

Division of Securities  
Utah Department of Commerce  
160 East 300 South, 2<sup>nd</sup> Floor  
Box 146760  
Salt Lake City, UT 84114-6760  
Telephone: (801) 530-6600

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

**STEVEN WAYNE THORNE,  
CRD#1124434**

**Respondents.**

**NOTICE OF AGENCY ACTION**

**Docket No. SD-15-0055**

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THE DIVISION OF SECURITIES TO THE ABOVE-NAMED RESPONDENT:

You are hereby notified that agency action in the form of an adjudicative proceeding has been commenced against you by the Utah Division of Securities (Division). Pursuant to Utah Admin. Code Rule R164-18-6(c) and Utah Code Ann. § 63G-4-202(3), the Division Director finds that it is in the public interest and does not unfairly prejudice the rights of any party to convert this adjudicative matter from an informal to formal proceeding, which will be conducted according to statute and rule. See Utah Code Ann. §§ 63G-4-201 and 63G-4-204 through -209; see also Utah Admin. Code R151-4-101, *et seq.* The facts on which this action is based are set forth in the accompanying Petition. The legal authority under which this formal adjudicative proceeding is to be maintained is Utah Code Ann. § 61-1-20. You may be represented by counsel or you may represent yourself in this proceeding. Utah Admin. Code R151-4-110.

You must file a written response with the Division within thirty (30) days of the mailing date

of this Notice. Your response must be in writing and signed by you or your representative. Your response must include the file number and name of the adjudicative proceeding, your version of the facts, a statement of what relief you seek, and a statement summarizing why the relief you seek should be granted. Utah Code Ann. § 63G-4-204(1). In addition, pursuant to Utah Code Ann. § 63G-4-204(3), the presiding officer requires that your response:

- (a) admit or deny the allegations in each numbered paragraph of the Petition, including a detailed explanation for any response other than an unqualified admission. Allegations in the Petition not specifically denied are deemed admitted;
- (b) identify any additional facts or documents which you assert are relevant in light of the allegations made; and
- (c) state in short and plain terms your defenses to each allegation in the Petition, including affirmative defenses, that were applicable at the time of the conduct (including exemptions or exceptions contained within the Utah Uniform Securities Act).

Your response, and any future pleadings or filings that should be part of the official files in this matter, should be sent to the following:

**Signed originals to:**

Administrative Court Clerk  
c/o Lee Ann Clark  
Utah Division of Securities  
160 E. 300 South, 2<sup>nd</sup> Floor  
Box 146760  
Salt Lake City, UT 84114-6760  
(801) 530-6600

**A copy to:**

Thomas M. Melton  
Assistant Attorney General  
Office of Attorney General  
160 East 300 South, 5<sup>th</sup> Floor  
Salt Lake City, UT 84114-0872  
(801) 366-0310

An initial hearing in this matter has been set for January 6, 2016 at the Division of Securities, 2<sup>nd</sup> Floor, 160 East 300 South, Salt Lake City, Utah, at 9:00 a.m. The purpose of the initial hearing

is to enter a scheduling order addressing discovery, disclosure, and other deadlines, including pre-hearing motions, and to set a hearing date to adjudicate the matter alleged in the Petition.

If you fail to file a response, as described above, or fail to appear at any hearing that is set, the presiding officer may enter a default order against you without any further notice. Utah Code Ann. § 63G-4-209; Utah Admin. Code R151-4-710(2). After issuing the default order, the presiding officer may grant the relief sought against you in the Petition, and will conduct any further proceedings necessary to complete the adjudicative proceeding without your participation and will determine all issues in the proceeding. Utah Code Ann. § 63G-4-209(4). In the alternative, the Division may proceed with a hearing under § 63G-4-208.

The Administrative Law Judge will be Gregory Soderberg, Utah Department of Commerce, 160 East 300 South, P.O. Box 146701, Salt Lake City, UT 84114-6701, telephone (801) 530-6706. This adjudicative proceeding will be heard by Judge Soderberg and the Utah Securities Commission. At any hearings, the Division will be represented by the Attorney General's Office. You may appear and be heard and present evidence on your behalf at any such hearings.

