redacted] internal compliance guidelines, Respondent is liable to Claimants for their losses resulting from such negligence.[4]

47. As a direct and proximate result of the grossly negligent conduct of Respondent as herein alleged, Claimants were damaged in the amount of $363,073 in just two trading days.

VII.
PRAYER

WHEREFORE, the Claimants respectfully request the following relief against

---

[4] In *Thropp v. Bache Halsey Stuart Shields, Inc.*, 650 F.2d 817 (6th Cir. 1981), the court stated, "when a defendant has disregarded rules that it has established to govern conduct of its own employees, evidence of those rules may be used against the defendant to establish the correct standard of care". Id. at 619. The *Throop* court further stated, "[t]he content of such rules may also indicate knowledge of the risks involved and the precautions that may be necessary to prevent the risks". Id.

Respondent:

a) Compensatory damages in the amount of $363,073;

b) Punitive damages;

c) Interest from the date of purchase to the date of the arbitration award pursuant to the CSA;

d) An award of attorneys' fees and costs pursuant to CSA; and

e) All such other relief as is just and equitable.

Dated: August 16, 2018

Respectfully submitted,

LAW OFFICES OF JOSHUA B. KONS

By: /s/ Joshua B. Kons
Joshua B. Kons, Esq.
Attorneys for Claimants

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

[redacted],

Plaintiffs,

v

Case No. [redacted]
Hon. [redacted]

[redacted],

Defendants.

/

[redacted]

[redacted]

/

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS, FIRST SET OF INTERROGATORIES AND REQUEST FOR ADMISSIONS

Plaintiffs hereby submit to Defendants [redacted] the following discovery requests pursuant to MCR 2.310, MCR 2.309, and 2.312. Plaintiffs expressly reserve the right to submit further discovery requests and further state that the discovery requests submitted herein are continuing in nature and must be promptly supplemented should conditions warrant. The documents and items requested herein should be delivered to [redacted], on or before **October 2, 2022**, at 5:00 pm.

INTERROGATORIES

1. Identify every employee or agent at [redacted] that communicated with Plaintiff, regarding her individual account or either account for which she was Trustee, and state the date and method of said communication, e.g., whether made via telephone, email, letter, or in-person meeting, and provide their email address, telephone number, and mailing address.

Response:

2. Identify each time any meetings took place between [redacted] or any agents of [redacted], where Plaintiff's individual account or either account for which she was Trustee, or [redacted] were discussed and further identify each participant and the place of said meeting.

3. Identify each internal manual used by [redacted] for compliance, supervision, or for their investment advisor representatives, that existed between 2015 and 2021.

Response:

4. Identify any software utilized by [redacted] for internal notetaking or chats.

Response:

5. Identify each third-party vendor used by [redacted] to archive, capture, monitor, or store email communications of its officers, directors, agents, representatives and employees, including [redacted].

Response:

6. Identify all document retention policies in existence since 2015.

Response:

7. Identify who is responsible for ensuring [redacted] adheres to its document retention policy.

Response:

8. Identify any and all statutes or regulations that require [redacted] to retain documents.

Response:

9. State whether any documents or records related to Plaintiffs have been destroyed or discarded and if so, identify when those records were destroyed and who was responsible for the destruction.

Response:

10. Identify anyone with knowledge of the facts of this case and provide their email address, telephone number, and address.

Response:

11. State the name, email address, telephone number, address or last known place of employment for each assistant who supported [redacted] in anyway during the relevant time period.

Response:

12. State the name, email address, telephone number, address or last known place of employment for each compliance officer, compliance director, compliance manager, or supervisor who supervised or should have supervised [redacted] during the relevant time period.

Response:

13. Describe in detail the steps that [redacted] took to supervise [redacted] during the relevant time period.

Response:

14. Identify the date and all individuals involved in any branch audit or regulatory audit by the Securities and Exchange Commission or the Michigan Department of Securities from 2015 to 2021.

