

State of Missouri Office of Secretary of State

Case No. AP-10-45

IN THE MATTER OF:

TRACY WAYNE MITCHELL, CRD No. 5521674
and GUIDEPOST FINANCIAL LIMITED
LIABILITY COMPANY;

Respondents.

CONSENT ORDER

SUMMARY OF ENFORCEMENT SECTION'S ALLEGATIONS

1. The Enforcement Section of the Missouri Securities Division ("Enforcement Section") alleged that Respondent Guidepost Financial Limited Liability Company ("Guidepost") engaged in unregistered investment adviser activity in violation of Sections 409.4-403(a), RSMo. (Cum. Supp. 2009), and that Respondent Tracy Wayne Mitchell ("Mitchell") engaged in dishonest and unethical practices in violation of Section 409.4-412(d)(13) and engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit upon another person in violation of Section 409.5-502(a)(2), RSMo. (Cum. Supp. 2009), and that this conduct constitutes grounds to discipline Respondents under Section 409.4-412 and/or Section 409.6-604, RSMo. (Cum. Supp. 2009).
2. Respondents and the Enforcement Section desire to settle the allegations and matters raised by the Enforcement Section relating to the alleged activity by Respondents.

CONSENT TO JURISDICTION

3. Respondents and the Enforcement Section stipulate and agree that the Commissioner has jurisdiction over these Respondents and these matters pursuant to the Missouri Securities Act, Chapter 409, *et seq.*
4. Respondents and the Enforcement Section stipulate and agree that the Commissioner has authority to enter this Order pursuant to Section 409.6-604(h), RSMo. (Cum. Supp. 2009), which provides:

"The commissioner is authorized to issue administrative consent orders in the settlement of any proceeding in the public interest under this act."

WAIVER AND EXCEPTION

5. Respondents waive their rights to a hearing with respect to this matter.
6. Respondents waive any rights that they may have to seek judicial review or otherwise challenge or contest the terms and conditions of this Order. Respondents specifically

forever release and hold harmless the Missouri Office of Secretary of State, Secretary of State, Commissioner of Securities, and their respective representatives and agents from any and all liability and claims arising out of, pertaining to, or relating to this matter.

7. Respondents and the Securities Division stipulate and agree that, should the facts contained herein prove to be false, the Missouri Securities Division reserves the right to pursue any and all legal or administrative remedies at its disposal.

CONSENT TO COMMISSIONER'S ORDER

8. Respondents and the Enforcement Section stipulate and agree to the issuance of this Consent Order without further proceedings in this matter, agreeing to be fully bound by the terms and conditions specified herein.
9. Respondents agree not to take any action or to make or permit to be made any public statement creating the impression that this Order is without factual basis. Nothing in this paragraph affects Respondents' (a) testimonial obligations; (b) right to take legal or factual position in defense of litigation or in defense of other legal proceedings in which the Commissioner of Securities is not a party; or (c) right to make public statements that are factual.
10. Respondents agree that they are not the prevailing party in this action since the parties have reached a good faith settlement.
11. Respondents neither admit nor deny the allegations made by the Enforcement Section, but consent to the Commissioner's Findings of Fact, Conclusions of Law, and Order as set forth below solely for the purposes of resolving this proceeding and any proceeding that may be brought to enforce the terms of this Consent Order.

COMMISSIONER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. FINDINGS OF FACT

12. Respondent Tracy Mitchell ("Mitchell") has a business address of 1525 East Republic Road, Suite A-120, Springfield, Missouri 65804. Mitchell is registered in Missouri through the Central Registration Depository with number 5521674.
13. Mitchell was a Missouri-registered investment adviser representative with Gradient Advisors from February 17, 2010 through March 2, 2011. For the period August 19, 2009, to February 17, 2010, Mitchell was a Missouri-registered investment adviser representative with Gradient Investments, LLC ("Gradient Investments"), an affiliate of Gradient Advisors. From September 15, 2008, through July 22, 2009, Mitchell was a Missouri-registered investment adviser representative for Envision Investment Advisors, LLC ("Envision"). From May 15, 2008, through November 5, 2008, Mitchell was a Missouri-registered investment adviser representative for Redhawk Wealth Advisors, Inc. ("Redhawk").
14. Respondent Guidepost Financial Limited Liability Company ("Guidepost"), is a Missouri limited liability company with its office at 1525 East Republic Road, Suite A-120, Springfield, Missouri 65804. Guidepost was organized in the state of Missouri

on January 10, 2007, for the purpose of providing financial services to the general public. Documents filed with the Missouri Secretary of State list Mitchell as the organizer, manager, and registered agent of Guidepost. Guidepost has not notice-filed with Missouri as a federal covered investment adviser and is not registered in Missouri as an investment adviser or a broker-dealer.