You may attempt to negotiate a settlement of the matter without filing a response or proceeding to hearing. To do so, please contact the Utah Attorney General's Office. Questions regarding the Petition should be directed to Thomas M. Melton, Assistant Attorney General, 160 E. 300 South, 5th Floor, Box 140872, Salt Lake City, UT 84114-0872, Tel. No. (801) 366-0320.

Dated this 20<sup>th</sup> day of November, 2015

  
Keith M. Woodwell  
Director, Division of Securities



Certificate of Mailing

I certify that on the 20<sup>th</sup> day of November, 2015, I mailed, by certified mail, a true and correct copy of the Notice of Agency Action and Petition to:

Steven Wayne Thorne  
Wells Fargo Advisors  
15 South Main Street, Suite 402  
Logan, UT 84321

Certified Mail # 7013 2630 00019180 5707

Douglas Griffith  
KESLER & RUST  
68 South Main Street, Ste. 200  
Salt Lake City, UT 84101  
Counsel for Respondent

Certified Mail # 7013 2630 00019184 4850

  
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Executive Secretary

Division of Securities  
Utah Department of Commerce  
160 East 300 South  
P.O. Box 146760  
Salt Lake City, Utah 84114-6760  
Telephone: 801 530-6600

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

**STEVEN WAYNE THORNE,  
CRD#1124434**

**Respondent**

**PETITION TO CENSURE LICENSEE  
AND IMPOSE A FINE**

Docket No. SD-15-0055

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Pursuant to the authority of the Utah Uniform Securities Act (“Act”), Utah Code Ann. § 61-1-6, the Utah Division of Securities (“Division”) hereby petitions the Utah Securities Commission (“Commission”) to enter an Order censuring Respondent Steven W. Thorne (“Thorne”) and imposing a fine. In support of this petition, the Division alleges:

**STATEMENT OF FACTS**

1. Thorne is a Utah resident who has been licensed in the securities industry since 1983 as a broker-dealer agent of several different broker-dealer firms. He is currently licensed with Wells Fargo Advisors Financial Network, LLC (“WFA”), CRD#11025, where he is also licensed as an investment adviser representative.<sup>1</sup>
2. Thorne has taken and passed the FINRA Series 7, General Securities Representative

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<sup>1</sup>At all times relevant in this matter, Thorne acted in the capacity of a broker-dealer agent and not an investment adviser representative.

Exam, Series 63, Uniform Securities Agent State Law Exam, Series 4, Registered Options Principal Exam, and Series 24, General Securities Principal Exam.

3. Records contained in the Central Registration Depository (“CRD”)<sup>2</sup> show that in 2005 Thorne was the subject of a customer complaint resulting in a FINRA arbitration matter that was settled by his employing firm for \$235,000, of which Thorne personally contributed \$47,000.00. That complaint alleged, among other things, “excessive and unsuitable trading” of equities and options.
4. In December 2010, the Division received a written complaint from a client of Thorne’s, L.O., concerning investments in non-traditional Exchange Traded Funds (“non-traditional ETFs”) recommended by Thorne. The complaint alleged that the investments were unsuitable and caused significant losses in L.O.’s account.
5. In March 2011, the Division conducted an on-site audit of Thorne’s branch office. The Division’s examination revealed the following:

Referral to Thorne

6. In 2007, L.O. was referred to A.G. Edwards & Sons, Inc. (“A.G. Edwards”), CRD#4, by a former co-worker. The agent who was recommended was no longer at A.G. Edwards and L.O. instead met with Thorne who worked in the same A.G. Edwards branch office.<sup>3</sup>
7. At the time, L.O. was 64 years old and a retired school teacher and administrator. He was

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<sup>2</sup>CRD is a computerized database maintained by the Financial Industry Regulatory Authority (“FINRA”). CRD contains employment, licensing and disciplinary information on broker-dealers, agents, investment advisers and investment adviser representatives.