Response:

15. Provide all addresses for offices from where [redacted] provided investment-related advisory services from 2015 through 2020.

Response:

16. Describe in detail the processes and steps that [redacted] took when approving [redacted] as an outside business activity for [redacted].

Response:

REQUEST FOR ADMISSIONS

1. Admit that [redacted] was an employee of [redacted].

Response:

2. Admit that [redacted] was an independent contractor of [redacted].

Response:

3. Admit that [redacted] was an agent of [redacted].

Response:

4. Admit that [redacted] was registered as an investment adviser of [redacted] from 2015-2021.

Response:

5. Admit that the Securities and Exchange Commission does not consider whether an agent is an employee or independent contractor as a factor in determining appropriate supervision.

Response:

6. Admit that Defendant was aware that [redacted] was operating [redacted] at all times relevant.

Response:

7. Admit that [redacted] never audited Mr. [redacted]'s office.

Response:

8. Admit that [redacted] never requested or reviewed [redacted]'s bank records, either personal or for [redacted].

Response:

9. Admit that [redacted] was, at all times relevant, required to follow SEC Rules and regulations specific to the governance of registered investment advisors.

Response:

10. Admit that [redacted] was, at all times relevant, required to adhere to their internal policies and procedures as outlined in their written supervisory procedures manuals.

Response:

11. Admit that [redacted] was responsible for supervising [redacted] at all times when [redacted] was providing services to Plaintiffs..

Response:

12. Admit that [redacted] was obligated to establish supervisory procedures reasonably designed to prevent and detect violations of state and federal securities laws.

Response:

13. Admit that [redacted] was required to review its supervisory procedures at least annually for their adequacy and the effectiveness of their implementation.

Response:

14. Admit that [redacted] was required to designate a chief compliance officer to be responsible for administering the Firm's supervisory policies and procedures.

Response:

15. Admit that [redacted] approved [redacted] as an Outside Business Activity.

Response:

16. Admit that [redacted] represented a potential conflict of interest to [redacted] and the firm's clients.

Response:

17. Admit that [redacted] was the chief compliance officer for [redacted] from 2015 to 2020.

Response:

18. Admit that [redacted] never requested information from [redacted] about [redacted].

Response:

REQUEST FOR DOCUMENTS

1) Produce all agreements between the Plaintiffs and [redacted], including, but is not limited to account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, new account forms, and investment policy statements.

2) Produce all documents establishing the amount of fees paid by Plaintiffs to [redacted] for any service provided, including income tax return preparation and investment advisory fees.

3) Produce all documents in [redacted] possession, custody, or control that reference or relate to the Plaintiffs' accounts, investments, income taxes, or annuities.

4) Produce all correspondence, including emails, to, from, or between Plaintiffs on the one end, and any agents or employees of [redacted].

5) Produce all 1099s or W-2s from [redacted] and its affiliates for [redacted] from 2015-2021.

6) Produce all documents in connection with the hiring of [redacted], including his employment application, any notes from his interviews, background checks, credit checks, litigation checks, and any records in connection with the onboarding of his book of business to [redacted]

7) Produce all documents contained in the [redacted] personnel files, investment adviser representative files, independent contractor files, registration files, or other employment-related files for [redacted], including but not limited to:

    a) Independent contract or employment applications;
    b) Form U-4 and Form U-5 (including all updates and disclosures reported therein);
    c) Employment, appointment, or independent contractor agreements;

d) Licensing applications;
e) Performance appraisals and/or evaluations;
f) Self-appraisals and/or evaluations;
g) Documents and information gathered during any 'background check' or other screening, including credit reports, credit checks, litigation checks, asset searches, or other intelligence gathering;
h) Documents regarding any client complaints;
i) Documents regarding any investigation or discipline; and
j) Documents regarding the termination from or resignation from [redacted] by [redacted]

8) Produce all documents that relate to or reference [redacted]

9) Produce all documents establishing total revenue generated by [redacted] on an annualized basis from 2015 through 2020.

