

Award
FINRA Dispute Resolution

In the Matter of the Arbitration Between:

Names of the Claimants

Shari Ackerman
James E. Majerik
Mary Anne Majerik
Ferrell Bush

Case Number: 08-01188

Name of the Respondent

Morgan Keegan & Company, Inc.

Hearing Site: Birmingham, Alabama

Nature of the Dispute: Customer vs. Member.

REPRESENTATION OF PARTIES

For Shari Ackerman ("Ackerman"), James E Majerik ("J. Majerik"), Mary Anne Majerik ("M. Majerik") and Ferrell Bush ("Bush"), hereinafter collectively referred to as "Claimants": Debra Brewer Hayes, Esq. and Eric Osteen, Esq., The Hayes Law Firm, P.C., Houston, Texas.

For Morgan Keegan & Company Inc., hereinafter referred to as "Respondent": Carl Burkhalter, Esq. and Andrea Morgan Greene, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: April 18, 2008.

Claimant J. Majerik signed the Submission Agreement: February 4, 2008.

Claimant M. Majerik signed the Submission Agreement: February 4, 2008.

Claimant Bush signed the Submission Agreement: February 13, 2008.

Claimant Ackerman signed the Submission Agreement: February 26, 2008.

Respondent signed the Submission Agreement: June 13, 2008.

Statement of Answer filed by Respondent on or about: July 24, 2008.

Request for Emergency Hearing Before Full Panel to Seek Partial Reconsideration of Discovery Order filed by Respondent on or about: December 22, 2008.

Response to Respondent's Request for Emergency Hearing Before Full Panel to Seek Partial Reconsideration of Discovery Order filed by Claimants on or about: December 31, 2008.

Motion to Dismiss with Prejudice for Failure to Comply with FINRA Rule 12204(b)(2) filed by Respondent on or about: January 16, 2009.

Response to Respondent's Motion to Dismiss with Prejudice for Failure to Comply with FINRA Rule 12204(b)(2) filed by Claimants on or about: January 26, 2009.

CASE SUMMARY

Claimants asserted the following causes of action: (1) breach of fiduciary duty; (2) breach of contract; (3) unsuitability; (4) failure to supervise; (5) violations of securities regulatory rules; (6) violations of the Alabama Securities Act; and, (7) common law claims. The causes of action relate to Claimants' investments in the Regions MK Select High Income-C Fund (RHICX), hereinafter referred to as the "Fund".

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested: (1) compensatory damages in the amount of \$150,000.00, comprised of: a) all net out of pocket losses in the accounts; (b) all charges to the accounts; and, (c) the lost earnings that the accounts would have earned if they had been properly invested; (2) pre-judgment interest at the maximum statutory interest rate on all losses sustained from the date of the transactions until the date of the award; (3) post-judgment interest at the maximum statutory interest rate; (4) rescission of the purchases of the Fund shares; (5) all costs, including hearing session fees, and costs in bringing this action, (6) attorneys' fees in bringing this action under Alabama statutory law, common law as well as under FINRA Rules of Fair Practice; 7) costs and expenses including expert witness fees; and, (8) punitive damages.

At the close of the hearing, Claimants increased their compensatory damages request to the amount of \$208,215.00, comprised of \$38,737.00 to Claimant Ackerman, \$131,520.00 to Claimants J. Majerik and M. Majerik and \$37,958.00 to Claimant Bush. Additionally, Claimants specified their request for pre-judgment interest in the amount of \$54,337.00.

In Respondent's Answer to the Statement of Claim, Respondent requested: (1) that the Panel reject Claimants' Statement of Claim in its entirety; (2) that its attorneys' fees and costs be paid by Claimants; and, (3) that forum fees be borne by Claimants.

At the close of the hearing, Respondent requested attorneys' fees in the amount of \$25,000.00 and that all hearing session fees be assessed against Claimants.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel acknowledges that they have each read the pleadings and other materials filed by the parties.

On or about December 22, 2008, Respondent filed a Motion for an Emergency Hearing Before the Full Panel to Seek Partial Reconsideration of Discovery Order. Therein, Respondent asserted [in a footnote] that Claimants failure to file the necessary opt-out notice required by FINRA Rule 12204 bars their entire claim and serves as an independent reason for Claimants' request for discovery to be denied. On or about December 23, 2008, the Panel conducted a pre-hearing conference with the parties on

this motion at which time the Panel agreed to allow time for Claimants to file a response to the motion. During the pre-hearing conference, Respondent raised the issue of Claimants' alleged non-compliance with the opt-out provisions of Rule 12204 of the Code of Arbitration Procedure, (the "Code"). Claimants agreed to discuss this issue in their response to Respondent's Motion for Partial Reconsideration. On or about December 31, 2008, Claimants filed their response to Respondent's Motion and asserted among other things, that the putative class action includes Respondent as well as many other defendants who are not subject to FINRA's jurisdiction, and thus not a part of this arbitration. Additionally, Claimants stated that Respondent has not fully briefed its request for dismissal of Claimants' claims.

On January 2, 2009, the Panel heard oral arguments from the parties on, among other things, Respondent's request for dismissal pursuant to Rule 12204 of the Code. On or about January 7, 2009, the Panel issued an Order that, among other things, directed Claimants to file their Rule 12204 opt-out Notice with FINRA Dispute Resolution no later than January 9, 2009. The Order further stated that Respondent may file a response to Claimants' Notice by January 16, 2009, and if needed, the Panel would conduct an additional pre-hearing conference to resolve any challenges to the sufficiency of Claimants' opt-out Notice.

On or about January 6, 2009, Claimants filed with FINRA Dispute Resolution, a Notice which stated that Claimants opt-out of the class action as to their claims against Respondent. Thereafter, on or about January 16, 2009, Respondent asserted a Motion to Dismiss this action in its entirety, with prejudice, due to Claimants' alleged failure to file a complete opt-out of the putative class action proceedings, in compliance with FINRA Rule 12204(b)(2). In response, Claimants stated among other things, that because the class action does not involve the same claims or the same defendants, and because Claimants have already opted-out of the claims against Respondent in any class action, Respondent's Motion to Dismiss should be denied. Following an executive session, the Panel issued an Order dated January 30, 2009, which granted Respondent's Motion to Dismiss, without prejudice, on the grounds that Claimants' [January 6, 2009] Notice did not meet the requirements of Rule 12204(b)(2). The Order stated that Claimants' Notice does not affirmatively state that they will not participate in the class action pending in the U.S. District Court for the Western District of Tennessee styled *In re Regions Morgan Keegan Open-End Mutual Fund Litigation* (Civil Action No. 2:07-CV-2784), hereinafter referred to as the "Class Action", or in any recovery that may result from the Class Action. The Panel granted Claimants the opportunity to re-file a Notice that complies with Rule 12204(b)(2), no later than February 9, 2009, failing which the Panel would dismiss the arbitration with prejudice.

On February 9, 2009, Claimants filed with FINRA Dispute Resolution a Notice that stated that Claimants will not participate in the Class Action, or in any recovery that may result from the Class Action. On February 10, 2009, the Panel issued an Order which stated that the Panel reviewed Claimants' February 9, 2009, opt-out Notice and found that the Notice meets the requirements of Rule 12204(b)(2), and accordingly, reinstated the case.

Respondent filed a Motion to Exclude Testimony and Bar the Presentation of Irrelevant Evidence Relating to Fund Management Issues within 20 days of the evidentiary

hearings, which the Panel determined not to consider under Rule 12503(a)(3) of the Code.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Respondent is liable and shall pay to Claimant Ackerman compensatory damages in the amount of \$38,737.00, pre-judgment interest specifically excluded.

Respondent is liable and shall pay to Claimant Bush compensatory damages in the amount of \$37,958.00, pre-judgment interest specifically excluded.

Respondent is liable and shall pay to Claimants Ackerman and Bush interest on their respective compensatory damage awards at the rate of 6% per annum accruing from the date the award is served until paid in full.

Respondent is liable and shall pay to Claimants Ackerman and Bush, costs in the amount of \$4,474.34, representing 66.7% of the "out-of-pocket expenses" set forth in the Affidavit of Debra Brewer Hayes in Support of Attorney Fees and Costs.

Claimants J. Majerik and M. Majerik's claims are denied in their entirety.

Respondent is liable and shall reimburse Claimants the sum of \$300.00, representing the non-refundable portion of the claim-filing fee paid by Claimants to FINRA Dispute Resolution.

Any and all claims for relief not specifically addressed herein, including Claimants' request for punitive damages and the parties' respective requests for attorneys' fees, are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution assessed a filing fee* for each claim:

Initial claim filing fee = \$1,425.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Respondent is a member firm.

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|-------------------------|--------------|
| Member surcharge | = \$1,700.00 |
| Pre-hearing process fee | = \$ 750.00 |
| Hearing process fee | = \$2,750.00 |

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

January 12- 16, 2009, adjournment by parties

The Panel waived the adjournment fee.

Contested Motion for Issuance of a Subpoena Fees

Fees apply for each decision on a contested motion for the issuance of a subpoena.

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| One (1) Decision on a contested motion for the issuance of a subpoena | |
| (1) One arbitrator @ \$200.00 | = \$200.00 |

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| Total Contested Motion for Issuance of Subpoenas Fees | = \$200.00 |
|---|------------|

1. The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees jointly and severally to Claimants.
2. The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees to Respondent.

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

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| Three (3) Pre-hearing sessions with a single arbitrator @ \$450.00 | = \$1,350.00 |
| Pre-hearing conferences: November 25, 2008 | 1 session |
| December 18, 2008 | 1 session |
| April 6, 2009 | 1 session |

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| Four (4) Pre-hearing sessions with Panel @ \$1,125.00 | = \$4,500.00 |
| Pre-hearing conferences: August 26, 2008 | 1 session |
| December 23, 2008 | 1 session |
| January 2, 2009 | 1 session |
| March 26, 2009 | 1 session |

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| Eight (8) Hearing sessions @ \$1,125.00 | | | = \$9,000.00 |
| Hearing Dates: | April 13, 2009 | 2 sessions | |
| | April 14, 2009 | 2 sessions | |
| | April 15, 2009 | 2 sessions | |
| | April 16, 2009 | 2 sessions | |

Total Hearing Session Fees = \$14,850.00

1. The Panel has assessed \$11,137.50 of the hearing session fees jointly and severally to Claimants.
2. The Panel has assessed \$3,712.50 of the hearing session fees to Respondent.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

ARBITRATION PANEL

J. Maxwell Williams - Public Arbitrator, Presiding Chairperson
Earle Park Kelley - Public Arbitrator
Richard David Schultz - Non-Public Arbitrator

Concurring Arbitrators' Signatures

| | |
|--|-------------------------|
| /s/ | 4/23/09 |
| _____ J. Maxwell Williams Public Arbitrator, Presiding Chairperson | _____ Signature Date |
| /s/ | 4/23/09 |
| _____ Earle Park Kelley Public Arbitrator | _____ Signature Date |
| /s/ | 4/23/09 |
| _____ Richard David Schultz Non-Public Arbitrator | _____ Signature Date |

April 23, 2009

Date of Service (For FINRA Dispute Resolution use only)

FINRA Dispute Resolution
Arbitration No. 08-01188
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Signature Date

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Public Arbitrator, Presiding Chairperson

Signature Date



Earle Park Kelley
Public Arbitrator

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Public Arbitrator, Presiding Chairperson

04-23-2009
Signature Date

Earle Park Kelley
Earle Park Kelley
Public Arbitrator

Signature Date

Richard David Schultz
Richard David Schultz
Non-Public Arbitrator

Signature Date

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