<sup>3</sup>In 2008 A.G. Edwards became a part of Wachovia Securities, LLC, which later was acquired by Wells Fargo & Co. WFA is the retail brokerage and wealth management affiliate of Wells Fargo & Co. Thorne’s licensing registrations transferred accordingly.

seeking to supplement his retirement income with “something secure” with an interest rate that was higher than what he could earn from a bank. He described his overall risk tolerance to Thorne as conservative. L.O. had no prior experience investing other than in his state retirement plan, where he held mutual funds.

8. L.O.’s goal was to use \$136,647 from his retirement plan and \$50,000 from a recent sale of property to receive steady monthly income of \$1,000 to \$1,500 over a period of years until those monies were exhausted.
9. Thorne suggested that rather than simply withdrawing monies from the account, L.O. instead allow Thorne to invest the monies, and that within five or six years L.O. could begin to receive his desired income stream by withdrawing only the interest earned, leaving the principal intact.
10. In September 2007, L.O. opened an account with Thorne, investing \$186,647, consisting of \$136,647 in rollover IRA monies (“IRA account”) and \$50,000 in non-retirement monies (“trust account”).
11. According to new account documents, L.O.’s primary investment objective was “aggressive appreciation” and secondary objective “conservative appreciation”. Annual income range was listed as \$150,000 to \$200,000 per year, and L.O.’s net worth described as between \$5,000,000 and \$10,000,000.<sup>4</sup> His investment experience was listed as 25 years in stocks and bonds, 40 years in mutual funds, and 28 years with insurance and annuities.

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<sup>4</sup>L.O. owns a family farm and that figure is presumably based on the estimated values of that property and farm equipment.

12. Thorne recommended a portfolio developed using an A.G. Edwards asset allocation model. Accordingly, L.O.'s monies were invested in a diversified portfolio of mutual funds.
13. Thereafter, L.O.'s account performed consistent with general market performance and experienced corresponding losses during the financial market declines in the fall of 2008. During the market declines of 2008 into 2009 L.O.'s account value dropped approximately 50%. No income was taken from the portfolio.

#### Recommendations of Non-traditional ETFs

14. In April 2009, Thorne recommended to L.O. and at least four additional WFA clients a new investment strategy of adding positions of inverse, leveraged non-traditional ETFs.
15. At the time, L.O. was a 66-year-old retired and unsophisticated investor who had never traded the stock market on a daily or near-daily basis. He had never purchased securities using leverage<sup>5</sup>, and had never sold a stock short.<sup>6</sup>
16. Non-traditional ETFs are highly complex products which have risk factors that differ from traditional ETFs and may include leveraging, daily reset, and time decay, all of which effect investment return. Investors holding non-traditional ETFs for more than one trading session – and especially when held for extended periods of time – can expect their performance to greatly differ from the underlying index or benchmark, particularly

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<sup>5</sup>“Leverage” generally means the use of various financial instruments or borrowed capital, such as margin, to increase the potential return of an investment.

<sup>6</sup>“Selling short” is an investment strategy employed when one believes the current price of a stock will fall and aims to profit from a future fall in the stock’s price.

in volatile market conditions.

17. The investments recommended by Thorne included inverse ETFs, which utilize derivatives for the purpose of profiting from the decline in the value of a benchmark, as well as double and triple-leveraged ETFs, meaning that a 1% move in the underlying index or benchmark would produce a 2% or 3% rise (or fall if inverse) of the investment's value.
18. Non-traditional ETFs are designed to be used by sophisticated investors and held in an account for short periods of time given their unique attributes and significant risks.
19. Thorne failed to understand the unique characteristics of the non-traditional ETFs he recommended, the risks associated with those products, and how those products could be properly used in an investment portfolio. Notably, he failed to tell his clients that non-traditional ETFs were especially unsuitable as long-term investments.
20. As a result, Thorne's clients had little to no understanding of the products, their significant risks, and how their performance could dramatically vary from the benchmarks, particularly when held over a long term.
21. Of the five client accounts reviewed by the Division, most held the products for more than 300 days, and the clients sustained total losses of \$131,607.