10) Produce [redacted] compliance manuals in their entirety from 2015-2021.

11) Produce all of [redacted] Forms ADV, including amendments, from 2015-2020.

12) Produce all correspondence, written requests for documents and information, and any responses thereto, between [redacted] and the Securities and Exchange Commission in connection with [redacted] or Plaintiffs.

13) Produce all documents provided to the Securities and Exchange Commission in connection with [redacted]

14) Produce all insurance policies or agreements in effect during the relevant time period that could make any insurance company liable for all or part of any judgment in his matter.

15) Produce all letters from any insurance company with whom [redacted] maintained any general liability, E & O, or D & O), or other insurance coverage,

declining to cover the claims made by Plaintiffs, whether the letter reflected a denial of coverage, a reservation or rights, or refusal to indemnify.

16) Produce all notes maintained by anyone at [redacted] that reference or relate to Plaintiffs or [redacted]

17) Produce all documents evidencing over or monitoring of the activities of [redacted] by [redacted].

18) Produce all communications or correspondence, including but not limited to letters, emails text messages, and notes, between [redacted] and [redacted] regarding Plaintiffs or the Plaintiffs' investments or accounts.

19) Produce all communications or correspondence, including but not limited to letters, emails text messages, and notes, between [redacted] and [redacted] regarding Plaintiffs or the Plaintiffs' investments or accounts.

20) Produce all communications or correspondence, including but not limited to letters, emails text messages, and notes, between [redacted] and [redacted] regarding Plaintiffs or the Plaintiffs' investments or accounts.

21) Produce all communications or correspondence, including but not limited to letters, emails text messages, and notes, between [redacted] and anyone at [redacted] regarding Plaintiffs or the Plaintiffs' investments or accounts.

22) Produce all versions of [redacted] Code of Ethics from 2015 through 2021.

23) Produce all records reflecting the supervision or review of [redacted] personal trading or investment accounts, including any attestations completed or signed by [redacted] regarding the existence of any personal investment or securities accounts.

24) Produce all compliance questionnaires completed by [redacted] from 2015 to 2020.

25) Produce all records establishing the supervision by [redacted]

26) Produce all records in connection with [redacted] approval of [redacted] as an outside business activity for [redacted].

27) Produce all documents in connection with supervision of [redacted] from 2015 to 2020.

<u>DEFINITIONS AND INSTRUCTIONS</u>

1. You are cautioned to omit nothing by way of information or detail when providing answers to this discovery request. The proponent of these requests must conclude that, where information is not provided, it does not exist, and where detail is missing, it cannot be provided by the answering party.

2. These discovery requests are to be answered in detail. If you are unable to answer any discovery request in full on the basis of immediately available information, you are requested to furnish as complete an answer as you can and explain in detail why a more complete answer cannot be furnished. You are further requested to make diligent efforts to obtain any missing information, and to describe such efforts and the results thereof.

3. In answering these discovery requests, you are requested to provide all information available to you, including any information that can be obtained from your agents, employees, representatives, investigators, attorneys, accountants, advisors, spouse, affiliates, sureties, indemnitors, or any other person who has made relevant information known to you or from whom such information can be gained.

4. These discovery requests shall be deemed to be continuing in nature; supplemental answers are required immediately if you obtain, or learn the existence of, further or different information from that provided in your original answers hereto.

5. If any of the answers to these discovery requests may be derived from documents in your possession or under your control, please attach copies thereof to your answers herein. If you are unwilling or unable to attach copies of said documents, you are requested to describe each document with specificity, identify the person in possession or control of said documents, and state a reasonable time when and where said documents will be made available for inspection and copying.

6. If you claim any privilege with respect to any information or documents requested herein, you are requested to:

a) specifically identify the information or documents involved;

b) specifically identify all persons in possession, or having knowledge of the information or documents involved; and

c) state the basis for your claim of privilege.

