

CITATION: French and Karas et al v. Smith and Stephenson et al
2012 ONSC Number 1150
COURT FILE NO.: 10-0690
DATE: 20120217

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

GEORGE FRENCH

Plaintiff

— and —

INVESTIA FINANCIAL SERVICES INCORPORATED, MONEY CONCEPTS
(BARRIE), DIAMOND TREE CAPITAL INC., DAVID KARAS and FINANCIAL
VICTORY ASSOCIATES INC.

Defendants

AND BETWEEN:

BRUCE SMITH and EDITH IRENE SMITH

Plaintiffs

— and —

INVESTIA FINANCIAL SERVICES INCORPORATED and JAMES STEPHENSON

Defendants

COUNSEL:

Alan A. Farrer, L. Craig Brown and Adam Halioua for the Plaintiff George French;

Harold Geller for the Plaintiffs Bruce Smith and Edith Irene Smith;

David Di Paolo and Caitlin Sainsbury for the Defendant Investia Financial Services
Incorporated;

Roger Horst, Ian Epstein and Jessica Grant for the Defendants Money Concepts (Barrie),
Diamond Tree Capital Inc., David Karas, James Stephenson and Financial Victory
Associates Inc.;

HEARD: December 12, 13, 14, 2011 and February 13 2012

Shaughnessy J.

**REASONS FOR DECISION ON A MOTION FOR CERTIFICATION OF A
CLASS ACTION PROCEEDING**

[1] The plaintiffs in each action bring a motion for certification of the proceedings as a class action pursuant to s.5 (1) of the *Class Proceedings Act, 1992*.

[2] David Karas ("Karas") and James Stephenson ("Stephenson") were registered salespersons who owned Diamond Tree Capital Inc., which operated Money Concepts Barrie ("MCB"). MCB was a branch office or franchise of an organization known as Money Concepts Canada (MCC"). MCC was acquired by AEGON which in turn was acquired by Investia Financial Services Inc. ("Investia").

[3] Investia is a mutual fund dealer registered with and regulated by the Ontario Securities Commission (OSC) and the Mutual Fund Dealers Association (MFDA). AEGON and Investia were the Responsible Dealer, in relation to the activities of MCB, Karas and Stephenson. Karas and Stephenson were also subject to the regulatory authority of the OSC and the MFDA.

[4] It is alleged in the statement of claim that Karas and Stephenson encouraged, recommended and arranged for clients to borrow significant amounts of money to invest in mutual funds and/or segregated funds. It is alleged that there was a 'one size-fits all' investment strategy that is called the "Leveraging Scheme." It is alleged that Karas and Stephenson made these recommendations systemically without regard to suitability of the strategy for any individual client and without consideration for each client's investment objectives. It is alleged that Karas and Stephenson made these recommendations for their clients in a manner that breached industry regulations and standards. It is further alleged that Karas and Stephenson undertook this strategy to increase their assets under management (AUM) and Investia's mutual fund sales, thereby increasing their own compensation (and that of Investia) and did so without due regard to the interest of the proposed Class Members. It is alleged that Investia failed in its compliance responsibilities by allowing the Leveraging Scheme to be applied systemically, in a manner that breached industry standards and regulations.

[5] The proposed Representative Plaintiff George French was a MCB client. He borrowed approximately \$ 900,000.00 to buy mutual funds through David Karas.

[6] The proposed Representative Plaintiffs in the second action, Bruce and Edith Irene Smith were retired and receiving disability income and they borrowed approximately \$100,000.00 through James Stephenson.

[7] The proposed class actions are on behalf of a class of persons all of whom were clients of Karas or Stephenson who participated in the Leveraging Scheme through MCB and held leveraged investments at MCB prior to the branch closing on or about March 2010.

[8] David Karas also created and operated the defendant Financial Victory Associates Inc. ("FVA") which it is alleged provided financial services to MCB clients for additional compensation. FVA is not registered with the OSC. Further FVA and MCB shared advisors, office premises, staff, clients, private client information, advice to clients and written communications.

[9] Karas was the directing mind of MCB, FVA and Diamond Tree Capital Inc. (hereinafter referred to as the "Karas Companies"). It is alleged that all the acts of Karas and his staff and through the Karas Companies, were within the scope of their employment, agency and regulatory responsibility, and as such, Investia is vicariously liable for his actions and those of the Karas Companies and their employees and agents.

[10] Stephenson became a mutual fund advisor at MCB in 2000. In 2005 he became a principal in Diamond Tree and the sales manager for the branch.

The "Leveraging Scheme"

[11] The statements of claim and supporting affidavits allege that Karas and Stephenson advocated and implemented the Leveraging Scheme as an investment strategy to their respective clients indiscriminately.

The Leveraging Scheme was based on layering levels of debt for each client. First, he had Clients borrow as much from their lending sources as possible with a view to raising money to buy mutual funds, increasing the Clients' assets under his management (or "AUM"). This permitted Karas [and/or Stephenson] to use client's AUM as collateral to have them borrow more money from lenders who advanced loans on the collateral security of mutual funds he acquired for class members, effectively using borrowed money to borrow more money. (Amended Statement of Claim, French v Investia para. 14).

[12] It is alleged that Karas and Stephenson recommended the Leveraging Scheme systemically and that MCB arranged the loans for clients. Effectively, it is alleged that clients invested money they did not have, which increased the AUM managed by Investia, and consequently, fees for Karas, Stephenson and Investia.

[13] It is alleged that Investia knew, or ought to have known, of the Leveraging Scheme that was being applied systemically by Karas and Stephenson through MCB. It is stated that Investia had a duty of increased monitoring of Karas and Stephenson and failed to do so.

[14] The defendants deny the existence of a Leveraging Scheme or a "one size-fits all" strategy. Further the defendants state that borrowing money is a long standing investment strategy. The defendants state that whether leveraging is a suitable investment strategy for investors cannot be determined on a common basis. They state that the suitability of Leveraging as an investment strategy requires an assessment of the individual investor followed by an assessment of whether the portfolio purchased is suitable given the individual characteristics of the investor.