#### L.O. Account and Losses

22. Between April 2009 and July 2009, Thorne recommended the purchase of four non-traditional ETFs, that were both inverse and leveraged, to L.O.: Direxion Small Cap Bear 3X ("TZA"), which seeks to return 3 times the inverse (opposite) of the Russell 2000 Index daily performance; ProShares Ultrashort Dow 30 ("DXD"), which seeks to return 2

times the inverse of the Dow Jones Industrial Average daily performance; Proshares Ultrashort QQQ (“QID”), which seeks to return 2 times the inverse of NASDAQ-100 daily performance; and Proshares Ultrashort Financials (“SKF”), which seeks to return 2 times the inverse of Dow Jones U.S. Financials Index daily performance.

23. Thorne believed the financial markets were due for an imminent collapse. Thorne told L.O. that the Obama administration’s bailout money was used to “prop up” the stock market and repeatedly told L.O. “a change was coming” and that the market would collapse at any time, bringing profits to L.O. based on those investments.
24. The prospectuses for the ETFs purchased by Thorne all explicitly stated that their performance was managed for daily results, and if held over longer periods of time, such as weeks or months, the shares could differ significantly from the performance of their underlying index or benchmark during the same period.
25. For example, the prospectus for TZA stated:

The Funds<sup>7</sup> are intended to be used as short-term trading vehicles. The Funds are not intended to be used by, and are not appropriate for, investors who do not intend to actively monitor and manage their portfolios. The Funds are very different than most exchange-traded funds. First, all of the Funds pursue *daily leveraged* investment goals, which means that the Funds are riskier than alternatives that do not use leverage because the Funds magnify the performance of the benchmark on an investment. Second, each of the Bear Funds pursues investment goals which are inverse to the performance of its benchmark, a result opposite of most exchange-traded funds. Third, each Fund offered in this Prospectus seeks *daily leveraged* investment results. The pursuit of daily leveraged investment goals means that the return of a Fund for a period longer than a full trading day will be the product of the series of daily leveraged returns for each trading day during the relevant period.

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<sup>7</sup>Besides TZA, the prospectus also pertained to another non-traditional ETF, the Direxion Daily Large Cap Bear 3X (“BGZ”), recommended by Thorne and purchased in the accounts of the four other clients.

The Funds should be utilized only by sophisticated investors who (a) understand the risks associated with the use of leverage, (b) understand the consequences of seeking daily leveraged investment results, (c) understand the risk of shorting and (d) intend to actively monitor and manage their investments. Investors who do not understand the Funds or do not intend to actively monitor and manage the Funds should not buy the Funds.

(emphasis in original).

26. During the same time that Thorne recommended non-traditional ETFs to L.O. and other clients, the securities industry and WFA were taking actions to address the misuse of those products, emphasizing their complicated, speculative and risky nature that made them inappropriate for most investors.

27. On June 11, 2009, FINRA released Regulatory Notice 09-31 (“FINRA Notice”) which put the securities industry on notice that non-traditional ETFs posed risks distinct from traditional ETFs, and specifically cautioned that, while non-traditional ETFs

may be useful in some sophisticated trading strategies, they are highly complex financial instruments that are typically designed to achieve their stated objectives on a daily basis. Due to the effects of compounding, their performance over longer periods of time can differ significantly from their stated daily objective. Therefore, inverse and leveraged ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.

(FINRA Notice, Executive Summary).

28. The FINRA Notice illustrated by example the unique risks posed by leveraged, inverse products such as those recommended by Thorne, even when meeting their stated objective:

For example, between December 1, 2008 and April 30, 2009:

- The Dow Jones U.S. Oil & Gas Index gained 2 percent, while an ETF seeking to deliver twice the index’s daily return fell 6 percent and the related ETF seeking to deliver twice the inverse of the index’s daily return fell 26 percent.

- An ETF seeking to deliver three times the daily return of the Russell 1000 Financial Services Index fell 53 percent while the index actually gained around 8 percent. The related ETF seeking to deliver three times the inverse of the index's daily return declined by 90 percent over the same period.

(FINRA Notice at 2).

29. The FINRA Notice further reminded members of their sales practice obligations under NASD Rule 2310 in determining the suitability of such products:

This analysis has two components. The first is determining whether the product is suitable for any customer, an analysis that requires firms and associated persons to fully understand the products and transactions they recommend.

Once a determination is made that a product is generally suitable for at least some investors a firm must also determine that the product is suitable for the specific customers to whom it is recommended. This analysis includes making reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and 'such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.'

(FINRA Notice at 3).

30. Despite the FINRA Notice, in the five client accounts reviewed by the Division, Thorne made nineteen (19) purchases in non-traditional ETFs in July 2009. In fact, most of Thorne's non-traditional ETF purchase recommendations were made after the FINRA Notice was issued.
31. By July 2009, L.O.'s trust account consisted of 80% ETFs and 20% short term/cash investments. The IRA account consisted of 45% ETFs and 44% short term/cash investments. The investment objective on both accounts remained "long term growth" during that time.
32. In a Compliance Alert ("Alert") distributed to WFA agents on July 29, 2009, WFA adopted new policies regarding the sale of non-traditional ETFs. The Alert discussed the

FINRA Notice and further stated:

Non-traditional leveraged and leveraged inverse ETFs are only permitted to be purchased in accounts with a **Trading and Speculation** (“L”) investment objective.

Investment objectives may not be changed to Trading and Speculation for the purpose of purchasing Non-Traditional leveraged and leveraged inverse ETFs when the investment objective is otherwise not appropriate for the client.

The Firm prohibits holding all Non-Traditional ETFs in any account as a long term investment. These positions are generally designed as intraday trading vehicles.

(Alert, emphasis in original).

33. Despite the prohibition set forth in the Alert, in August 2009, L.O.’s investment objectives were changed by Thorne to “trading and speculation”. That information was changed for both the IRA and Trust accounts.
34. Also at that time, WFA prohibited clients holding non-traditional ETFs in any account as a long term investment absent specific client direction, which was required to be verified by a qualified supervisor and documented in the client file.
35. In September 2009 WFA updated its sales materials related to non-traditional ETFs and sent a letter to all clients then-holding non-traditional ETFs. The letter discussed the products’ complexity, risks posed, and emphasized such positions should be liquidated by clients who did not understand and could not continually monitor the holdings. In a document that accompanied the letter, entitled “A Guide to Investing in Exchange-Traded Funds”, WFA further described how inverse and leveraged ETFs work and their attendant risks. Under “Suitability” the guide states: “Non-traditional ETFs are suitable only for sophisticated and speculative investors who fully understand the complexities of these products and the significant risks involved in their purchase or trade” and for those able

“to absorb potentially significant losses” who can “constantly monitor” their accounts.

36. In February 2010, WFA sent a second mailing to clients still holding non-traditional ETFs as long term account positions. That letter unequivocally urged liquidation of those positions:

**At this time, we are advising you to sell your non-traditional ETF positions if you cannot monitor your holdings on a daily basis and are not a speculative investor. Speculative investors should be willing to accept the risks inherent in these products, including the loss of principal up to the full value of the investment.**

(emphasis in original).

37. When interviewed by the Division, Thorne stated he was aware of the FINRA Notice and WFA Compliance Alert, as well as the two letters sent to clients as described above. Despite that knowledge, Thorne took no action to liquidate the unsuitable positions taken in his clients' accounts. Instead, he told L.O. and the other clients that if they liquidated the non-traditional ETF positions the clients could not repurchase them in the future. He did not, however, tell them that was because WFA had changed its policies to address the significant risks of loss posed to unsophisticated retail investors.
38. As the overall markets continued to climb, L.O.'s account continued to fall in value. He had frequent conversations with Thorne during that period and voiced his concerns about the decline in value. Thorne told him to “hang on” and that things would “turn around” eventually.
39. In April 2010, L.O. directed Thorne to liquidate all the positions in his accounts to prepare to transfer his monies to another broker-dealer. L.O. also complained to WFA's

legal department about Thorne's handling of his account.<sup>8</sup>

40. L.O. sustained losses totaling \$37,506, which represents almost 20% of his original investment amount. The longest holding period for non-traditional ETFs was 366 days.
41. In addition, for the vast majority of activity in L.O.'s account, Thorne incorrectly marked trades as unsolicited, indicating that the transactions were initiated by L.O. rather than Thorne.

#### Other Client Accounts and ETF Losses

42. From May through July 2009 Thorne also recommended inverse leveraged ETFs (BGZ and SKF) to an 84-year-old retiree, J.B., for his IRA account. Like L.O., J.B. had limited investment experience. According to new account documents, his annual income was \$50,000-99,000 and net worth between \$50,000-99,000. His investment objective was changed by Thorne in August 2009 from "long term growth" to "trading and speculation". Thorne set up a new client account with the "trading and speculation" objective and transferred existing shares in-kind. The longest ETF positions were held for 411 days and the account sustained losses of \$28,903.
43. In July 2009 Thorne recommended inverse leveraged ETFs (BGZ, SKF and TZA) to a 75-year-old retiree, R.J. who also had limited investment experience. According to new account documents, his annual income was \$50,000-99,000 and net worth between \$50,000-99,000. His investment objective was changed by Thorne in August 2009 from "long term growth" to "trading and speculation". Thorne set up a new client account with the "trading and speculation" objective and transferred existing shares in-kind. R.J.'s

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<sup>8</sup>That complaint was later resolved by WFA for \$25,000 in July 2013.

employment status was reported as self employed in the education field, even though he was retired. The longest ETF positions were held for 364 days and the account sustained losses of \$22,630.

44. Another Thorne client, J.R., was a 64-year-old retiree when Thorne recommended inverse leveraged ETFs (BGZ and SKF) to her in July 2009. According to new account documents, her annual income was \$1,000-25,000 and net worth between \$250,000-350,000. Her investment objectives were changed by Thorne in August 2009 from a primary objective of “aggressive appreciation” and secondary objective of “conservative appreciation” to “trading and speculation”. The longest ETF positions were held for 309 days and the account sustained losses of \$6,617.
45. Investor K.C. was 74 years old and retired when Thorne recommended inverse leveraged ETFs (BGZ, SKF, TZA) in July 2009 and Barclays Bank PLC iPath S&P 500 VIX Short Term Futures ETN (“VXX”) in July 2010. His investment objective was changed by Thorne in August 2009 from “moderate growth” to “trading and speculation”. Thorne set up a new client account with the “trading and speculation” objective and transferred existing shares in-kind. K.C.’s employment status was reported as self employed in the unskilled labor field even though he was retired. The longest ETF positions were held for 313 days and the account sustained losses of \$35,878.

#### Inverse Leveraged ETFs were Unsuitable for Thorne’s Clients

46. Thorne’s five clients were all unsophisticated, elderly retail investors with limited knowledge of the financial markets who did not understand the investment risks associated with inverse, leveraged ETFs. They were not seeking market speculation or

implementing a sophisticated daily trading strategy. The products were not being purchased as an intraday, daily, or near-daily holding position. None had any experience short selling stocks, purchasing stock options, or investing using margin, all of which would be experience relevant to understanding the nature of the inverse, leveraged ETF products recommended by Thorne. All five investors told the Division they relied on Thorne for recommendations and deferred to his judgment in choosing investments.

47. At no time did Thorne communicate to L.O. or the other clients that his recommendations to purchase and hold non-traditional ETFs were inconsistent with the product prospectuses, and FINRA and WFA guidelines on their suitable use.
48. Thorne likewise failed to adopt any process to monitor the holdings as described in the prospectuses, which further demonstrates Thorne's fundamental misunderstanding of the securities, such that his recommendations could not have been made on reasonable grounds.
49. In 2011, during the Division's on-site examination, Thorne admitted he had limited knowledge of the characteristics of non-traditional ETFs during the period he recommended them to investors. He told the Division he did not receive any formal training from WFA on their use, risks, or suitability.<sup>9</sup>
50. During a 2013 interview, Thorne also indicated that in 2009 he did not understand that

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<sup>9</sup>In May 2012, WFA consented to a FINRA fine of \$2.1 million and restitution in the amount of \$641,489 as well as remedial undertakings, for violations of NASD/FINRA rules, failing to establish and maintain a reasonable supervisory system including written procedures with regard to non-traditional ETFs and allowing its agents to recommend those products to customers without performing reasonable diligence to understand the risks and features associated with the products.

the products were a day trading instrument, and that accordingly, nor did his clients understand that. Thorne said his knowledge of the products came from television ads, watching the cable television business channel CNBC, and “Googling” them.