7. These discovery requests, and the terms used therein, shall be construed in the broadest possible sense. In this regard, the following shall apply:

a) all nouns shall be construed in both the plural and singular senses;

BEFORE THE AMERICAN ARBITRATION ASSOCIATION
CONSUMER RULES

In the Matter of Arbitration Between

[redacted] and [redacted]
Individually and on Behalf of their
Individual Retirement Accounts,

AAA Case No. 01-18-0003-1067

Claimants,

vs.

[redacted]

Respondent.

CLAIMANTS' FIRST REQUEST FOR DOCUMENTS & INFORMATION
DATED JANUARY 30, 2019

The Claimants hereby request that the Respondent [redacted] provide the following documents and information to the Claimants no later than thirty (30) days after the date of the service of this request.

The following Definitions and Instructions are to be utilized in connection with the Requests for Documents & Information that are hereinafter set forth:

DEFINITIONS

(a) The term "Claimant" or "Claimants" shall be defined so as to include all Claimants named in the Statement of Claim, [redacted] and [redacted];

(b) The term "Respondent" or "Respondents" shall be defined as the "Firm" which term shall, in turn, be defined as [redacted] ("[redacted] which definition shall include each, any, and/or all of their officers, agents, servants, employees and all other persons who acted or purported to have acted on behalf of said Respondent with regard to the Claimants' accounts.

(c) The term "Investment Advisor" and/or "Associated Person" shall be defined so as to refer to as any and all financial advisors of the Claimants who were employed by the Firm during the Time Period, including but not limited to [redacted] (“[redacted]

(d) The term “Time Period” shall be defined so as to refer to the period of time during which the Claimants maintained accounts with [redacted] unless otherwise noted;

(e) The term “accounts” shall refer to one or more individual or joint, personal or entity accounts that the Claimants maintained at [redacted] during the Time Period;

(f) The term “Document” shall be defined so as to include all writings of any kind including the originals, drafts and all copies whether different from the originals by reason of any notation made thereon or otherwise, and shall include, but not be limited to, any written, printed, typed, recorded, filmed, punched, transcribed, taped or other graphic matter of any kind or nature including emails, however produced or reproduced, whether sent or received or neither, and shall include, but not necessarily be limited to, all records, memoranda, reports, financial statements, account statements, conformation slips, handwritten or other notes, transcripts, papers, indices, letters, envelopes, telegrams, cables, telex messages, facsimile transmissions, tabulations, studies, analyses, evaluations, projections, work papers, statements, summaries, opinions, journals, desk calendars, appointment books, diaries, lists, comparisons, questionnaires, surveys, charts, graphs, books, pamphlets, articles, magazines, newspapers, booklets, circulars, bulletins, notices, instructions, manuals, minutes or transcriptions or notations of meetings, telephone conversations, or other communications of any type, photographs, microfilm, microfiche, tapes or other recordings, punch cards, magnetic tapes, discs, data cells, drums, computer printouts, other data compilations from which information can be obtained, and any other documents as defined within Rule 34 of the Federal Rules of Civil procedure to which the Respondents have and/or had access; and

(g) The terms “relate”, “relating to” or “in connection with” shall be defined so as to include, in whole or in part, constituting, containing, embodying, reflecting, identifying, stating, referring to, evidencing, or in any way being relevant to the given subject matter stated herein.

INSTRUCTIONS

(a) The terms “and” and “or” shall be construed either disjunctively or conjunctively, whenever appropriate, in order to bring within the scope of the request any documents which might otherwise be considered beyond its scope;

(b) Whenever appropriate, the singular form of a word shall be interpreted in the plural, or vice versa, and verb tenses shall be interpreted to include past, present and future tenses;

(c) With respect to any request for which no responsive documents exist, for any reason whatsoever, please state the information responsive thereto, if known, in narrative form; and

(d) With respect to any request to which any privilege is asserted, in whole or in part, please state the exact privilege that is being asserted, identify the nature and substance of the applicable document, and provide the factual basis for the assertion of the privilege.