15. Gradient Advisors is a federal covered investment adviser with its home office at 4570 Churchill Street, Suite 100, Shoreview, Minnesota 55126. Gradient Advisors' registration was approved by the U.S. Securities and Exchange Commission ("SEC") on February 10, 2010, and Gradient Advisors notice-filed in Missouri on February 16, 2010. Gradient Advisors is registered through the Investment Adviser Registration Depository ("IARD") with number 152665.
16. Gradient Investments is a federal covered investment adviser with its home office at 4570 Churchill Street, Suite 200, Shoreview, Minnesota 55126. Gradient Investments is registered through the IARD with number 141726. Gradient Investments' registration was approved by the SEC on December 1, 2009, and Gradient Investment notice-filed in Missouri on December 1, 2009. For the period October 22, 2007, through December 8, 2009, Gradient Investments was a Missouri-registered investment adviser.
17. As used herein, the term "Respondents" refers to Mitchell and Guidepost.
18. A senior citizen residing in Ozark, Missouri ("MR1") stated that MR1 attended a free-lunch seminar conducted by Mitchell in June 2009 and that Mitchell encouraged investors to sell their securities and/or annuities and take surrender penalties in order to purchase equity index annuities ("EIAs"). Mitchell stated that the bonus feature of the EIA would pay for the surrender fees and investors would never lose money investing in an EIA. Although MR1 was provided with a sign-up sheet and encouraged to schedule a subsequent one-on-one meeting with Mitchell, MR1 did not attend a subsequent appointment with Mitchell.
19. Mitchell contracted with at least two (2) FMOs that made contractual arrangements for Mitchell with various insurance companies. In addition, these FMOs provided Mitchell with marketing and training support to sell EIAs. These marketing materials included, but were not limited to, seminar handouts, brochures, seminar invitations, and mailing lists for potential seminar attendees.
20. Mitchell utilized free-lunch and dinner seminars as his primary marketing tool for selling EIAs. Mitchell specifically targeted retirees and individuals fifty-five years and older in his seminar marketing material.
21. During his seminars, Mitchell usually discussed the volatility of the markets, highlighting both the risks involved with investing in the markets and the various costs associated with mutual funds, stocks, bonds, and variable annuities. Mitchell would contrast the volatility and costs associated with investments in the market with features of fixed annuity and EIA investments that he claimed would provide safety and remove market risk.
22. During his seminars, Mitchell also described the EIA as containing the same safety features as a fixed annuity, and that the EIA could also link to a market index.

Mitchell would indicate that the EIA had no downside market risk, but there was a downside in the form of the potential for no growth.