51. Thorne further acknowledged in hindsight he would not have bought the non-traditional ETFs in the five client accounts, and would have liquidated them earlier rather than holding them for an extended period of time.

**FIRST CAUSE OF ACTION**  
**Unsuitable Investments - Dishonest or Unethical Practices**  
**Under Section 61-1-6(2)(a)(ii)(G) of the Act**

52. Under Utah Admin. Code Rule R164-6-1g(C)(3), applicable to agents through (D)(7), it is a dishonest or unethical practice to recommend the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the investor’s investment objectives, financial situation and needs, and other relevant information known by the agent.
53. Likewise, NASD Conduct Rule 2310, applicable during the relevant period,<sup>10</sup> required that an agent have reasonable grounds for believing a recommendation is suitable for a client on the basis of facts, if any, disclosed by the customer as to other security holdings, financial situation, and needs. Moreover, prior to executing a recommended transaction, Rule 2310 required that the agent make reasonable efforts to obtain information concerning the client’s financial status, tax status, investment objectives, and other information relevant to whether the investment is suitable for an individual. Violation of

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<sup>10</sup>That rule was superseded by FINRA Rule 2111 which became effective in 2012.

an NASD/FINRA Rule is also a basis for sanctions under Utah Admin. Code Rule R164-6-1g(C)(28), applicable to agents through (D)(7).

54. Finally, as described herein, FINRA Regulatory Notice 09-31 alerted securities agents of specific risk and suitability issues presented by leveraged and inverse ETFs, concluding that they “typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.”
55. Thorne’s recommendations of leveraged inverse ETFs were unsuitable, warranting sanctions under Section 61-1-6(2)(a)(ii)(G) of the Act, because, among other things:
- a. his clients were unsophisticated, retired, and elderly retail investors;
  - b. his clients were not seeking a speculative, high-risk investment product;
  - c. the ETF holdings were not part of any sophisticated investing strategy;
  - d. the ETFs were purchased and held long term contrary to their intended design and purpose as a daily tool as described in their prospectuses, FINRA Notice and WFA guidance; and
  - e. Thorne didn’t understand the products sufficiently to make a suitability determination, particularly as to appropriate use in a portfolio, risk, volatility and divergence from the products’ stated objectives and benchmarks when held for more than one trading session.

## **SECOND CAUSE OF ACTION**

### **Dishonest or Unethical Practices Under Section 61-1-6(2)(a)(ii)(G) of the Act**

56. Thorne further engaged in dishonest or unethical practices, warranting sanctions under 61-1-6(2)(a)(ii)(G), by setting new accounts up in order to maintain his clients’ positions in unsuitable investments. None of the investors’ personal financial situations or goals

had changed to justify claiming “trading and speculation” as their investment objective. Furthermore, during his interview Thorne claimed that the WFA “trading and speculation” investment objective – as changed by Thorne or reflected in the new accounts created in 2009 – was actually the same level of risk acceptance as in the original A.G. Edwards accounts but simply a matter of different verbiage. That is false.

57. Thorne also falsely reported on new account applications that R.J. and K.C. were employed when they were retired.

**REQUEST FOR RELIEF**

The Division requests that, based upon Respondent’s willful violations of the Act, pursuant to § 61-1-6 of the Act, the Commission enter an order censuring him and imposing a fine in the amount of \$55,000.00.

Dated this 19 day of November, 2015.



Kenneth O. Barton  
Director of Compliance  
Utah Division of Securities

Approved:



Thomas M. Melton  
Assistant Attorney General