REQUESTS FOR DOCUMENTS & INFORMATION

1) Produce all agreements between the Claimants and [redacted] or [redacted] including, but is not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, new account forms, financial plans, and investment policy statements.

2) Produce all materials prepared, used, or reviewed by Respondent or [redacted] relating to the LJM Preservation and Growth Fund (LJMIX). This request includes, but is not limited to, offering memorandum, research reports, prospectuses, other offering documents, marketing pieces, sales scripts, advertising or promotional material, including documents intended or identified as being "for internal use only" along with all evidence and all documents evidencing the actual review of said materials.

3) Produce all account statements for the Claimants' accounts.

4) Identify [redacted] email addresses used from January 1, 2012 through the present.

5) Produce all correspondence, including emails, between the Claimants and [redacted] or anyone at [redacted]

6) Produce all notes including entries in any diary or calendar referencing the Claimants, Claimants' accounts, or LJMIX in any manner.

7) Produce all recordings and notes of telephone calls or conversations with the Claimants.

8) Produce all compliance or supervision manuals in effect at [redacted] during the Time Period, including any separate or supplemental manuals governing the duties and responsibilities of the Investment Advisor and any bulletins (or similar notices) issued by the compliance or supervision departments of [redacted]

9) Produce all analyses, reconciliations and profit and loss computations of the Claimants' accounts.

10) Identify any services subscribed to by [redacted] or [redacted] that provide information about investments, securities, or mutual funds, including but not limited to Morningstar.

11) Produce all documents and information obtained from the sources identified in response to Request No. 10 relating to LJMIX.

12) Identify who at [redacted] performed due diligence into LJMIX.

13) Produce all documents in connection with due diligence performed into LJMIX prior to the fund being purchased for Claimants' accounts.

14) Produce all documents in connection with ongoing due diligence performed on LJMIX during the time period the fund was held in Claimants' account.

15) Produce all emails or correspondence authored by [redacted] referencing LJMIX in any way. In the event any of these communications are alleged to be protected by attorney-client privilege, Claimants request the production of a simple privilege log identifying the subject of the correspondence, the date it was sent, and the addressee.

16) Identify the date(s) and location(s) of the meetings with LJMIX managers, as alleged in the Answer at 2.

17) Identify those in attendance at the meetings identified in response to Request No. 16.

18) Produce all notes, correspondence, presentation materials, or other records in connection with the meetings identified in response to Request No. 16.

19) Produce all documents establishing the Preservation Fund posted a gain of 12.12% during 2008, as alleged in the Answer at 2.

20) Produce [redacted] Forms ADV, including all amendments, from 2016-2018.

21) Produce all documents in connection with any [redacted] office or [redacted] branch audit performed by the SEC, State of Colorado, or any regulator.

22) Produce all documents establishing "the Preservation Fund performed very well" in 2008, as alleged in the Answer at 2.

23) Produce documents establishing LJMIX's performance from inception in 2006 through 2014, as alleged in the Answer at 2.

24) Produce documents that form the basis for the allegation in the Answer at 3 that says "2017 was a challenging year for the Preservation Fund because equity markets increased substantially with little volatility."

25) Produce documents sufficient to establish LJMIX's performance during market dislocation in 2011.

26) Produce asset allocation models, research, or other documents indicating the formulae used by [redacted] and/or [redacted] which either establish or suggest allocations based on different investment objectives and risk tolerances.

27) Produce documents used by [redacted] when it analyzed Claimants' investments based upon ***all*** of the [redacted] assets not just those managed by [redacted], as alleged in the Answer at 12.

28) Produce all literature provided to Claimants over the years discussing the Fund, as alleged in the Answer at 13.

29) Produce the "audited performance information available from 2006…including its performance in the 2008 market crash" for LJMIX as referenced in the Answer at 14.

30) Identify any third parties that provided information to [redacted] about the Preservation Fund.

31) Produce all insurance policies or agreements in effect during the relevant time period that could make any insurance company liable for all or part of any judgement in this matter, including reservation of rights or declination letters.