[15] While the plaintiffs allege that leveraging was recommended to all clients, nevertheless the defendants Karas and Stephenson state that 2/3 and 1/3 of each of their respective client base of approximately 400 persons borrowed to invest.

MFDA Regulations

[16] Rule 2.6 of the Mutual Fund Dealers Association requires members to provide a risk disclosure document to a client who borrows money to purchase mutual funds but this rule does not provide guidance for when leveraging is a suitable investment strategy.

[17] The plaintiffs plead that the MFDA regulates the duty of care owed by mutual fund dealers with respect to leveraging strategies. Through its Member Regulatory Notice MR-0069 (enacted in April 2008) the MFDA has established guidelines that detail the standard it requires. MR-0069 provides the following preamble to its "Leveraging" section:

A number of previous MFDA Member Regulation Notices have reminded Members that using borrowed funds to invest (or leveraging) is not suitable for all investors and have highlighted the Member's responsibility to ensure that all leveraging recommendations are suitable for the client and in keeping with the client's KYC [Know Your Client] information, in accordance with MFDA Rule 2.2.1.....

[18] The plaintiffs allege that Investia, *inter alia*, failed to supervise the services provided by Karas and Stephenson to their clients. They seek to certify as a common issue whether Investia breached its duty to members of the class to monitor and supervise the conduct of Karas and Stephenson to ensure that they complied with internal guidelines and MFDA guidelines, and to address any breaches and duties by Karas and Stephenson. Investia states that MFDA Policy No.2 establishes minimum industry

standards for account supervision. Save and except for the requirement to establish written policies and procedures and to hire qualified people to supervise those procedures, the obligations set out in Policy 2 are to individually supervise client accounts in accordance with the policy. The obligations in Policy 2 to supervise individual client accounts are bifurcated between supervisory activities that are to take place at the branch office and those at the head office. The only individual located at the branch office with supervisory compliance responsibilities is the Branch Manager or alternate.

Leveraging —George French

[19] George French became involved with MCB in approximately 1992 when he opened an account with his father. He had several financial advisors at MCB. His first advisor was Virginia Lamb. He made his first two leveraged investments while Lamb was his advisor. Lamb retired and his account was transferred to Karas in approximately 2003. While a client of MCB, French made multiple leveraged loans. Between 2003 and 2008, the plaintiff alleges that Karas advised and arranged for him to borrow over \$900,000.00 for the purposes of participating in the Leveraging Scheme with Karas and the defendants. French, a dairy farmer sold his dairy quota and ceased to earn income from his dairy operation in 2005. He states that Karas continued to recommend and arrange for him to borrow even more money after 2005.

[20] Counsel for the plaintiff French state, that in order for clients to qualify for the "Leveraging Scheme" they had to meet certain requirements relating to their net worth, investment knowledge, investment objectives and risk tolerances among other things. George French states that his investment knowledge in or around January 2003 would have been fair nevertheless the applicable KYC form completed by MCB indicated his investment knowledge was either "good" or "excellent" (on different forms). French states that "he [Karas] was always pushing those loans----more loans so I just do what he wanted me to do." He states that Karas never explained the risks of the Leveraging Scheme to him.

Leveraging—The Smiths

[21] The Smiths made a single leveraged investment. Stephenson was their only financial advisor while they were clients from December 2005 to March 2010. Edith Smith had stopped working in 2000 and received a disability pension. Bruce Smith had stopped working in 2002 also because of a physical disability. His disability entitlement had run out. Bruce Smith had a Locked-in Retirement Account (LIRA), which he transferred to MCB. At their first meeting with Stephenson they received his only financial recommendation to borrow money to invest in mutual funds. It is alleged that Stephenson recommended and arranged for the Smiths to borrow \$ 100,000.00 against their home for the purpose of participating in the "Leveraging Scheme." They already

had a substantial mortgage on their home. They state they were told that they would not need to pay for the loan as it was "self-funding."

[22] As their disability related medical expenses became too great for the Smiths to pay the loan from their limited cash flow, Stephenson assisted them in arranging for withdrawals from Bruce Smith's LIRA based on financial hardship and medical necessity. The Smiths state by the end of 2009 they still owed the \$100,000.00 loan but the underlying investment declined to approximately \$ 61,000.00

[23] Bruce Smith testified that his investment knowledge in or around December 2005 would have been "poor". The KYC form completed by MCB at that time indicated his investment knowledge to be "good." The Smiths state that Stephenson did not discuss their risk tolerances with them, nor did he explain the risks of the "Leveraging Scheme" to them.

[24] David Karas opened Money Concepts Financial Planning Centre in Barrie, Ontario, which evolved into MCB in 1986. He published three books on financial planning and was a regular commentator on two radio stations in Barrie for many years. He was the leader of the financial advisors at MCB.

[25] Karas states in his affidavit (Joint Compendium Tab 4 pgs. 23-24):

Any client referred to me would go through a financial planning exercise to determine a suitable financial plan. The process involved a review of all of the client's assets and liabilities, their income, their insurance needs, their investments and their tax situation.

[26] In his affidavit Karas gave the following evidence about when he recommended Leveraging to clients:

Through the assessment process, the client and I would agree on a financial plan. Sometimes a leveraging structure was part of that client's investment, tax, or risk conversion portion of their financial plan. Some clients did not meet the appropriate criteria for using a leveraging structure as an investment tool and I recommended against a leveraging structure for those clients. Some clients did meet these criteria to use leveraging. If they did, I would review with them the risks of borrowing money to invest. If the client was still interested, I recommended that we proceed to arrange a loan structure for them.

Other Financial Products

[27] The motion record and the Affidavit of John Hollander refer to three other strategies implemented by Karas and MCB to advance his interests through greater compensation; the "insurance scheme", the "FVA scheme" and the "RRIF scheme".

[28] In the case of the insurance it is alleged that French and Class Members did not need the insurance, could not afford it and could not afford the escalating premium costs associated with the manner in which the policies were underwritten.

