Before The
FINANCIAL INDUSTRY REGULATORY AUTHORITY

CASE NUMBER 16-03454

JAMES W. FITZPATRICK and
SANDRA J. FITZPATRICK, and
THE FITZPATRICK FAMILY TRUST by
KERRY FITZPATRICK in his capacity as
TRUSTEE,

Claimants,

-vs-

AXA ADVISORS, LLC and CAMBRIDGE
INVESTMENT RESEARCH, INC.,

Respondents.

AMENDED STATEMENT OF CLAIM FOR ARBITRATION

This case involves a reprehensible broker, Francesco Puccio (CRD #3204237) ("Puccio") and his brokerage firm's failure to supervise numerous highly questionable transactions into life insurance policies and variable annuities for James W. Fitzpatrick ("James") and Sandra J. Fitzpatrick ("Sandra") and The Fitzpatrick Family Life Insurance Trust dated August 24, 2012 (collectively "Claimants" or "the Fitzpatricks") that garnered enormous commissions for Puccio and Respondents. Puccio was registered with AXA Advisors, LLC (CRD #6627) ("AXA") from January 2011 to January 2014. He was registered with Cambridge Investment Research, Inc. (CRD #39543) ("Cambridge") from January 2014 to July 2015.

Puccio was recently made infamous in Western New York when he was charged with second-degree larceny and fourth-degree conspiracy, both felonies, for allegedly defrauding a 75-year-old woman out of approximately $345,000. According to news reports, his victim in that case was a client of Puccio's firm, Invictus Wealth Strategies. *See* Ex. 1. It were these news reports that caused the Fitzpatricks' adult children to investigate Puccio's handling of their parents' accounts.

Sadly, their investigation revealed that Puccio took advantage of the Fitzpatricks' wealth by selling them unnecessary life insurance policies and variable annuities. Puccio took advantage of the Fitzpatrick's advanced age and diminished capacity by selling them unnecessary products that paid him huge commissions and charged these elderly people enormous fees. Puccio actually made more money selling these unnecessary life insurance policies and annuities through his brokerage firms than he did from stealing the $345,000 from his other elderly client.

Pursuant to FINRA Rule 12213, Claimants request that this arbitration hearing be in Buffalo, New York because Buffalo is the hearing location "closest to the customer's residence at the time of the events giving rise to the dispute …"

Due to the Fitzpatricks' advanced age and serious health issues, Claimants ask that this proceeding be granted expedited hearing status.

THE PARTIES

I. The Fitzpatricks

The Fitzpatricks are a true American success story. James was born in 1928. Sandra was born in 1941. James and Sandra were married in 1969 and raised two children together. They live in the small town of Whitesville, New York. James attended St. Lawrence College to study electrical engineering, but did not graduate. From 1951 to 1952, James served in the

United States Army as a Private First Class. He was honorably discharged in 1952. Sandra did not work outside of the home so that she could focus on raising their two children. From the 1960's until very recently, James built an impressive business for himself and his family.

In 1952, James moved back to Whitesville. For the next 15 years, James was a moderately successful businessman, having opened, operated and closed numerous small businesses. In 1967, James's life changed when he started Fitzpatrick Poultry Farms. From 1967 to 2012, James operated the family poultry farm in Whitesville while it became what must have been one of the largest poultry farms in the northeast. At its peak, what their son believes to be in the 1980's and 1990's, the farm produced thousands of eggs per day and distributed them throughout the country and the world. Despite their success, James and Sandra have maintained a very simple lifestyle. They still live in Whitesville and maintain their very nice, yet simple home that they estimate to be worth approximately $150,000.

Now almost 88 years old, James's health is deteriorating. He has atrial fibrillation and some cognitive issues that have developed. Sandra is 75 years old. She is in good physical health, but her children worry about her cognitive functions as well.