32) Produce all customer complaints filed against [redacted] or [redacted] regarding LJMIX.

33) Produce all documents establishing research performed by [redacted] or anyone at [redacted] in connection with options trading strategies, including the "short strangle", uncovered options trading, or "short volatility".

34) Produce all correspondence between [redacted] or [redacted] including emails, with any wholesalers of LJMIX, including but not limited to Northern Lights and Two Roads Shared Trust.

PLEASE TAKE NOTICE, that if any party maintains that any document or information requested herein has been destroyed or otherwise disposed of, the Respondent is to identify each such document, the location of any copies of such document, the nature and date of such disposition or destruction, the name of the person who ordered or authorized such disposition or destruction, and the reasons therefore.

PLEASE TAKE FURTHER NOTICE that the foregoing Request for Documents and Information is continuing in nature and that if any of the items herein before demanded come into the possession of the Respondent, they are to be forwarded to the office of the undersigned immediately.

PLEASE TAKE FURTHER NOTICE, that if the Respondent fails to provide any of the items herein before demanded, the Claimants will move to preclude the introduction of any evidence of the same at the time of hearing.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

/s/ Joseph Wojciechowski

cc: Joshua Kons (co-counsel for Claimant)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JAMES GINZKEY, RICHARD FITZGERALD, CHARLES CERF, BARRY DONNER, and on behalf of the class members described below, *Plaintiffs*, v. NATIONAL SECURITIES CORPORATION, a Washington Corporation *Defendant*.	**Case No.: 2:18-cv-1773**

NOTICE OF TAKING 30(b)(6) DEPOSITION OF NATIONAL SECURITIES CORPORATION

PLEASE TAKE NOTICE that, in accordance with Fed. R. Civ. P. 30(b)(6), Plaintiff JAMES GINZKEY shall take the deposition upon oral examination of NATIONAL SECURITIES CORPORATION ("NSC") through one or more officers, directors, agents, or other representatives who shall be designated to testify on NSC's behalf regarding all information known or reasonably available to NSC with respect to the subject matters identified in Exhibit A. Plaintiffs request that NSC provide written notice at least five (5) business days before the deposition of the name(s) and employment position(s) of the individual(s) designated to testify on NSC's behalf.

The deposition shall commence on September 14, 2020 at 9:30 a.m. and shall be conducted utilizing the secure web-based deposition option afforded by Veritext or in the alternative video teleconferencing (VTC) services or telephonically to provide remote/virtual access for those parties wishing to participate in the deposition via the internet and/or telephone, and shall be taken before a duly certified court reporter and notary public or other person authorized by law to administer oaths. The deposition will be recorded by stenographic means.

The Plaintiffs reserve the right to record the deposition either by stenographic means by a court reporter certified to record depositions or a digital reporter utilizing state-of-the-art digital recording equipment. Take note that the deposition officer may also be remote and out of the presence of the deponent via one of the options above for the purposes of providing the oath/affirmation to the deponent and capturing the proceeding.

Plaintiffs further reserve the right to utilize the following: (1) record the deposition utilizing audio or video technology; (2) instant visual display such that the reporter's writing of the proceeding will be available to all who are a party to this proceeding to request and receive it in realtime; (3) exhibit Capture (picture-in-picture) technology in which any exhibit reviewed by the deponent during the deposition can be captured visually; and (4) to conduct this deposition utilizing a paperless exhibit display process called Exhibit Share or a similar paperless virtual display platform. The parties are advised that in lieu of a paper set of exhibits they may be provided and displayed digitally to the deposition officer, deponent, parties and counsel. The exhibits will be compiled by the deposition officer for the purposes of exhibit stamping, and ultimate production of the final certified transcript.