[29] In relation to the "FVA scheme" it is stated that Karas claimed he had a system that could pick mutual funds and/or segregated funds and time their purchase and sale so as to maximize gains and avoid losses. The amended statement of claim in the French action states that

[t]oward the end of 2006, Karas created FVA, to provide market timed alerts with appropriate moments to sell or purchase funds. These alerts were intended to serve as investment recommendations to Clients. FVA included a stop-loss component for Clients which required Karas to sell relevant holdings if they reached pre-defined loss thresholds. Karas represented to Clients that they would make greater market profits and eliminate the exposure of their holdings to loss by subscribing to and paying a fee (the "FVA FEE") for this service.

[30] In the case of the "RRIF scheme", it is pleaded that the conversion of RRSP to RRIF to pay current debt obligations conflicted with the purpose of RRSP/RRIF, which was to provide retirement income.

Expert Opinion

[31] Expert evidence was adduced by the plaintiffs and the defendants.

[32] In support of the plaintiff's claim was filed the affidavit of Professor Eric Kirzner, who is the John H. Watson Chair in Value Investing at the Rotman School of Management at the University of Toronto and is also a director of the Investment Industry Regulatory Organization of Canada (IIROC). The plaintiffs retained Professor Kirzner as an expert to provide an opinion as to whether the defendants complied with the industry standards for suitability of investments for clients such as the plaintiffs and class members. Professor Kirzner concluded that it was his expert opinion that assuming the allegations in the Statements of Claim to be true, Karas, Stephenson and Investia failed to meet industry standards in managing the accounts of the representative plaintiffs and in the recommendations provided. Professor Kirzner opined that not only was the "Leveraging Scheme" unsuitable for the representative plaintiffs, but also that a "common investment approach for all clients would be a direct violation of suitability and inconsistent with industry standards."

[33] In cross-examination on his affidavit, Professor Kirzner, by way of summary in relation to leveraging generally and determining the suitability of an investment in a client account stated:

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- (1) in cases where leveraging is an issue the first step is to review the know-your-client (KYC) forms to determine the suitability of investments held in the account of a client;
 - (2) suitability is an individual process;
 - (3) suitability must be analyzed and determined;
 - (4) in conducting a suitability analysis, one looks at what investments were in a portfolio in addition to looking at the information in the KYC;
 - (5) borrowing money to invest may be suitable for some investors, depending on their personal circumstances;
 - (6) even if an advisor failed to take into account an investor's essential facts in making an investment recommendation in accordance with MFDA Rule 2.2.1 the investment may nevertheless be suitable relative to the individual's circumstances; The suitability for the particular client must be examined to make this determination.

[34] Julia Dublin was retained by Investia to provide expert evidence. Ms. Dublin is a lawyer in private practise specializing in securities law. Prior to entering private practise Ms. Dublin spent 18 years at the Ontario Securities Commission as Senior Legal Counsel and for a period as Deputy Director, Registration. Ms. Dublin was requested, *inter alia*, to provide an opinion regarding the factors that must be considered in determining whether an investment recommendation was suitable and whether there were additional factors to consider if a client used borrowed money to invest. Ms. Dublin on cross-examination stated:

- (1) suitability is a case-by-case assessment;
- (2) the nature of suitability is in fact individual specific or customer specific
- (3) there are many variables as to whether there is a breach of the suitability standard.

[35] C. Douglas Fox was retained by the defendants other than Investia. Mr. Fox is an independent consultant with twenty-five years experience in the securities industry. He has held the positions of Chief Compliance Officer and Ultimate Designated Person with various Dealers. Mr. Fox's evidence in relation to determining the suitability of an investment for a customer is:

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- (1) the suitability process involves the advisor learning the essential facts of their client
 - (2) the suitability determination is made by the advisor according to the information obtained and their experience in discussions with the client;
 - (3) the standard requires the advisor to use "due diligence" to learn the essential facts of each client to ensure the recommendation made for that client are in keeping with their age, sophistication and financial circumstances;
 - (4) there are many and varied circumstances for individual investors that may or may not determine the suitability of leverage as a strategy;
 - (5) the question of whether leverage is suitable may only be answered in reference to a specific investor after assessing their individual investment need and risk tolerance.

Issues and the Law

[36] *The Class Proceedings Act, 1992* (CPA) in section 5(1) sets out the test for certification. It states that a Court shall certify a class proceeding on a motion if:

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (c) the claims or defence of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff who,
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and,
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[37] There are a number of general principles that emerge from the case law summarized as follows:

- (1) The CPA should be construed generously to ensure that Courts have a procedural tool to deal efficiently, and on a principled rather than an ad-hoc basis with the increasingly complicated cases of the modern era. (*Hollick v. Toronto (City)* [2001] 3 S.C.R. 158 (S.C.C.) at para 14);
- (2) The question at the certification stage is *not* whether the claim is likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding. (*Hollick v. Toronto (City)* *supra* at para.16);
- (3) The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim (*Hollick v. Toronto (City)* *supra* paras. 28-29);
- (4) Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would be determined at a trial when the merits of the claims of class members are in issue (*Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) at para 82);
- (5) To certify an action as a class proceeding the class representative must "show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action." The representative plaintiff must present a minimum evidentiary basis for a certification order (*Hollick v. Toronto (City)* *supra*, at para 22-25). The Ontario Court of Appeal refined this concept in *Cloud et al v. Attorney General of Canada et al* [2004] O.J. 4924 (C.A.) at para. 50 as follows

Hollick also makes clear that this does not entail any assessment of the merit at the certification stage. Indeed, on a certification motion the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

- (6) The "some basis in fact" standard has been referred to in other cases as a "minimum standard" or "very weak" evidentiary threshold. (*Lambert v*

Guidant Corporation, [2009] O.J. No. 1910 at paras. 60-61 and 67-71; *Taub v Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.) aff'd 42 O.R. (3d) 576 (div. Ct.); *Griffin v Dell Canada Inc.*, [2009] O.J. No. 418 (Div. Ct.); *Sauer v Canada (Agriculture)*, [2009] O.J. No. 402.)

- (7) This low factual threshold applies to each of the certification elements, other than the pleadings issue. (*Hollick v Toronto (City) supra* para 25; *Sauer v Canada (Agriculture) supra* para. 15).

[38] The defendants acknowledge that the plaintiffs have satisfied the requirement set out in s. 5(1) (a) of the CPA. In all other respects the defendants submit that the proposed class action does not meet the requirements of the CPA.