II. Respondent AXA Advisors LLC

AXA is a FINRA registered brokerage firm with its principal place of business in New York, New York. It is regulated by the Securities and Exchange Commission and FINRA. AXA employs registered representatives all over the country and does business in 53 U.S. states and territories.

In January 2011, AXA hired Puccio, thereby determining that he was worthy of being held out to the investing public as an AXA registered representative. In so doing, AXA undertook the obligation of properly supervising Puccio. It undertook this obligation for the period of time from January 2011 to January 2014.

Interestingly, Puccio had previously worked for AXA from March 1999 to August 2009. He was rehired by AXA in January 2011 after a 17 month period of employment with CCO Investment Services Corp.

III. Respondent Cambridge Investment Research, Inc.

Cambridge is a FINRA registered brokerage firm with its principal place of business in Fairfield, Iowa. It is regulated by the Securities and Exchange Commission and FINRA. Cambridge employs registered representatives all over the country and does business in 52 U.S. states and territories.

In January 2014, Cambridge hired Puccio, thereby determining that he was worthy of being held out to the investing public as a Cambridge registered representative. In so doing, Cambridge undertook the obligation of properly supervising Puccio. It undertook this obligation for the period of time from January 2014 to July 2015. On July 17, 2015, Cambridge terminated Puccio after he was charged with 2 counts of conspiracy for stealing one of his client's life savings.

NON-PARTY FRANCESCO PUCCIO

On July 15, 2015, Puccio was charged with two felonies, second-degree grand larceny and fourth-degree conspiracy for allegedly stealing an elderly woman's life savings. According to news articles, Puccio was holding himself out as a financial adviser with Invictus Wealth Strategies, a company he co-founded. The conspiracy came to light when the 75-year-old woman learned her life savings were gone and she owed taxes to the IRS. According to New

York State troopers, Puccio "cultivated the relationship" and "liquidated her retirement accounts and investments, then systematically transferred the money through a series of unsecured loans and distributions to accounts held individually by himself and [his co-conspirator]." *See* Ex. 1.

Invictus Wealth Strategies is a curious entity in this scheme because it does not appear to be a registered investment advisory firm or an outside business disclosed on Puccio's broker check report. Claimants intend to learn more about this entity throughout the discovery process and hereby reserve their rights to present evidence relating to Invictus Wealth Strategies at the final hearing of this matter.

The fact that Puccio was tempted to take advantage of elderly clients should not come as a great surprise given his disclosed financial problems. In fact, roughly one and one-half years before his scheme to reap commissions from Claimants and defraud an elderly woman out of $345,000 began, Puccio paid out well over $10,000 to satisfy liens placed against him by Wells Fargo Financial Cards and HSBC Bank.

The credit card liens were modest compared to the issues Puccio was having with various tax authorities. On March 28, 2012, the IRS filed a $58,437 lien on Puccio's assets. On March 11, 2014, the New York State Department of Taxation and Finance filed a $28,844 lien on Puccio's assets. On April 1, 2014, the IRS filed a $124,754 lien on Puccio's assets. Each of these liens were red flags that should have been followed up on by AXA and Cambridge.

On July 17, 2015, two days after Puccio was charged with conspiracy and one day after the story hit local papers, Cambridge discharged Puccio and noted that he "was alleged to have engaged in criminal activity regarding the wrongful taking of property."

On July 23, 2015, as a result of the criminal charges, FINRA sent Puccio a letter requesting documents and information. Puccio ultimately refused to respond to multiple requests for documents and information. On August 13, 2015, Puccio signed an AWC consenting to his permanent bar from the securities industry.

On September 23, 2015, AXA received a customer complaint from a client requesting that it investigate Puccio for loans taken on two variable life insurance policies she purchased in 2012. Just over one week later, on October 2, 2015, AXA denied the complaint.

FACTUAL BACKGROUND

The Fitzpatricks met Puccio when he was referred to them by a former financial advisor that was retiring. They believe this occurred sometime in 2011 or 2012. No doubt impressed by the Fitzpatricks' wealth and sensing two vulnerable investors, Puccio drove to Whitesville on multiple occasions to discuss the Fitzpatricks' investments. Their children's investigation into the handling of their parents' investments has revealed the life insurance and variable annuity abuses that are the subject of this complaint.

In December 2011, Puccio advised James and Sandra to invest $708,316 into an Equivest variable annuity contract.

In 2012, Puccio advised that James and Sandra each purchase a $5 million life insurance policy. In Spring 2012, Puccio advised Sandra to purchase a $5,013,330 life insurance policy. In the summer of 2012, Puccio advised the Fitzpatricks, via the Fitzpatrick Family Trust, to purchase a $5,000,000 flexible premium joint survivorship policy. In light of their age and the excessive premiums charged, these policies are excessive and were taken out not in the Fitzpatricks' best interest, but in Puccio's interest in commissions. The premiums on these two policies total nearly $400,000 per year.

Sandra's policy was initially funded with over \$2.7 million. Approximately \$2.1 million was immediately withdrawn from this policy, leaving a \$2 million loan on the policy which is accruing interest at rates of approximately 3%.[1] In 2015, these funds were ultimately used to purchase a Jackson National Life annuity for \$2 million. This was the second of two Jackson annuities that Puccio sold to Sandra as a result of his desire to earn commissions.

Also in 2012, Puccio sold a Transamerica annuity to James for \$1.4 million. The Fitzpatrick children believe their parents were sold additional bad investments and reserve their right to demonstrate additional evidence at the arbitration hearing should more unsuitable and conflicted investment advice be revealed.

FINRA, and its predecessor, the NASD, has paid special attention to annuity abuses since the mid-1990s. Of particular concern is the long surrender periods. The surrender periods are structured by the annuity company to ensure it will recoup the large up-front commission it paid to the selling broker.

NASD Notice to Members 96-86 reminds brokers to consider if the customer is in a position to "fully appreciate how much of the purchase payment is allocated to cover insurance or other costs and the customer's ability to understand the complexity of variable insurance products generally."

NASD Notice to Members 99-35 reminds brokers that they should "discuss all relevant facts with the customer, including the liquidity issues such as potential surrender charges and IRS penalty fees, including mortality and expense charges …"

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[1] AXA's Answer indicates this loan was taken on a pre-existing policy that was used to fund this policy. In any event, the loan existed on this policy either at the time or right after Puccio advised the purchase of this policy.

Puccio failed to do that in this instance. Puccio did not described the commission structure of the life insurance policies or the annuities, the long surrender periods or many of the relevant facts prior to soliciting the purchase of these policies and annuities. As a result, Claimants purchased these products and allowed Puccio and Respondents to make hundreds of thousands of dollars in commissions.

JURISDICTION

This case is arbitrable pursuant to the Federal Arbitration Act and the Arbitration clauses contained in (a) the Licensing Agreement between Respondents and FINRA, (b) the NASD Code of Arbitration, including Rule 12200 of the Code, and (c) the client agreement between Claimants and Respondents.[2] Moreover, all of the arbitrability requirements are satisfied in this case. Respondents are broker-dealers, FINRA members, and FINRA associated persons; Claimants were customers of Respondents; and this dispute arises in connection with Respondents' business activities. Therefore, Respondents are bound by the NASD Code to arbitrate this dispute.

LEGAL BASES UPON WHICH RELIEF CAN BE GRANTED

A. FINRA Rules Do Not Require Claimants to Plead Formal Claims or Identify Elements of Traditional Causes of Action; Claimants in FINRA Arbitration are Entitled to an Equitable Result.

This action is governed by FINRA rules, rather than by rules of civil procedure. Unlike in court, FINRA rules do not require that "claims" or "causes of action" be pled. In fact, in its

[2] "[T]he NASD Code constitutes an agreement in writing under the Federal Arbitration Act, 9 USCS § 2," which binds the member to submit an eligible dispute to arbitration upon a customer's demand. *Liberte Capital Group, LLC v. Capwill*, 148 Fed. Appx. 413, 416 (6th Cir. 2005) (*quoting Washington Square Secs., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004)).

response to comment letters regarding motions to dismiss, FINRA has stated:

> ...FINRA reminds parties that there are no specific pleading requirements under the Codes. Rules 12302 and 13302 require a claimant to supply only "[a] statement of claim specifying the relevant facts and remedies requested" along with the required fees, copies, and signed submission agreement in order to initiate an arbitration. Similarly, the answer must include only "[an] answer specifying the relevant facts and available defenses to the statement of claim." Parties may obtain further information and documents through the discovery process.[3]

Since FINRA rules do not contain specific pleading requirements, Claimants are not obligated to set forth specific names or titles for their alleged rights of recovery against Respondents. Rather, ample case authority establishes that arbitrators have the right to fashion whatever remedy best fits the evidence set before them. Moreover, while respondents' counsel often expect or demand a pleading setting forth the specific elements of causes of action such as they would see in a court of law, that sort of specificity is not required in a FINRA proceeding. This fact has been recognized publicly by both Mark Lackritz, former President and CEO of the Securities Industry and Financial Markets Association[4] and Linda Fienberg, former President and

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[3] Letter dated September 15, 2008 from Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution to Securities and Exchange Commission, available online at: http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p116990.pdf.

[4] Mr. Lackritz testified before the Committee on Financial Services, U.S. House of Representatives, on March 17, 2005 that "[u]nlike in court cases, claimants in arbitration are not held to technical pleading requirements." Mr. Lackritz further stated that while a "plaintiff in a court case may be faced with a daunting gauntlet of obstacles [including] a threshold motion attacking the sufficiency of pleading in a complaint," in contrast, "arbitration allows for a simple statement of claim[.]" See
http://www.sifma.org/issues/item.aspx?id=18702.

Chief Hearing Officer of FINRA Dispute Resolution.[5]

FINRA's approach to the arbitration process is typical of arbitral forums. Courts have long made clear that arbitrators are not bound by legal technicalities and are free to fashion results based on fairness in light of the facts. For example, as stated in 6 C.J.S. *Arbitration* §104, "Generally, arbitrators are not obliged to follow strict rules of law in the matter at hand and they are privileged to apply broad principles of justice."[6]

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[5] Ms. Fienberg, formerly the president of NASD Dispute Resolution, was a featured speaker and panelist at the North American Securities Administrators Association ("NASAA") presentation entitled "NASAA Listens Forum," held at the National Press Club in Washington DC. on July 20, 2004. She stated:

> In arbitration, in SRO NASD arbitration, unlike in court, you get an equitable result. You do not have to have a claim that is cognizable under state or federal law. It can be cognizable under NASD rules. So for example, there's only one cause of action under the federal securities laws, that's 10(B), it's very limited, has a short statute of limitations. The rules that are applied by arbitrators looking for equitable relief are much broader than if they had to strictly follow the law.

The import of this statement by the CEO of FINRA-DR is that arbitration is an equitable proceeding, rather than an action strictly governed by law. Indeed, according to Ms. Fienberg, claimants are not even required to have a claim cognizable at law.

[6] See also, for example, *National Iranian Oil Company v. Ashland Oil, Inc.*, 817 F .2d 326 (5th Cir. 1987) (*en banc*) ("[A]rbitration proceedings are by nature equitable."); *Application of Columbia Broadcasting System, Inc.*, 26 Misc.2d 972, 205 N.Y.S.2d 85 (1960) ("It is the settled policy of our courts to encourage arbitration and to enforce arbitration agreements with complete relief from legal technicality ...[and]...proper relief is ordinarily granted when the facts warrant, regardless of what may have been asked for."); *In the Matter of Arbitration Between Stanley J. Staklinski and Pyramid Electric Company*, 6 A.D.2d 565, 180 N.Y.S.2d 20 (1958) ("As already pointed out, as embodied in the arbitration statue and as recognized in our highest court, arbitration may provide relief in circumstances and on conditions which even a court has no power to grant."); *Harold Rosa v. Transport Operators Co.*, 45 N.J. Super. 438, 133 A.2d 24 (1957) ("We recognize that an arbitrator does not always decide a case according to strict legal principles, but sometimes according to his own concept of what is just and right, and in such cases the courts will not disturb his decision except for very cogent reasons."); *California State Council of Carpenters v. The Superior Court of Orange County*, 11 Cal.App.3d 144, 89 Cal.Rptr. 625 (1970) ("Arbitrators may base their decisions on broad principles of justice and equity and

Consequently, Rule 12302 of the FINRA Code of Arbitration states that the statement of claim need only specify "the relevant facts and remedies requested." Claimants have met those requirements here. They are under no obligation to delineate common law or statutory claims such as "negligence" or "breach of fiduciary duty," although such claims certainly are supported by the facts in the within matter.

Nonetheless, Claimants recognize that Respondents or the Panel might feel more comfortable with at least a suggestion as to the types of traditional claims that might be supported by the alleged facts. Thus, *without waiving their right to seek or prove their entitlement to recover for any form of wrongdoing by Respondents*, Claimants will delineate the following types of wrongdoing for which they are entitled to be compensated.

B. VIOLATIONS OF FINRA RULE 2111: RECOMMENDING AND SELLING SECURITIES WITHOUT A REASONABLE BASIS.

Respondents violated FINRA Rule 2111 by recommending and selling the variable annuities and insurance policies to Claimants without first conducting adequate due diligence and gaining a reasonable basis to make such recommendations and sales. FINRA Rule 2111 mandates that securities broker dealers:

> must have a *reasonable basis* to believe that a recommended transaction … involving a security … is suitable for the customer, based on the information obtained through the *reasonable diligence* of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.

FINRA Rule 2111(a) (*emphasis supplied*).

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every intendment of validity must be given the award.").

FINRA has admonished its members that their suitability duties are comprised of "three main obligations: reasonable-basis suitability, customer-specific suitability, and quantitative suitability." FINRA Rule 2111.05 (Supplementary Material). It explained the three obligations as follows:

> (a) The reasonable-basis obligation requires a member or associated person to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least *some* investors. In general, what constitutes reasonable diligence will vary depending on, among other things, the complexity of and risks associated with the security or investment strategy and the member's or associated person's familiarity with the security or investment strategy. A member's or associated person's reasonable diligence must provide the member or associated person with an understanding of the potential risks and rewards associated with the recommended security or strategy. The lack of such an understanding when recommending a security or strategy violates the suitability rule.
>
> (b) The customer-specific obligation requires that a member or associated person have a reasonable basis to believe that the recommendation is suitable for a particular customer based on that customer's investment profile, as delineated in Rule 2111(a).
>
> (c) Quantitative suitability requires a member or associated person who has actual or de facto control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer's investment profile, as delineated in Rule 2111(a). No single test defines excessive activity, but factors such as the turnover rate, the cost-equity ratio, and the use of in-and-out trading in a customer's account may provide a basis for a finding that a member or associated person has violated the quantitative suitability obligation.

FINRA Rule 2111.05 (*emphasis in the original*).

Thus, FINRA Rule 2111.05 makes clear that the first prong of the suitability analysis – *before a product is even presented to a customer* – requires a broker-dealer firm to conduct reasonable due diligence as to the product. *Id*. Only after the broker-dealer, following such reasonable due diligence, has acquired a reasonable basis to believe that the product "is suitable for at least *some* investors," id., is the broker-dealer allowed to present that opportunity to its customer and proceed with the other steps of the suitability analysis. In other words, the first step of the suitability analysis – which must occur before the broker-dealer determines whether or not to present the product to the customer – is *focused on the product, not the customer*. The second and third steps of the suitability analysis are focused on the customer – i.e. on his or her investment risk profile and the appropriate concentrations of various investments in the customer's portfolio.