Please contact the noticing attorney at least five (5) calendar days prior to the deposition to advise that it is your desire to appear via this remote participating means so that the necessary credentials, call-in numbers, firm name, email address, services, testing and information, if necessary, can be arranged and provided to you prior to the proceeding(s)

/ / /

STOLTMANN LAW OFFICES, P.C.
161 North Clark St., 16th Floor
Chicago, Illinois 60601
312-332-4200

Respectfully submitted,
JAMES GINZKEY, RICHARD FITZGERALD, CHARLES CERF, BARRY DONNER,
Plaintiffs

By: <u>/s/ Joseph Wojciechowski</u>
One of Their Attorneys

Alexander Loftus, Esq.
Joseph Wojciechowski, Esq.
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Attorneys for Plaintiffs

EXHIBIT A

In accordance with Fed. R. Civ. P. 30(b)(6), Plaintiff designates the matters identified below for examination. In construing these topics, the following instructions and definitions shall apply:

1. All terms shall be construed to encompass as broad a range of information as permitted under the Fed. R. Civ. P.

2. The term “Plaintiff,” as used herein, shall include Charles Cerf.

3. The term “Defendant,” as used herein, shall include National Securities Corporation.

4. The terms “You” and “Your,” as used herein, shall refer to Defendant and shall include, without limitation, any and all consultants, agents, and attorneys therefor.

5. The term “Document(s),” as used herein, shall mean all writings of any kind, including the originals and all non-identical copies, whether different from the original by reason of any notation made on the copies or otherwise, including, without limitation, correspondence, memoranda, personal notes, diaries, statistics, letters, materials, invoices, orders, directives, interviews, telegrams, electronic/computer data, e-mail, minutes, reports, studies, statements, transcripts, summaries, pamphlets, books, interoffice and intra-office communications; notations of any sort of conversations, telephone calls, meetings, or other communications; bulletins, printed matter, teletype, telefax, worksheets, and all drafts, alterations, modifications, changes, and amendments of any of the foregoing; graphic or aural recordings or representations of any kind, including, without limitation, tapes, cassettes, cartridges, discs, chips and records.

STOLTMANN LAW OFFICES, P.C.
161 North Clark St., 16th Floor
Chicago, Illinois 60601
312-332-4200

6. The term “Action,” as used herein, shall refer to the lawsuit filed by Plaintiffs against NSC in the United States District Court for the District of Washington, Case No**.** 2:18-cv-1773.

<u>The deponent(s) shall be prepared to address the following topics:</u>

1. The factual basis for each of your Affirmative Defenses including but not limited to:

   a. Any and all facts that support your claim that Plaintiffs are not adequate representatives of any purported class; their claims are not typical, common questions of law or fact affecting the individual members of the class do not predominate; a class action is neither manageable nor superior; and/or there is no ascertainable class with a community of interest;

   b. Any and all facts that support your claim that any acts and/or omissions alleged on the part of Defendant were not the factual, legal, or proximate cause of Plaintiffs’ alleged injuries and damages, if any;

   c. Any and all facts that support your claim that Plaintiffs’ causes of action are barred, in whole or in part, by the doctrines of estoppel, waiver, release, laches, or consent;

   d. Any and all facts that support your claim that Plaintiffs’ alleged injuries and damages, if any, were directly caused in full or in part by Plaintiffs’ own negligence, and/or that of a third party for which Defendant bears no responsibility, including Beamreach.

   e. Any and all facts that support your claim that Plaintiffs’ causes or action are barred, in whole or in part, due to assumption of risk

   f. Any and all supervening or intervening causes to Plaintiffs’ losses.

2. The factual basis for the denials of any allegations contained in Plaintiff’s Complaint including but not limited to:

   a. The factual basis for your denial of any allegations that NSC owed Plaintiffs a duty of care. (Cmplt. ¶¶ 54-72)

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161 North Clark St., 16th Floor
Chicago, Illinois 60601
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The factual basis for your denial of any allegations that NSC breached its duty of care. (Cmplt. ¶¶ 73-110)

b. The factual basis for your denial that "At least hundreds of persons are believed to be members of the putative Class, and those persons or entities are geographically dispersed" (Cmplt. ¶ 125).

c. The factual basis for your denial of Paragraph 126.

d. The factual basis for your denial of Paragraph 129.

3. The factual basis for any negligent acts or omissions you claim Plaintiffs committed. *See* (ECF #31, p. 19).

4. The factual basis for the claim that any Plaintiff had "unclean hands". *See* (ECF #31, p. 19).

5. The employees or agents that conducted due diligence on Beamreach Solar, Inc. ("Beamreach"), or the Beamreach Securities for NSC.

6. NSC's process for conducting due diligence on private placement securities offerings exempt under Rule 506 of Regulation D under the Securities Act of 1933.

7. NSC's process for approving the sale of private placement securities offerings that are exempt under Rule 506 of Regulation D under the Securities Act of 1933.

8. Documents reviewed by NSC in connection with conducting due diligence on Beamreach and the Beamreach Securities.

9. Any and all risk disclosures to Plaintiffs or the Proposed Class Members regarding Beamreach.

10. The factual basis for each and every one of Your Answers to Plaintiff's Interrogatories.

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11. The factual basis for each and every one of Your Responses to Plaintiff's Requests for Production of Documents.

12. Each and every Document produced by You in response to Plaintiff's Requests for Production of Documents.

13. The name, address, and phone number for all custodians of the documents produced by You in response to discovery requests in this case.

14. All Investors that purchased any Beamreach Solar, Inc. ("Beamreach"), Securities through Defendant, including:

a. Names and addresses investor;

The date of each investment in Beamreach Securities;

b. The amount of money invested by each Investor;

c. The identity of employee or agent of the Defendant that participated in the offer and sale of each investment in the Beamreach Securities;

d. The commission derived by the employee or agent of Defendant for each sale of the Beamreach Securities to each Investor;

e. The commission derived by the Defendant for each sale of the Beamreach Securities to each Investor; and

f. Any fees, costs, expenses, or other charges paid by the Investor to Defendant for each purchase of Beamreach Securities by each Investor.

15. Facts regarding electronic records requested in this action including but not limited to:

a. NSC's search for responsive records to Defendants' production requests;

NSC's email service provider;

b. Most likely locations of electronic records relevant to the subject matter of the action;

c. Electronic records management policies and procedures;

d. Corporate policies regarding employee use of company computers and data;

e. Identities of all current and former personnel who have or had access to network administration, backup, archiving, or other system operations during any relevant time period;

f. Any and all email correspondence referring or relating to Beamreach.

16. All lawsuits or claims made against you to in the last 10 years relating in any way to the suitability of the Beamreach investment.

17. Compliance manuals, supervisions manuals, or any other applicable manuals, guidebooks, handbooks, instructions, or regulations utilized by NSC that refer or relate to due diligence on private placement investments, non-conventional investments, or Regulation D securities.

18. Any and all rules, treatises, guides, or regulations followed by NSC referring or relating to due diligence on private placement investments, non-conventional investments, or Regulation D securities.

19. NSC's compliance with FINRA Regulatory Notice 10-22 in connection with its investigation of Beamreach and the Beamreach Securities.

20. NSC's investigation into Beamreach and the Beamreach Securities including the process employed and results obtained.

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21. All contracts or agreements between NSC and Beamreach.

22. The business relationship between NSC and Beamreach including compensation paid.

23. Complaints from clients of NSC who invested in in Beamreach.

24. Any monies or other consideration paid to any NSC customer in exchange for releasing any claim relating to their investment in Beamreach.

25. Communications to or from NSC to Beamreach investors.

26. NSC's relationship with National Holdings Corporation and Fortress Biotech, Inc.

27. Any communications to or from Opus Bank regarding Beamreach or the Beamreach Securities.

28. NSC's identification of any "red flags" that were revealed during its due diligence of Beamreach and the Beamreach Securities.

Respectfully submitted,
JAMES GINZKEY, RICHARD FITZGERALD, CHARLES CERF, BARRY DONNER,
Plaintiffs

By: /s/ Joseph Wojciechowski
One of Their Attorneys

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