An Identifiable Class, s. 5 (1) (b) of the CPA.

[39] In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.) the three purposes of a class definition are:

- (a) to identify persons who have a potential claim for relief against the defendants;
- (b) to define the parameters of the lawsuit so as to identify those persons who are bound by the result; and,
- (c) to describe who is entitled to notice.

[40] The Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para 38 stated that the class must be capable of clear definition:

.....It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determined by stated objective criteria....

[41] There is no requirement that all class members have an equivalent likelihood of success. The defining aspect of class membership is an interest in the resolution of the proposed common issues. (*Western Canadian Shopping Centres Inc. v. Dutton, supra*, paras. 38 and 54).

[42] The class must be defined without elements that require a determination of the merits of the claim: (*Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para 19).

[43] Class membership identification is not commensurate with the elements of the cause of action: there simply must be a rational connection between the class member and the common issue(s): (*Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para 32, leave to appeal to Div. Ct. refused [2009] O.J. No. 402 (Div. Ct.).

[44] There must be a rational relationship between the class, the causes of action and the common issues, and the class must not be unnecessarily broad or over-inclusive: (*Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57).

[45] The class definition is particularly important because the scope of the class definition affects the commonality of the proposed common issues, the manageability of procedures and whether a class action is preferable, which also affects the ability of the representative plaintiffs to represent class members without conflict and the appropriateness of the litigation plan. (*Fischer v IG Investment Management Ltd.* [2010] O.J. No. 112 para 133; rev'd on other grounds [2011] O.J. No. 562 (Div. Ct.) and appeal dismissed [2012] O.J. No. 343 (C.A.).

[46] The class definition proposed by the plaintiffs is:

All clients of David Karas [and/or James Stephenson] who borrowed money to invest in mutual funds or segregated funds (the "Leveraging Scheme") through Money Concepts (Barrie) and held leveraged investments at Money Concepts (Barrie) prior to the branch closing on or about March 2010 (the "Class"), excluding the named Defendants and their immediate family members.

[47] The defendants submit that that the class as identified does not state whether the leveraged account had to be at MCB on the date referred to. Further it does not deal with the issue of leveraged accounts recommended many years ago and maintained for many years by different advisors. Therefore, it is submitted that the proposed class definition does not define an identifiable class for purposes of the CPA.

[48] I find that the proposed class definition meets the requirements detailed in *Bywater v. Toronto Transit Commission, supra* and *Western Canadian Shopping Centres Inc. v. Dutton, supra*. Since the class members are all clients of Karas and/or Stephenson who participated in the "Leveraging Scheme" through MCB and held leveraged investments through MCB prior to the branch closing on or about March, 2010, the class members can easily be identified through the MCB records. I would also add that this class definition is a workable, rational, fair and objective definition.

[49] Accordingly I find that the criteria under s. 5 (1) (b) of the CPA has been satisfied.

Common Issues, s. 5 (1) (c) of the CPA.

[50] The common issues proposed by the plaintiff are as follows:

Scope of the Duty

(a) What was the scope of the Duty owed by the Defendants to the Class Members?

Breach of Duty

(b) Did *Karas, Stephenson* and/or the *Karas Companies* breach their Duty to Class Members by:

(i) Adopting a systemic (one-size-fits-all) approach to investment advice, resulting in recommending the leveraged investments to *Class Members*?

(ii) Systemically providing investment advice to *Class Members*:

1. Without warning them of the true risks of the recommended investment strategy?
2. Without regard to the industry standards for leveraged investments set out by the MFDA?
3. Without regard to the internal standards for leveraged investments set out by *Investia*?

(iii) Preferring the interest of the Defendants over that of *Class Members* ?

(c) Did *Investia* breach its Duty to *Class Members* by:

- (i) Failing to monitor and supervise the conduct of *Karas, Stephenson* and/or MCB?
- (ii) Failing to ensure its agents complied with its own guidelines and those of the MFDA?

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- (iii) Failing to prevent its agents from providing advice that was contrary to its own guidelines and that of the MFDA?; and
 - (iv) Failing to take steps to advise *Class Members* of breaches of duty by its agents or take steps to address and correct those breaches in a timely manner?

Damages

(d) What is the appropriate amount of damages for:

- (i) Losses suffered by *Class Members* as a result of the *Leveraging Scheme*, including:
 1. How to determine the value of the loss of use of funds (i.e. the amount that ought to have been generated by any non-leveraged investments, if any)?
 2. How to determine a crystallization date?
 3. How to calculate the amount of loans and the cost of borrowed money?
 4. How to value the tax implications, if at all, on any losses?
- (ii) Expenses associated with participating in the other initiatives, including:
 1. How to calculate the recoverable expenses associated with the Life insurance scheme?
 2. How to calculate the recoverable expenses associated with the FVA scheme?

Punitive Damages

(e) Does the Defendant's conduct warrant an award of punitive damages?

[51] The position of the defendants is that the proposed common issues are not suitable for certification for the following reasons:

(a) there is no basis in fact, or any evidence at all, in support of any of the proposed common issues;

(b) the common issues are inherently flawed, as by definition, they are dependent upon individual findings of fact that have to be made with respect to each individual claimant;

(c) a resolution of the common issues on liability would not advance the litigation as they would only inform the issue of whether the duty owed by the salespersons to the class members was breached, but would not dispose of that issue and would not resolve the issue of causation;

(d) the degree of knowledge and understanding of each class member will be relevant to all parts of the proposed common issues. Even if most class members did not understand the risks of leveraging, it cannot be said for all of them. It is not possible to make a common finding on the knowledge of class members about the risks of leveraging;

(e) if the action were to be certified as a class action, it would break down into an individual analysis of each class member's particular circumstances, thereby defeating the common issue requirement. The common issue then requires an individual assessment.

(f) the individual issues also affect the damages analysis and accordingly neither an aggregate assessment of damages, a common issue related to the measure of damages, or an assessment of whether the defendants' conduct warrants an award of punitive damages is appropriate in this case;

[52] In *Western Canadian Shopping Centres Inc. v Dutton* supra (para 39) the Supreme Court of Canada in relation to the requirement of common issues stated:

Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient

to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.