23. In or around 2008, after spending a number of years engaging in EIA sales through seminars and contrasting EIAs with securities, Mitchell sought to obtain a Series 65 license and affiliate with an investment advisory firm. According to Mitchell, a Series 65 license would serve as a marketing tool for his business, “lend credibility” to his EIA recommendations, and ensure he was compliant with the securities laws.
24. After being referred by an FMO, GamePlan Financial Marketing, LLC, of Woodstock, Georgia (“GamePlan”), Mitchell took the Series 65 exam and registered as an investment advisor representative (“IAR”) with Redhawk in 2008. From August 2009 until March 2011, Mitchell was an IAR for either Gradient Investments or Gradient Advisors.
25. Mitchell’s “Professional Profile” provided through his membership in the National Ethics Bureau (“NEB”) indicated that Mitchell had completed his Series 65 exam, which allowed Mitchell to “advise clients concerning their mutual funds, stocks, bonds & other securities,” and “[teach] investors how to preserve their assets, increase their income and reduce income taxes.” This material was contained in packets that were provided to attendees at Mitchell’s seminars.
26. Mitchell’s business card stated that Mitchell was an “Investment Advisor [sic] Representative” with Guidepost. Mitchell’s business card did not disclose that he was, in fact, registered as an IAR with Gradient Advisors or that Guidepost was Mitchell’s limited liability company under which Mitchell markets his insurance services.
27. Mitchell’s seminar invitation also marketed his credentials by prominently displaying Mitchell’s IAR designation. Approximately one-fourth (1/4) of the invitation is dedicated to introducing Mitchell as “Your Investment Advisor [sic] Representative.” The introductory paragraph of the invitation states that Mitchell is a “financial educator and advisor” and that he has “developed a specialty in teaching retirees how they may preserve their principal and protect their income.”
28. Mitchell’s seminar invitations included, among other things, the following:
 - Is your Annuity SAFE?
 - What your banker doesn't want you to know about CD's
 - 80% of tax returns are prepared incorrectly!
 - Is there a difference between Advisors and brokers? *Know the Facts!*
29. In addition to Mitchell’s Professional Profile, business card, and seminar invitation, Guidepost’s website also touted Mitchell’s credentials and experience. The website stated that Mitchell’s goal was “to be the most comprehensive retirement planner and investment advisor [sic] based upon [his] experience, professional judgement [sic] and skills.” The website also stated that, since 1995, Mitchell has been “providing [Mitchell’s] clients with unbiased and independent financial advice.”
30. Mitchell’s stated goals included “superior financial planning,” providing education “on the most current financial products and opportunities,” conducting business with “integrity and diligence,” and offering guidance in the “fulfillment of your asset

retention and estate conservation goals.” In addition, the website stated that Mitchell’s services for his clients include “preparing and implementing comprehensive personal retirement & financial plans, annual asset advisory & management review, and mortgage services.”

31. According to the website, the primary focus of Guidepost was “to provide sound advice to those that are approaching [sic] or in retirement” and that, in part, Guidepost’s research and efforts are spent on “finding the tools and information that can help the retiree maintain or increase income”
32. Although Mitchell’s marketing materials espoused Mitchell’s status as an IAR, his seminars promoted insurance products over stocks, bonds, mutual funds, or other equity products.
33. While Mitchell’s marketing materials and website stated and Mitchell’s seminar presentations talked about the importance of having a financial plan in place and the subtle differences between a stockbroker (broker-dealer agent) and “Independent Investment Advisor,” the only products Mitchell promoted were fixed and indexed annuities, which are insurance products. Mitchell promoted these insurance products without thoroughly detailing the potential benefits or risks the annuities may have in comparison to the benefits and/or risks of other investment vehicles, such as CDs, stock, bonds, mutual funds, or variable annuities.
34. Although Guidepost and Mitchell hold themselves out as an investment adviser and an IAR and financial planning professional to the senior market, gathering assets to manage as an investment adviser representative was not Mitchell’s focus when he obtained his Series 65. Instead, Mitchell and Guidepost used Mitchell’s IAR as a marketing tool to attract new insurance clients, and Mitchell continued to concentrate on EIA sales as his primary source of income.
35. Currently, according to Mitchell, approximately seventy-five to eighty percent (75-80%) of his income is derived from EIA sales.
36. During an April 14, 2010, on-the-record interview with the Enforcement Section (“Mitchell’s OTR”), Mitchell acknowledged that he is not experienced in managing assets. In addition, Mitchell stated that he relied on and continues to rely on GamePlan and other FMOs to provide him with the marketing and training support necessary to expand his annuity business.
37. According to GamePlan’s website, GamePlan is one of the top producing “financial marketing organizations in the United States” and offers “custom-tailored marketing programs and exclusive incentives and promotions” for increased sales in EIAs, fixed annuities, and other insurance products.
38. In 2010 GamePlan offered incentives to GamePlan affiliated producers that included, among other things:
 - a. trips to the Caribbean shoreline in Puerto Rico, San Juan, and the Vieques Island;
 - b. a Producer Partnering Program that allowed GamePlan affiliated producers to increase paychecks;

- c. a Referral Program that allowed GamePlan affiliated producers to earn additional money through referrals; and
 - d. marketing reimbursement.
39. The GamePlan website indicated extensive product and marketing training to help grow the GamePlan affiliated producer's business. However, it did not indicate that any education would be given to affiliated producers that would address the suitability of EIA sales.
 40. During Mitchell's OTR, Mitchell acknowledged that he has a fiduciary duty to his clients as an IAR. Mitchell stated that he understood that this fiduciary duty meant he is required to put his clients' needs before his own.
 41. According to Mitchell, when Mitchell is presenting a seminar and dealing with members of the public, Mitchell tries to meet his fiduciary duties.
 42. Mitchell was a member of the NEB, and Mitchell provided a copy of NEB's "Ethics Check" to everyone who attended Mitchell's seminars.
 43. NEB is a fee-based membership organization that approves individual membership based on existing information NEB receives from third-party regulatory and judicial sources. According to NEB's website, however, NEB provides "no guaranteed assurance or warranty of the character or competence of its members."
 44. In addition to his NEB membership, Mitchell stated he is a Chartered Federal Employee Benefits Consultant ("ChFEBC"), and the NEB and ChFEBC logos were indicated on his business card.
 45. Mitchell did not disclose on his marketing materials or in his seminars that the ChFEBC was not a designation accredited by either the National Commission for Certifying Agencies or the American National Standards Institute, that two of the three parts of the ChFEBC training course consisted entirely of marketing and sales techniques, or that the entire training could be finished in approximately one week.
 46. For the period October 2, 2008, through July 16, 2009, Mitchell held six (6) free lunch seminars throughout the Branson/Springfield, Missouri, area.
 47. During this approximate period, Mitchell held approximately fifty-five (55) subsequent meetings with seminar attendees for whom he made investment recommendations. Those prospective clients for whom Mitchell made investment recommendations were Missouri investors and were primarily over the age of sixty (60).
 48. Of those fifty-five (55) subsequent meetings with over eighty (80) individuals, Mitchell made recommendations to five prospective clients that would result in the liquidation of securities. Mitchell made a recommendation to five other individuals that resulted in the transfer of a pre-existing variable annuity into an EIA. Only two of those recommendations for transfer of a variable annuity would have resulted, if followed, in a surrender penalty. Mitchell also made two recommendations for transfer of another EIA into an EIA through Mitchell.

49. Mitchell stated that when he holds a subsequent meeting with a seminar attendee, he inquires as to whether the prospective client wants to reduce risk. If so, Mitchell explains that he/she will either have to go to a bank for a CD, or the prospective client may want to look at a fixed annuity or an EIA that Mitchell sells because a fixed annuity or EIA “does not have market exposure”
50. In or around July 2009, a 62-year old resident of Battlefield, Missouri (“MR2”), met with Mitchell after attending one of Mitchell’s seminars. MR2 was preparing to retire from the U. S. Postal Service (“USPS”) and had questions about the thrift savings plan (“TSP”) MR2 had through the USPS.
51. MR2 was interested in placing the assets from MR2’s TSP in “something that would make money” every year and would not lose the principal investment. MR2 also indicated that the assets in the TSP would be used for income.
52. Mitchell recommended that MR2 purchase an RBC Choice 12 EIA (“RBC Annuity”). Based on Mitchell’s recommendation, MR2 purchased the RBC Annuity with assets from MR2’s TSP.
53. The RBC Annuity contained, among other things, the following provisions:
 - a. a 12-year surrender period, during which time MR2 could access only ten percent (10%) of the annuity value per year without incurring surrender charges; and
 - b. at the end of the surrender period, RBC had the option to move all of MR2’s assets to the fixed account, paying a minimum of one percent (1%).
54. MR2 invested sixty-one thousand, five hundred thirty dollars (\$61,530) in the RBC Annuity. These funds represented approximately one hundred percent (100%) of MR2’s liquid investment assets.
55. Mitchell placed one hundred percent (100%) of MR2’s annuity assets in the fixed account, which had a guaranteed interest rate the first year of two and eight-tenths percent (2.8%) and a five percent (5%) up front bonus. On MR2’s first anniversary date, while still working with Mitchell, he reallocated to index options.
56. MR2 stated that, although MR2 knew Mitchell had placed MR2’s assets in an insurance product, MR2 was not aware that MR2 had purchased an EIA.
57. In addition, MR2 stated that Mitchell, among other things:
 - a. did not discuss investment products other than EIAs;
 - b. only provided information about the RBC Annuity;
 - c. did not explain the surrender charges or surrender period applicable to the RBC Annuity; and
 - d. never indicated to MR2 that there could be years with no appreciation of MR2’s annuity.

58. Although, according to Mitchell, MR2's investment in the RBC Annuity was to provide future income and, although MR2's investment in the RBC Annuity represented approximately one hundred percent (100%) of MR2's liquid net worth, Mitchell did not explain to MR2, among other things, that:
- a. for twelve (12) years, MR2 would only be able to withdraw ten percent (10%) of MR2's annuity each year without incurring a surrender charge;
 - b. for years two (2) through eight (8) of the annuity contract, the fixed account only paid interest at a rate of one and eight-tenths percent (1.8%); and
 - c. for years nine (9) through twelve (12), the minimum guaranteed rate of interest on the fixed account was only one percent (1%).
59. In or around August 2009, a seventy (70) year old resident of Springfield, Missouri ("MR3"), and spouse met with Mitchell concerning questions about MR3's annuity. MR3 and spouse had previously met Mitchell at a dinner seminar. According to Mitchell, MR3's spouse had heard that some annuities offered lifetime income benefit riders that guaranteed a lifetime income stream.
60. At the time MR3 met with Mitchell, MR3 had an annuity in the approximate amount of one hundred eighty-nine thousand, eight hundred ninety-seven dollars (\$189,897) with OM Financial Life Insurance Company ("OM Financial"), and MR3 and spouse were interested in knowing whether they could receive a lifetime income stream from that annuity.
61. After calling and talking to representatives of OM Financial, Mitchell informed MR3 that it was not possible to add an income benefit rider to MR3's current annuity, and the only way MR3 would be able to have a policy with a lifetime income stream was to surrender the OM Financial annuity contract and purchase an RBC Enhanced Choice 12 EIA.
62. Mitchell completed an annuity application form for the RBC Enhanced Choice 12 EIA, and on August 6, 2009, MR3 signed the application.
63. MR3 intended to roll over MR3's OM Financial annuity totaling one hundred eighty-nine thousand, eight hundred ninety-seven dollars (\$189,897) to fund the RBC Enhanced Choice 12 EIA, which would represent approximately fifty percent (50%) of MR3 and spouse's net investment assets.
64. The surrender of MR3's OM Financial annuity would have resulted in a substantial surrender penalty totaling more than twenty-five thousand dollars (\$25,000). Mitchell made MR3 aware of the surrender penalty prior to MR3 signing the application, but did not recommend to MR3 that MR3 not purchase the annuity.
65. In addition to the twenty-five thousand dollar (\$25,000) surrender charge, MR3's new RBC contract would have established a new twelve (12) year surrender period, with a first-year surrender penalty of approximately fourteen percent (14%).
66. Although Mitchell, as an IAR, had a fiduciary duty to MR3, Mitchell did not explain to MR3 that a lifetime income stream could also be obtained by either taking systematic monthly withdrawals or "annuitizing" MR3's current OM Financial

annuity (i.e., by converting MR3's assets in that annuity into a lifetime series of monthly payments).