Broker-dealers "may not recommend the securities of obscure issuers … without reliable financial data." *In re Willard G. Berge,* 1976 SEC LEXIS 718, 46 S.E.C. 690, 696 (1976). Nor can broker-dealers "simply rely on an issuer's 'self-serving statements,'" *Dan King Brainard*, 47 S.E.C. 991, 996 (1983), or "on others, such as clearing firms, transfer agents, or issuers' counsel, to fulfill [their] obligations." FINRA NTM 09-05.

Respondents took at face value the information provided by the annuity and life insurance companies and its agents and never tried to conduct its own, independent and adequate investigation to verify whether such representations were accurate, despite the fact that Respondents knew or should have known that those representations were questionable, incomplete, and included suspicious information.

Ignoring FINRA and SEC due diligence duties, Respondents recommended the variable annuities and life insurance products to Claimants without conducting an adequate investigation to obtain reliable information about those investments and their sponsor, and without having a reasonable basis to make such recommendations, in violation of Rule 2111. Respondents failed to adequately investigate the numerous red flags surrounding the investments, which pointed to violations of the securities rules and regulations. Respondents also ignored Claimants' investment needs and best interests in recommending the sale of these products that provided enormous commissions to Respondents and their broker, Puccio.

As a direct and proximate result of Respondents' recommendations and sales of unsuitable investments to Claimants without adequate due diligence and without first gaining a reasonable basis, Claimants have been damaged in an amount to be determined at the hearing of this cause, and is entitled to rescission.

C. VIOLATIONS OF FINRA RULE 2110.

Respondents violated FINRA Rule 2110 by recommending and selling the variable annuities and insurance products to Claimants without first conducting adequate due diligence and obtaining a reasonable basis as to the investment products to make such a recommendation, and without disclosing to Claimants that it had failed to conduct such adequate due diligence and lacked any reasonable basis to recommend the variable annuity and life insurance products to Claimants.

Rule 2110 mandates that broker-dealers, in the conduct of their business, "observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 2110. FINRA has stated that broker-dealers:

> have an obligation of fair dealing in actions under the general anti-fraud provisions of the federal securities laws. The Commission bases this obligation on the principle that when a securities dealer opens his business he is, in effect, representing that he will deal fairly with the public… Usually, any breach of the obligation of fair dealing as determined by the Commission under the anti-fraud provisions of the securities laws could be considered a violation of the Association's Rules.

IM-2310-2(d) (Fair Dealing with Customers).

Securities industry regulators have warned that violations by broker-dealers of SEC or NASD rules or regulations are inconsistent with the just and equitable principles of trade and have found that such violations also constitute violations of NASD Conduct Rule 2110. *See Alvin W. Gebhart*, Exch. Act Rel. No. 53136, 2006 SEC LEXIS 93, at *54 n.75 (2006), *rev'd and remanded in part on other grounds sub. nom Gebhart v. SEC*, 2007 U.S. App. LEXIS 27183 (9th Cir. 2007).

Respondents recommended that Claimants purchase the variable annuities and life insurance policies without having a reasonable basis to make such recommendations, and without disclosing material features of the products to Claimants. Respondents failed to deal fairly with Claimants and to observe the high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2110. Respondents engaged in the improper recommendations and sales of investments to Claimants through material misrepresentations and omissions, breaching their fair dealing duties mandated by Rule 2110.

As a direct and proximate result of Respondents' baseless recommendations of the variable annuities and life insurance policies securities through material misrepresentations and omissions, Claimants have been damaged in an amount to be determined at the hearing of this case, and are entitled to compensation.