[53] Therefore for an issue to be a common issue, it must be a "substantial common ingredient" of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. (*Hollick v Toronto (City) supra* para. 19)

[54] The decision of the Ontario Court of Appeal in *Cloud et al. v The Attorney General of Canada et al.* [2004] O.J. No. 4924 (para 55); (leave to appeal to the SCC refused [2005] S.C.C.A. No. 50) provides direction in relation to the determination relating to a common issue. The Court states that the focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues, the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.

[55] The underlying question of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis :(*Western Canadian Shopping Centres Inc. v. Dutton supra* para. 39).

[56] The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment; (*Cloud v. Canada (Attorney General) supra* para. 65).

[57] Whether a duty of care exists and whether the defendants have breached their duty of care has been found to be common issues that would substantially advance the proceedings, even in cases where complex individual issues remain. (*Rumley v. British Columbia*, [2001] 3 S.C.R. 184; *Cloud v Canada (Attorney General) supra*; *Tiboni v Merck Frosst Canada Ltd.* [2008] O.J. No. 2996 (S.C.J.); *Lavier v MyTravel Canada Holidays Inc.* [2009] O.J. No. 1314 (Div. Ct.)

Proposed Common Issues (a)-(c)

[58] The proposed common issues (a) to (c) concern allegations of a breach of duty. In the present case it appears that the duty issue is common to the claims of all the investors. In determining the common issues the Court will determine whether there have been breaches of duty to class members by the defendants. In relation to all class members the Court will determine, *inter alia*, whether Karas and Stephenson had a duty to provide reasonable investment recommendations; warn clients of the risks of the leveraging scheme; avoid conflicts of interest; and consider industry and Investia-prescribed standards and/or guidelines. Therefore these issues and the questions posed in questions (a) –(c) are common to all the investors in the class.

[59] The responsibility of Investia, as the mutual fund dealer, to supervise its sales representatives (Karas and Stephenson) is likewise an issue common to all the class members. It is alleged that Investia failed to ensure compliance with the MFDA regulations and guidelines or the internal guidelines of MCB.

[60] The defendants state that there is no evidence of any single or common statement made by Karas or Stephenson to the proposed class members and therefore it is necessary to examine what each individual class member was told by Karas or Stephenson in order to resolve the proposed common issue related to the salesperson's breach. Accordingly it is submitted that this type of individual inquiry is fatal to certification of that common issue. It is argued that there is no means to determine liability on a class wide basis. This position of course mistakenly merges the commonality of the questions with the commonality of answers to the questions. As stated in *Western Canadian Shopping Centres Inc. v Dutton supra* (para 39), the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. I find that the substantial common ingredient of each class member's claim relates to a duty of care and whether there was a breach of that duty of care. Further the question relating to the liability of Investia involves a consideration of whether it failed to ensure compliance with the MFDA regulations and guidelines and the internal guidelines of MCB. Accordingly it is readily apparent that the determination of that common issue question by a single trier of fact will afford judicial efficiency.

[61] As detailed above (para.57), a duty of care and a breach of the duty of care have been found to be common issues that would substantially advance the proceedings, even in cases where complex issues remain. Therefore I find that the Court in deciding questions (a)-(c) will substantially advance the litigation for the class members and the defendants.

Proposed Common Issue (d)

[62] In relation to damages (question (d)) as detailed as a common issue the plaintiffs state that if one or more of the common issues (a) through (c) are answered affirmatively, the Court will be able to answer this question conditionally for those members of the class who are subsequently able to establish valid claims.

[63] The defendants state that whether the plaintiffs seek an aggregate assessment of damages under s. 24(1) of the CPA or to certify the common issue of new damages, the issue is incapable of certification because each issue and sub-issue is dependent upon an assessment of individual circumstances related to each class member.

[64] Section 24(1) of the CPA provides that a court may determine the aggregate or part of a defendant's liability to class members, if no questions of fact or law other than

those relating to the assessment of monetary relief remain to be determined, and if “the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.”

[65] In order for the plaintiffs’ entitlement to an aggregate assessment of damages be certified as a common issue, there must exist a reasonable likelihood that the conditions under s. 24 (1) of the CPA are met (*Fresco v Canadian Imperial Bank of Commerce*, [2009] O.J. 2531 (S.C.J.) para. 83 aff’d 103 O.R. (3d) 659 (Div. Ct.).

[66] In the present case, it is not reasonably likely that the conditions for an aggregate assessment could be met.

[67] The evidence shows that the quantification of the harm suffered by investors is an individual and not a common issue. The evidence shows that the calculation of harm is the summation of the investor’s individual harms. It was not suggested by the plaintiffs that in the circumstances of this case that it would be possible to use statistical sampling as provided for under s. 23 of the CPA.

[68] The measure of damages and any assessment thereof are necessarily specific to individual members of the class. This assessment on an individual basis would include *inter alia*:

- (a) the date on which the class member’s investments were purchased, and in certain circumstances, redeemed and the value of the accounts on these dates;
- (b) the interest rate applicable to the loans at issue;
- (c) any tax benefits received by the class member as a result of borrowing money to invest and whether as a matter of law any tax benefit for the individual investor should be considered in the damage assessment;
- (d) whether or not each class member mitigated his/her damages and the impact of mitigation on the measure and assessment of the damages;

[69] The defendants submit that each of the issues detailed in the previous paragraph requires an individual assessment that cannot be engaged in on a class wide basis. It is further submitted that to varying degrees, each of these issues will have an impact on both the measure and assessment of damages rendering it both impractical and inappropriate for class wide assessment.

[70] I agree with the defendants position and I find that assessment of the class member's damages will require individual assessment for each potential class member. Accordingly I will not certify question (d) as common issues.

Proposed Common Issue (e) Punitive Damages

[71] The plaintiffs submit that the issues of punitive damages and an aggregate assessment of damages are matters best dealt with through a common issues trial. The plaintiffs rely on the Court of Appeal decision in *Cloud et al. v The Attorney General of Canada supra* para 70 which states:

[I]n a trial of these common issues, the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed, this is consistent with s. 24 of the CPA. As well, given that the common trial will be about the way the respondents ran the School and their alleged purpose in doing so, it can properly assess whether this conduct towards the members of the [class] should be sanctioned by means of punitive damages.