67. Had MR3 either annuitized or established a systematic monthly withdrawal from MR3's current annuity with OM Financial, MR3 could have avoided surrender penalties and a new surrender period applicable to the RBC Enhanced Choice 12 EIA recommended by Mitchell.
68. After consulting with third parties, MR3 cancelled the transaction.
69. In or around April 2009, an eighty-two (82) year old resident of Springfield, Missouri (MR4), met with Mitchell to discuss MR4's finances. MR4 had previously met Mitchell at a dinner seminar. According to Mitchell, MR4 was looking for safety for MR4's investments and additional income.
70. Although MR4 already owned several annuities and approximately eighty-five percent (85%) of MR4's investments were illiquid, Mitchell recommended that MR4 exchange a Hartford Life Insurance Company variable annuity ("Hartford VA") for an EIA from American Equity Investment Life Insurance Company ("American Equity").
71. Based on Mitchell's recommendation, MR4 purchased an American Equity Advantage Gold EIA ("American Equity EIA") from Mitchell.
72. The total amount invested in the annuity was forty-three thousand thirty-three dollars (\$43,033), and the assets used to purchase the annuity were derived from the 1035 exchange of the Hartford VA.
73. The exchange of MR4's Hartford VA incurred a surrender charge of approximately four thousand six hundred dollars (\$4,600).
74. The American Equity EIA had a twelve (12) year surrender period, during which time MR4 could only access ten percent (10%) of MR4's money annually without incurring surrender charges.
75. Although many variable annuities have a fixed income account that would remove any market risk from the annuity, Mitchell did not discuss with MR4 whether or not MR4's Hartford VA had a fixed account and whether MR4 had the option of keeping the Hartford VA and moving the assets from the variable accounts to the fixed account without incurring any surrender charge.
76. When asked during Mitchell's OTR if it was a concern to Mitchell that MR4 would be ninety-four (94) years old before MR4's annuity was fully liquid, Mitchell replied that "[i]t's a concern to me . . . if it's a concern for the client"
77. In or around March 2009, a seventy-nine (79) year old resident of Willard, Missouri (MR5), met with Mitchell to discuss investments options for MR5. MR5 had previously attended one of Mitchell's luncheon seminars.
78. MR5 stated that MR5 had lost money in the stock market and wanted to transfer MR5's assets to a less volatile investment for approximately three (3) years, at which time MR5 believed rates on certificates of deposit ("CDs") would have increased.

79. After talking with MR5, Mitchell recommended that MR5 purchase an Aviva Income Select Plus EIA (“Aviva Annuity”).
80. On March 5, 2009, MR5 purchased the Aviva Annuity for ten thousand dollars (\$10,000), and the assets invested in the Aviva Annuity were derived from the liquidation of MR5’s mutual funds.
81. Although MR5 believed that the product MR5 purchased had a three (3) year duration, the Aviva Annuity actually had a ten (10) year surrender period, with a surrender penalty the first year of approximately sixteen percent (16%). According to MR5, Mitchell did not tell MR5 that the annuity was subject to surrender penalties for ten (10) years.
82. Mitchell created a document titled “Internal Suitability Fact Find for Annuity Recommendation” that indicated the reason for MR5’s purchase of the annuity was “growth.” However, Mitchell placed one hundred percent (100%) of MR5’s assets invested in the annuity in the fixed account that, for a period of three (3) years, paid an interest rate similar to that of a CD.
83. MR5 planned to move the assets back to MR5’s bank to a CD at the end of the three (3) year period if CD rates improved, and MR5 stated to the Enforcement Section that he would never invest in a 10-year annuity that paid interest of approximately one percent (1%) per year.
84. Although MR5 had desired a short-term investment until bank CD rates improved, Mitchell, in fact, recommended and sold MR5 an annuity that had a ten (10) year surrender period, that would incur substantial surrender penalties if surrendered during that ten (10) year period, and that had a minimum renewal rate after the first three (3) years of only one and three-fourths percent (1.75%).
85. In or around May 2009, a sixty-three (63) year old resident of Springfield, Missouri (“MR6”), met with Mitchell to discuss the possible disposition of assets MR6 had in a 401(k) plan. MR6 had previously attended one of Mitchell’s seminars. MR6 stated that Mitchell recommended “safety” for MR6’s assets so that MR6 would not lose any principal invested.
86. After this May 2009 meeting, MR6 purchased an American Equity Retirement Gold EIA (“American Equity EIA II”) from Mitchell with approximately one hundred seventy-two thousand dollars (\$172,000) derived from MR6’s 401(k).
87. In addition, MR6 also purchased an RBC Enhanced Choice 12 EIA (“RBC EIA II”) from Mitchell with approximately one hundred eighty-eight thousand dollars (\$188,000) derived from MR6’s non-qualified money-market assets. Both purchases were made on the sole recommendation of Mitchell.
88. The American Equity EIA II contract had a ten (10) year surrender period with a fourteen (14) year vesting schedule for the bonus that was attached to the contract. The RBC EIA II contract had a twelve (12) year surrender period with a first year surrender penalty of fourteen percent (14%).
89. According to records provided to the Enforcement Section by Mitchell, eighty percent (80%) of MR6’s investment assets were concentrated in these two EIAs.

90. When asked why Mitchell recommended MR6 purchase two (2) different annuities, Mitchell stated that the primary reason was that “[d]ifferent allocation options in the indexes are available with RBC than American Equity.”
91. Although Mitchell emphasized the importance of index allocation for MR6’s annuities, one hundred percent (100%) of MR6’s funds invested in the two (2) EIAs were allocated to the fixed accounts and, as of the date of the Petition, those assets still remained in the fixed accounts.
92. According to MR6, sometime in April 2010 Mitchell called MR6 for an account review, and as a result of that review, Mitchell did not recommend any change to MR6’s allocation.
93. When asked by investigators with the Enforcement Section if MR6 understood EIAs, MR6 stated that MR6 only knew the basics and took Mitchell’s word on what the product could do for MR6.
94. Although CDs, bonds, or other investment vehicles could have provided diversification to MR6’s portfolio without sacrificing liquidity, when asked if other investment vehicles had been recommended, MR6 stated that Mitchell did not recommend or discuss any products other than the EIAs MR6 purchased.
95. Mitchell has been registered and has held himself out as an IAR in the State of Missouri since May 15, 2008. However, the Enforcement Section was unable to find any evidence that Mitchell recommended products or investment options such as fixed or variable annuities, CDs, or mutual funds to his clients; instead, Mitchell only recommends EIAs to his clients.
96. Although Mitchell held himself out as an IAR and recommended to his clients that they purchase EIAs from him, he failed to provide written disclosures to his clients about the material conflicts of interest that could reasonably be expected to impair Mitchell’s rendering of unbiased and objective investment advice, including, but not limited to:
 - a. that Mitchell would materially benefit from the sale of the insurance products he recommended thorough the payment of commissions;
 - b. the amount of the commission that he would receive on any particular insurance product that he sold to his clients.
 - c. that Mitchell was acting in the capacity of an insurance agent when selling EIAs.
97. One of the primary features of an EIA that differentiates it from other investment vehicles is the manner in which returns can be enhanced based on gains in linked indices, while maintaining a guaranteed minimum return.
98. Although Mitchell recommended and sold EIAs to his clients, the Enforcement Section has uncovered no evidence that Mitchell recommended or placed his clients’ assets in the indexed accounts of the annuities sold at the inception of the account. Instead, assets were placed in fixed accounts, which simply provide a fixed interest return (currently around one (1%) percent), without allowing for the upside potential

of the indices.

99. Instead of recommending other less costly and less restrictive products that provide similar returns to the fixed accounts of the annuities sold, such as CDs, traditional fixed annuities, or recommending that clients place their money in the fixed accounts of existing annuities, Mitchell recommended and sold annuity products in which he would obtain a substantial commission and subject the client to surrender penalties, additional surrender periods, and/or higher costs.
100. The Enforcement Section uncovered no evidence that Mitchell had prepared any analysis of the financial situation and needs of his clients, or prepared and provided his clients with comparisons of options which may have met those needs, prior to recommending and selling his clients EIAs.
101. Mitchell failed to provide all of the information to his clients necessary for them to make an informed decision about whether or not to invest in an EIA. All of the six (6) Missouri residents interviewed by the Enforcement Section indicated that they did not understand critical aspects of the products they purchased through Mitchell, including but not limited to, caps, participation rates, or the different indexing methods. All six (6) Missouri residents stated that they relied on Mitchell to recommend the product most suitable for them.
102. On February 28, 2011, the Enforcement Section received information that Mitchell mailed a letter dated on January 20, 2011, to his clients regarding, among other things the Cease and Desist Order issued by the Missouri Commissioner of Securities on December 30, 2010. In this letter Mitchell states, among other things, that “[m]y compliance department with Gradient Advisors has reviewed the allegations and evidence and have found no wrongdoing on my part and are standing behind me 100%.”
103. On March 1, 2011, the Enforcement Section contacted Gradient Advisors and requested, among other things, the following information:
 - a. verification that Gradient Advisors had reviewed Mitchell’s January 20, 2011, letter prior to its dissemination to Mitchell’s clients;
 - b. verification that Gradient Advisors had approved Mitchell’s January 20, 2011, letter prior to its dissemination to Mitchell’s clients; and
 - c. verification that Gradient Advisors had, in fact, reviewed the “allegations and evidence” referenced in Mitchell’s letter and “found no wrongdoing on [Mitchell’s] part and are standing behind [Mitchell] 100%.”
104. On March 1, 2011, Gradient Advisors responded to the Enforcement Section’s request for verification and stated, among other things, the following:
 - a. that Gradient Advisors “was not aware of, nor approved the distribution of the letter sent to Mr. Mitchell’s clients”;
 - b. that Mitchell’s statement that “Gradient Advisors has reviewed the allegations and evidence and have found no wrongdoing . . .” was without basis and inaccurate; and