D. NEGLIGENCE

Respondents were negligent in reviewing, agreeing to sell, recommending, and selling the annuities and life insurance policies to Claimants. Such negligence arose vicariously out of the unlawful sales to Claimants by Puccio. It also arose out of Respondents' negligent supervision of Puccio's sales practices.

To recover for negligence, plaintiffs must prove the existence of a duty, breach of that duty, injury, and a causal connection between the duty breached and the injury suffered.

Respondents owed Claimants a duty to act as a reasonable broker-dealer and/or registered representative would do under the same or similar circumstances, in connection with its review, recommendation, supervision and sales of the variable annuities and life insurance policies to Claimants. The duties set forth herein, and more fully alleged elsewhere in this Statement of Claim, arise from common law, the fiduciary nature of the broker-customer relationship; the regulations, customs and usage of the brokerage trade; Respondents' internal policies and procedures; and state and federal statutes.

As a direct and proximate result of Respondents' recommendation and sale of variable annuities and life insurance policies through material misrepresentations and omissions, Claimants have been damaged in an amount to be determined at the hearing of this case.

E. NEGLIGENT MISREPRESENTATIONS AND OMISSIONS OF MATERIAL FACTS

As stated above, Respondents made numerous misrepresentations and omissions of material fact to Claimants regarding its sale of the variable annuities and life insurance policies and lack of reasonable basis to recommend such products.

The Restatement (Second) of Torts has described the claim of misrepresentation as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating

the information.

Restatement (Second) of Torts § 552(1), (2) (1977).

Respondents served as Claimants' broker-dealers and investment advisors. Respondents understood and accepted the trust and reliance reposed in them by Claimants and specifically understood that Claimants looked to them to select suitable investments. Claimants justifiably relied on Respondents' material omissions and negligent misrepresentations when they purchased the variable annuities and life insurance investments recommended by Respondents.

As a direct and proximate result of their reliance upon Respondents' negligent misrepresentations in connection with their investments, Claimants have been damaged in an amount to be demonstrated at the hearing.

F. BREACH OF FIDUCIARY DUTY

Respondents, who were Claimants' financial advisor, breached their fiduciary duties when they induced Claimants to invest in the annuities and life insurance policies. Brokers who approach their customer and recommend that the customer purchase an investment have a fiduciary duty to independently investigate that investment before recommending it. *See SEC v. Glt Dain Rauscher, Inc.*, 254 F.3d 852, 857-858 (9th Cir. 2001) (stating that a financial professional "had a duty to make an investigation that would provide him with a reasonable basis for a belief that the key representations in the statements provided to the investors were truthful and complete.").

Respondents held the entire trust and confidence of Claimants on the subject of investments. Respondents failed to adequately investigate the annuities and life insurance policies, recklessly ignored a plethora of red flags and problems surrounding the offerings which it had a duty to investigate, concealed from Claimants material information regarding the investments, and actively, unreasonably, and illegally induced Claimants into investing their money in the annuities and life insurance policies.

As a direct and proximate result of Respondents' breaches of the fiduciary duties owed to Claimants in connection with its investment recommendations, Claimants have been damaged in an amount to be determined at the hearing.

RELIEF REQUESTED

As a result of the course of conduct outlined above, Respondents are liable to Claimants as follows:

(1) for all losses of principal suffered by Claimants;

(2) for all interest, commissions and fees paid by Claimants;

(3) for the loss of income that would have been received had Claimants' accounts been managed properly, as well as other losses, foreseeable or not, that Claimants have suffered, including non-pecuniary losses;

(4) for attorneys' fees, costs and other expenses;

(5) for interest, both pre-judgment and post-judgment;

(6) for all other sums Claimants are entitled to at law or equity; and

(7) for punitive damages.

Dated: November 20, 2017

Respectfully submitted,

/s/ Jason J. Kane

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