[72] Whether a defendant's conduct justifies an award of punitive damages has been accepted as a common issue in a number of class proceedings. (*Cloud v The Attorney General of Canada supra* para. 72; *Rumley v. British Columbia supra*). In the recent decision of *Robinson v Medtronic Inc.*, [2010] O.J. No. 3056 the Ontario Divisional Court upheld the motion certification judge's decision ([2009] O.J. No. 4366(S.C.J.) which held that in class actions where the common issues judge is unable to determine compensatory damages for the whole class, punitive damages are not amendable to certification since their assessment requires an appreciation of the factors governing punitive damages detailed in *Whiten v Pilot Insurance Co.*, [2002] 1 S.C.R. 595. These factors are: (*Robinson v Medtronic Inc.*, [2009] O.J. No. 4366 at paras. 164, 189-190)

- (a) the degree of misconduct;
- (b) the amount of harm caused;
- (c) the availability of other remedies
- (d) the quantification of compensatory damages; and,
- (e) the adequacy of compensatory damages to achieve the objectives of retribution, deterrence and denunciation.

[73] The Divisional Court in *Robinson v Medtronic Inc supra* does approve of the common issue certified in *Anderson v St. Jude Medical Inc.*, [2010] O.J. No. 8 (S.C.J.), which is stated as:

“Does the defendant’s conduct merit an award of punitive damages?”

[74] In other recent cases courts have indicated that the question for certification with respect to punitive damages would be: “Does the conduct of the Defendant justify an award of punitive damages in the circumstances?” (*Schick v Boehringer Ingelheim (Canada) Ltd.* [2011] O.J. No. 1381 paras. 63-65 (S.C.J.); *Robinson v Rochester Financial Ltd.*, [2010] O.J. No. 187 aff’d [2010] O.J. No. 1481 (Div Ct.) paras 56-61; *Anderson v St. Jude Medical Inc.*, *supra* paras.33-38; *McCracken v Canadian National Railway Authority* [2010] O.J. No. 3466 (S.C.J.) paras. 326 and 360; *578115 Ontario inc.(C.O.B.) McKee’s Carpet Zone v Sears Canada Inc.*, [2010] O.J. No. 3921 (S.C.J.) paras 52-53).

[75] The position of the Defendants is that any assessment of punitive damages in these cases will necessarily be specific to individual members of the class. It is submitted that the entitlement to punitive damages cannot be determined until after a trial of the individual issues and therefore it is not a common issue.

[76] I find based on the principles developed in the case law that the common question whether the Defendants’ conduct justifies an award of punitive damages allows for a common answer to the necessary inquiry with respect to the degree of misconduct that is required under the *Whitten v Pilot Insurance Co.*, principles summarized above. I find that this question as framed can be answered on a common basis and that a common answer will advance the action even if individual assessments are required. Therefore, punitive damages are a proper common issue for trial as the question is framed.

Preferable Procedure s. 5(1) (d) of the CPA

[77] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims. (*Cloud v Canada (Attorney General) supra* paras. 73-75). Preferability captures whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute. (*Markson v MBNA Canada Bank* (2007) (3d) 321 (C.A.) para 69).

[78] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues. (*Markson v MBNA Canada Bank supra* at para 69; *Hollick v. Toronto(City) supra*; *Hollick v Toronto supra* para. 31.)

[79] In determining whether a class proceeding is the preferable procedure for the resolution of the common issues, all alternative proceedings put before the court must be considered. (*Williams v. Mutual Life Assurance Co. of Canada* (2000) 51 O.R. (3d) (S.C.J.) at para. 50, aff'd [2001] O.J. No. 4952(Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.). The defendant must support the proposition that another procedure is to be preferred with an evidentiary foundation, (*1176560 Ontario Ltd. V Great Atlantic & Pacific Company of Canada Ltd.*, (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[80] In the most recent decision of *Fischer v. IG Investment Management Ltd.* [2012] O.J. No. 343 (C.A.) Chief Justice Winkler (para. 80) states:

...in considering whether an alternative means of resolving a class members' claims is preferable to the mechanism of a class action, a court must examine the fundamental characteristics of the proposed alternative proceeding, such as the scope and nature of the jurisdiction and remedial powers of the alternative forum, the procedural safeguards that apply, and the accessibility of the alternative proceeding. The court must then compare these characteristics to those of a class proceeding in order to determine which is the preferable means of fulfilling the judicial economy, access to justice and behaviour modification purposes of the CPA. In a given case, certain characteristics will drive the preferability analysis more than others.

Ombudsman for Banking and Investment Services ("OBSI")

[81] In the present case the defendants submit that each member of the class has the right to have their claim for compensable losses to be addressed through the dispute mechanism provided by the Ombudsman for Banking and Investment Services ("OBSI"). The defendants state that the OBSI procedure is the preferred procedure to a class action.

[82] The OBSI is a complaint handling process mandated by the MFDA By-laws and MFDA Policy No. 3. The terms of reference of the OBSI is detailed in Exhibit "R" to the affidavit of the defence expert Julia Dublin sworn July 29, 2011. These terms provide *inter alia*:

- (a) that the Ombudsman shall serve as an independent and impartial arbiter of Complaints;
- (b) within limitations investigate Complaints with a view to their resolution through appropriate dispute resolution processes;

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- (c) if appropriate in the circumstances, make *recommendations* to Participating Firms and Complainants to resolve Complaints or reject complaints on their merits (*emphasis added*);
 - (d) the Ombudsman may not make a recommendation that a participating firm pay an amount greater than \$ 350,000.00 in respect of a single Complaint or in a Systemic Issue, any single individual or small business;
 - (e) the Ombudsman's recommendation is *not* binding on the Participating Firm or the Complainant;
 - (f) if a Participating Firm does not accept the recommendation of the Ombudsman, the Ombudsman shall make the name of the Participating Firm, the recommendation and the circumstances of the case public in a manner considered appropriate by the Ombudsman;
 - (g) If a Participating Firm does not cooperate in the investigation of an individual complaint against it, OBSI shall make public the name of the Participating Firm and the circumstances of the refusal to co-operate in a manner considered appropriate by the Ombudsman. OBSI will inform the regulating authority of non-cooperation by a Participating Firm.