c. that Gradient Advisors “has never taken the position that the claims, allegations or evidence presented by the State of Missouri were without merit. . . .”

105. According to Mitchell’s CRD, Gradient Advisors opened an internal review on March 1, 2011, regarding the distribution of unapproved sales materials by Mitchell.
106. On March 3, 2011, the Enforcement Section received notice from Gradient Advisors that Mitchell submitted his resignation to Gradient Advisors on March 2, 2011, effective immediately.

II. CONCLUSIONS OF LAW

107. The Commissioner finds Respondents engaged in unregistered investment adviser activity in violation of Sections 409.4-403(a), RSMo. (Cum. Supp. 2009), and dishonest and unethical practices in violation of Sections in providing investment advice in violation of Section 409.5-501, RSMo. (Cum. Supp. 2009), and that this conduct constitutes grounds to discipline Respondents under Section 409.6-604, RSMo. (Cum. Supp. 2009).
108. The Commissioner, after consideration of the stipulations set forth above and on the consent of Respondents and the Enforcement Section, finds and concludes that the Commissioner has jurisdiction over Respondents and this matter and that the following Order is in the public interest, necessary for the protection of public investors and consistent with the purposes intended by Chapter 409, RSMo. (Cum. Supp. 2009).

III. ORDER

NOW, THEREFORE, it is hereby Ordered that:

1. Respondent Mitchell shall pay to the Missouri Secretary of State’s Investor Education and Protection Fund the sum of Seventy Thousand Dollars (\$70,000). Payment of Sixty Thousand Dollars (\$60,000) of this total amount will be suspended provided Respondent Mitchell is in compliance with the provisions of this Order and with the Missouri Securities Act of 2003. Payment of Ten Thousand Dollars (\$10,000) shall be sent within ten (10) days of the effective date of this Order to the Securities Division at 600 W. Main Street, Jefferson City, Missouri 65101, and shall be payable to the Missouri Secretary of State’s Investor Education and Protection Fund. The Division will send the money to the Missouri Secretary of State’s Investor Education and Protection Fund;
2. Respondent Mitchell is permanently BARRED from applying for registration as an investment adviser, broker-dealer, investment adviser representative, or agent in the State of Missouri;
3. Respondents Mitchell and Guidepost are jointly and severally ordered to pay Twelve Thousand Four Hundred Seventy-two Dollars (\$12,472) as the cost of this investigation. Payment of Seven Thousand Four Hundred and Seventy-two Dollars (\$7,472) of this total amount will be suspended provided Respondents are in compliance with the provisions of this Order and with the Missouri Securities Act of 2003. Payment of Five Thousand Dollars (\$5,000) shall be sent within ten (10) days of the effective date of this Order to the Securities Division at 600 W. Main Street,

Jefferson City, Missouri 65101, and shall be payable to the Missouri Secretary of State's Investor Education and Protection Fund. The Division will send the money to the Missouri Secretary of State's Investor Education and Protection Fund; and

4. Respondents shall pay their own costs and attorneys' fees with respect to this matter.

SO ORDERED:

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY, MISSOURI THIS 24TH DAY OF MAY, 2011.

ROBIN CARNAHAN
SECRETARY OF STATE

(Signed/Sealed)
MATTHEW D. KITZI
COMMISSIONER OF SECURITIES

Consented to by:
MISSOURI SECURITIES DIVISION

Nathan Soendker
Chief Enforcement Counsel

Approved as to Form:

David B. Cosgrove
Cosgrove Law, LLC
Attorney for Respondents

Tracy Mitchell, RESPONDENT