[83] The defendants submit that the OBSI's dispute resolution process achieves the three goals of the CPA;

(i) Behaviour Modification

- payment up to \$ 350,000 per complaint;
- publishing the names of firms who do not accept recommendations and/or fail to comply with OBSI requests;

(ii) Access to Justice

- OBSI is a free service with no lawyers involved in the investigation process;
- MFDA By-law I and OBSI's Terms of Reference require Members to provide all non-privileged information to OBSI which it is submitted is a form of document discovery;
- OBSI requires parties to enter a tolling agreement, therefore complainants do not need to be concerned with losing their right to commence a civil action if they are unsatisfied with the OBSI recommendation;

- The OBSI process eliminates the need to retain experts to opine with respect to suitability and damages.

(iii) *Judicial Economy*

- The process will spare judicial resources;
- OBSI's Terms of Reference states that OBSI will endeavour to complete its investigation within 180 days which is significantly less than a civil action.

[84] Applying the analysis of the Court of Appeal in *Fischer v IG Investment Management Ltd. supra* (para. 10), I note that focussing on the outcome of the OBSI proceedings is not a relevant factor in the comparative analysis under s. 5(1)(d) of the CPA. Rather the court has to consider the regulatory nature of the OBSI jurisdiction and its remedial powers, as well as the lack of participatory rights to affected investors by the OBSI proceedings.

[85] I find that the OBSI proceedings would not fulfill the CPA goal of providing class members with access to justice in relation to their claims for the reasons that follow:

1) The scope and nature of the OBSI jurisdiction and remedial powers are very limited and summarized as follows.

- (a) the characteristic of the OBSI is that it invites participation by the Participating Firm but it cannot compel cooperation;
- (b) the OBSI can make a recommendation but it cannot compel the Participating Firm to make the payment recommended;
- (c) the only remedy for non cooperation in an investigation and/or not following a recommendation is the rather anaemic remedy of publishing the name of the Participating Firm and details of the refusal;
- (d) the enforcement procedure is not binding on the Participating Firm;
- (e) the OBSI can only receive Complaints and make recommendations for amounts not greater than \$350,000.00 (except if the parties otherwise agree);
- (f) it is not readily apparent that punitive damages can be claimed in the OBSI proceeding.

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- 2) The appearance of impartiality and independence of the OBSI is to some extent in play. While the Terms of Reference states that the Ombudsman shall at all times serve as an independent and impartial arbiter and shall not act as an advocate for the Participating Firm or the Complainant nevertheless the same Terms state at s. 24 (d) that the Ombudsman's recommendation is not binding on the Participating Firm or the Complainant. A truly impartial and independent body would have control over its process.
 - 3) This dispute process is sparsely defined. In s.16 (b) of the Terms of Reference there is a listing of non-privileged information that the Participating Firm may be asked to produce and which the OBSI reviews in making any recommendation. There is no hearing process defined wherein the Complainant may introduce evidence or make submissions. The Ombudsman is not bound by the rules of evidence (s.15). The OBSI does not provide legal, accounting or other professional advice (s.3 (i)).
 - 4) In contrast to the procedure underlying a class proceeding, which is premised on facilitating transparency and participation on a class wide basis, the OBSI proceedings provide little or no basis for investor participation.
 - 5) Similarly the procedure by which recommendations are arrived at does not facilitate investor participation or a record of how the OBSI recommendation, if any, is calculated

[86] The cross-examination of John Hollander counsel to the plaintiffs is that the OBSI is not logically set up to deal with a large number of claims and it is significantly backlogged with claimants facing delays.

[87] A class action involving the common issues will promote access to justice for all class members. A common issues trial in the present case would focus on the knowledge and conduct of the defendants. It would also involve a determination of the motives of the defendants in relation to the alleged breaches of duties. A common issues trial will not require substantial participation from class members. The fixed costs of the common issues trial may be equitably shared among class members, making the litigation affordable and thereby promoting access to justice.

[88] In contrast to the OBSI, a class action procedure allows for the appointment of a representative plaintiff who shares a sufficient common interest with members of the class. The representative plaintiff conducts the litigation on behalf of the class members under court supervision and within the principle of an open court.

[89] The fact that the OBSI proceedings can only make a recommendation and not bind the Participating Firm is itself a denial of access to justice. To reason by analogy to *Fischer v IG Investment Management Ltd. supra* (para 73): "access to justice by the investors surely could not be achieved through the completion of a process that was not made accessible to them."

[90] I further find that a class action proceeding will address the issue of behaviour modification which does not appear to be the objective or mandate of the OBSI process. A class action is the only forum to properly and comprehensively address the alleged conduct of the defendants and modify behaviour in the future.

[91] I therefore find that the underlying nature of the OBSI process does not adequately resolve the class member claims when compared to the procedure under the CPA. In coming to this conclusion on the preferability analysis I am considering the law in *Hollick v Toronto (City) supra* that there need only be "some evidence in fact" to ground the conclusion that a class proceeding is the preferable procedure.

Representative Plaintiffs CPA s 5(1)(e)

[92] The next criterion for certification is that there is a representative plaintiff who would adequately represent the interest of the class without conflict of interest and who has produced a workable litigation plan.

[93] The representative plaintiff must be a member of the class asserting claims against the defendants. (*Drady v Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) paras. 36-45; *Attis v Canada (Minister of Health)*, [2003] O.J. No.344 (S.C.J.) para 40, aff'd [2003] O.J. No. 4708 (C.A.).

[94] The determination of whether the representative plaintiff can provide adequate representation depends on such factors as : their motivation to prosecute the claim; their ability to bear the costs of the litigation; and the competence of their counsel to prosecute the claim. (*Western Canadian Shopping Centres Inc. v Dutton supra* para. 41).

[95] The defendants acknowledge that the threshold to be a representative plaintiff is relatively low. It is submitted that the distinguishing feature of George French is that he is wealthier than the other class members. I reject this submission as it is not a valid criterion to disqualify French. Other objections put forth by counsel for Investia are that French has no dependants; is working almost full time; that "he realized significant tax benefits as a result of the leveraging recommendation"; that he was an experienced investor for many years and therefore his claims are likely statute barred. By way of contrast it is submitted that most of the other class members "are approaching or are in retirement; and many are elderly." Again I reject these submissions as none of the criteria meets the factors in *Western Canadian Shopping Centres Inc. v Dutton supra* . I am satisfied that both French and the Smiths would adequately represent the members of the

class. In light of the reasons set out above, there would be no common issue about the assessment of individual damages and therefore there cannot be any conflict among the class members about the distribution of the damages. In any event this Court can deal with problems, if any, concerning distribution of judgment funds. There is no conflict that affects the common issues to be tried which the representative plaintiffs have common cause with their class.

[96] The defendants also state that the Litigation Plan fails to provide a mechanism to determine individual liability and causation issues or to assess contributory negligence. I observe however that the plaintiffs have not had the opportunity to revise the litigation plan in light of the common issues that would actually be proceeding. The class action of the common issues is to have the court determine some complex questions about duty of care and whether that duty has been breached as well as a consideration of whether the defendants' conduct merits an award of punitive damages, with individual trials to follow. Litigation plans are subject to revision and adjustment as the litigation progresses. There is substantial precedent for maintaining flexibility. (*Frohlinger v Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 28; *Howard v Eli Lilly & Co.*, [2007] O.J. No. 404 (S.C.J.); *Nantais v Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Div. Ct.) para 15). Litigation plans are something of a work in progress and may have to be amended during the course of the proceedings (*Cloud v Canada (Attorney General)* *supra* para. 95).

[97] Therefore I am satisfied that the criteria under s. 5(1)(e) of the CPA has been satisfied subject to filing a revised Litigation Plan relating to the common issues that are actually proceeding.

Application to Adduce Fresh Evidence

[98] Subsequent to the hearing of the motion for certification but before a decision had been delivered the plaintiffs brought a further motion to introduce fresh evidence on the certification in the form of a Settlement Agreement between the Mutual Fund Dealers Association (MFDA) and Investia Financial Services Inc.

[99] On or about January 23, 2012 the plaintiffs became aware of a Notice of Settlement Hearing dated December 16, 2011 by the MFDA to consider a settlement agreed to by the staff of MFDA and Investia. An in-camera hearing took place on January 27, 2012 and the MFDA panel approved the settlement on January 30, 2012. The motion for fresh evidence was then made returnable on February 13, 2012.

[100] The relevant portions of the Settlement Agreement in summary are as follows:

(1) In September 30, 2008 the parent company of Investia acquired another Member of MFDA namely Aegon Dealer Services Canada Inc. (AEGON) and the operations were merged. The deficiencies identified in the Settlement Agreement do not relate to the operations of AEGON;

(2) During the period January 2009 to April 2009 Investia failed to establish and maintain adequate internal controls, books and records, pertaining to leveraged accounts contrary to MFDA Rules 2.9, 5.1 and 2.2.1;

(3) Investia pays a fine of \$ 100,000.00 upon acceptance of the Settlement Agreement;

(4) Investia agrees to implement revised policies and procedures and a Leverage Review Action Plan.

[101] The Settlement Agreement on its face does not appear to relate to MCB or Karas or Stephenson.

[102] In 2001, AEGON purchased the assets and trade name of Money Concepts. Included in the acquisition were the operations of the Barrie branch.

[103] The defendants submit that the test for adducing fresh evidence is detailed in *Palmer v The Queen* [1980] 1 S.C.R. 759 at 775. The defendants acknowledge that the plaintiffs could not, by due diligence, have adduced the Settlement Agreement at the hearing of the certification motion as it was not available at that time. Further, it is acknowledged that the Settlement Agreement is credible in the sense that it is an agreement reached between the Staff of the MFDA and Investia and approved by a Hearing Panel. However, it is submitted by the defendants that the plaintiffs have failed to establish that the Settlement Agreement is relevant to the Certification motion or that the admission of the Settlement Agreement would be expected to affect the result of the Certification motion.

[104] Counsel for the defendant Investia also states that if the Settlement Agreement is admitted into evidence then it would like the opportunity to introduce further and other affidavit material and documentation.

[105] I have also been referred by counsel for the plaintiffs to the decision of Justice Lauwers in *Jackson v Vaughan (City)* [2009] O.J. No. 145 (S.C.J.) at paras 22-23.

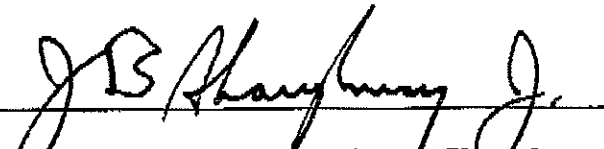
[106] I am not satisfied that the Settlement Agreement has been shown to be relevant or that it would affect the result on this Certification motion. It may be relevant at the discovery stage when other ancillary documents related to it may be examined. However, I am not dealing with what documents may be relevant at discovery.

[107] Accordingly, I dismiss the application to introduce fresh evidence.

Summary

[108] In the result the certification order shall issue on the condition that a revised Litigation Plan is submitted for approval. Counsel may also submit a formal order to be settled, if necessary.

[109] Counsel may contact the trial coordinator at Oshawa to arrange an appointment to speak to the issue of costs.


The Honourable Mr. Justice Bryan Shaughnessy

DATE RELEASED: February 17, 2012

CITATION: French and Karas et al v. Smith and Stephenson et al
2012 ONSC 1150
COURT FILE NO.: 10-0690
DATE:

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GEORGE FRENCH

Plaintiff

v

**INVESTIA FINANCIAL SERVICES
INCORPORATED, MONEY CONCEPTS (BARRIE),
DIAMOND TREE CAPITAL INC., DAVID KARAS
and FINANCIAL VICTORY ASSOCIATES INC.
Defendants**

AND B E T W E E N:

COURT FILE NO.: 11-0234

BRUCE SMITH and EDITH IRENE SMITH

Plaintiffs

v

**INVESTIA FINANCIAL SERVICES
INCORPORATED and JAMES STEPHENSON
Defendants**

Shaughnessy J.

Released: