

**Award
FINRA Dispute Resolution**

In the Matter of the Arbitration Between:

Claimant
Richard Fornell, as Trustee of the
Fornell Enterprises, Inc. 401(k) Profit
Sharing Plan

Case Number: 10-02526

vs.

Respondent
Morgan Keegan & Company, Inc.

Hearing Site: Orlando, Florida

Nature of the Dispute: Customer vs. Member

REPRESENTATION OF PARTIES

For Claimant Richard Fornell, as Trustee of The Fornell Enterprises, Inc. 401(k) Profit Sharing Plan: Jeffrey Erez, Esq., Sonn & Erez, PLC, Fort Lauderdale, Florida.

For Respondent Morgan Keegan & Company, Inc.: S. Lawrence Polk, Esq. and Bryan M. Ward, Esq., Sutherland Asbill & Brennan, LLP, Atlanta, Georgia.

CASE INFORMATION

Statement of Claim filed on or about: May 27, 2010.
Richard Fornell, as Trustee of the Fornell Enterprises, Inc. 401(k) Profit Sharing Plan signed the Submission Agreement: May 5, 2010.
Opposition to Motion to Strike from Statement of Claim References to Irrelevant Regulatory Actions filed on or about: September 7, 2010.
Agreed Motion for Leave to Amend the Statement of Claim [with Amended Statement of Claim attached thereto] filed on or about: January 21, 2011.
Opposition to Motion in Limine to Exclude Evidence of Regulatory Actions and Regulatory Settlements filed on or about: November 28, 2011.

Statement of Answer [to Amended Statement of Claim] filed by Respondent on or about: March 8, 2011.
Morgan Keegan & Company, Inc. signed the Submission Agreement: June 14, 2010.
Motion to Strike from Statement of Claim References to Irrelevant Regulatory Actions filed on or about: August 10, 2010.
Reply in Support of Motion to Strike from Statement of Claim References to Irrelevant Regulatory Actions filed on or about: September 20, 2010.

Unopposed Motion to File Amended Answer [with Amended Answer attached thereto] filed on or about: October 7, 2011.

Motion in Limine to Exclude Evidence of Regulatory Actions and Regulatory Settlements filed on or about: November 21, 2011.

Reply in Support of Motion in Limine to Exclude Evidence of Regulatory Actions and Regulatory Settlements filed on or about: December 5, 2011.

CASE SUMMARY

Claimant asserted the following causes of action in the Statement of Claim, as amended: (1) violation of the Employee Retirement Income Security Act of 1974; (2) breach of fiduciary duty; (3) negligence; (4) negligent supervision; (5) fraud; and, (6) breach of contract. The causes of action relate to Claimant's investments in the RMK Select High Income Fund, RMK Select Intermediate Bond Fund, RMK High Income Fund; RMK Strategic Income Fund; RMK Advantage Income Fund; and, RMK Multi-Sector High Income Fund.

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

RELIEF REQUESTED

In the Statement of Claim, as amended, Claimant requested: (1) compensatory damages in the range of between \$100,000.00 and \$500,000.00; (2) punitive damages; (3) interest; (4) costs; (5) attorneys' fees; and, (6) such other and further relief deemed just and proper by the Panel.

At the close of the hearing, Claimant requested damages based on three distinct alternative theories: trading loss (\$337,000.00); benefit of the bargain (\$405,764.00); and, well-managed account (between \$194,976.00 and \$405,764.00), plus punitive damages equal to three times compensatory damages, costs of \$19,342.00, and an unspecified amount of attorneys' fees.

Respondent requested: (1) dismissal of this action; (2) assessment of all costs to Claimant; (3) an award of its preparation costs, travel expenses and fees; and, (4) such other further and general relief to which it may be entitled.

At the close of the hearing, Respondent requested attorneys' fees in the amount of \$197,092.00 and costs in the amount of \$40,000.00.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

Respondent filed a Motion to Strike from Statement of Claim References to Irrelevant Regulatory Actions in which Respondent asserted, among other things, that unproven regulatory allegations are legally and factually irrelevant to this arbitration and evidence

of regulatory actions is inappropriate in FINRA arbitrations because regulatory actions apply different procedures and lesser standards of pleading and proof. In response, Claimant asserted, among other things, that Respondent's motion is improper and legally unsupported. On or about October 11, 2010, the Panel issued an Order that denied Respondent's motion.

Claimant filed an Agreed Motion for Leave to Amend the Statement of Claim for the purpose of adding five more causes of action in this matter. On or about February 15, 2011, the Panel issued an Order granting Claimant's motion.

Respondent filed an unopposed Motion to File Amended Answer for the purpose of clarifying which of the RMK Funds at issue were purchased by Claimant during an Initial Price Offering and to include additional defenses to the claims at issue. On or about October 20, 2011, the Panel issued an Order granting Respondent's motion.

Respondent filed a Motion in Limine to Exclude Evidence of Regulatory Actions and Regulatory Settlements in which Respondent asserted that: (1) the motion is properly before the Panel; (2) regulatory allegations and settlements are admissible under FINRA rules and policies; (3) courts routinely exclude regulatory allegations and settlements because they have zero evidentiary weight; (4) Claimant's claims and allegations do not mirror the allegations in the regulatory actions; (5) admission of the regulatory allegations and settlements will unfairly prejudice Respondent and create undue confusion; (6) Claimant is clearly and improperly attempting to offer the regulatory settlements to prove liability; (7) regulatory settlements and allegations are not admissible under Federal Rule of Evidence 803(b); and (8) Rule 803(b) cannot be used as a back door vehicle to introduce evidence that is otherwise inadmissible under Rule 408. In response, Claimant asserted that: (1) the regulators' findings and conclusions are unquestionably relevant because they focus on the same fraud and other illicit conduct at issue in this case; (2) Respondent's motion is prohibited by FINRA's longstanding policy in favor of the "liberal introduction of evidence"; (3) even if the Federal Rules of Evidence did apply, the regulators' consent orders and findings are unquestionably admissible; and, (4) Respondent's motion relies on inapplicable, outdated and non-controlling decisions that have no precedential value in arbitration. On or about December 12, 2011, following a telephonic conference with the parties, the Panel issued an Order that granted Respondent's motion. The Order further stated that the Panel would not consider any references to the regulatory materials in Claimant's prehearing brief, nor will Claimant be able to refer to those materials in opening statements, questioning of witnesses, or closing arguments.

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:

The Panel finds that Respondent is liable on the claims of violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), breach of fiduciary duty, negligence and negligent supervision. Specifically, Claimant proved that Respondent, acting through Claimant's financial advisor, assumed the obligations of a co-fiduciary under ERISA. Claimant also proved that Respondent breached its fiduciary duties under Florida law by making unsuitable recommendations and by negligently failing to disclose material facts about the nature of the subject investments. Claimant failed to prove that Respondent had actual knowledge that its wrongful conduct had a high probability of causing damage to Claimant. Claimant did establish its right to an award of attorneys' fees, pursuant to 29 U.S.C. § 1132 (ERISA). However, because Claimant asserted during closing argument that the Panel lacked power under Florida law to determine the amount of fees and did not present any evidence of what fees were incurred, the Panel does not award any attorneys' fees to Claimant.

Respondent is liable for and shall pay to Claimant compensatory damages in the amount of \$194,976.00, plus interest at the maximum rate allowed under Florida law accruing from December 23, 2011 until the award is paid in full.

Respondent is liable for and shall pay to Claimant the sum of \$19,342.00, representing costs incurred by Claimant in connection with this arbitration proceeding.

Respondent is liable for and shall pay to Claimant the sum of \$300.00, representing reimbursement of the non-refundable portion of the initial claim filing fee previously paid by Claimant to FINRA Dispute Resolution.

The Panel's explanation of its decision in the Award is for the information of the parties only and is not precedential in nature.

Any and all claims for relief not specifically addressed herein, including Claimant's requests for punitive damages, are denied.

FEES

Pursuant to the Code of Arbitration Procedure, 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, as a party and a member firm, Respondent is assessed the following:

Member Surcharge = \$ 1,700.00
Pre-Hearing Processing Fee = \$ 750.00
Hearing Processing Fee = \$ 2,750.00

Contested Motion for Issuance of a Subpoena Fees

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

One (1) Decision on a contested motion for the issuance of a subpoena

(1) one arbitrator @ \$200.00 (maximum of \$600) = \$200.00

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

The Panel has assessed the total \$200.00 contested motion for issuance of a subpoena fee 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 arbitrator(s), including a pre-hearing conference with the arbitrator(s) that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ \$450.00/session = \$ 450.00
Pre-hearing conference: November 14, 2011 1 session

Three (3) Pre-hearing sessions with the Panel @ \$1,125.00/session = \$3,375.00
Pre-hearing conferences: November 1, 2010 1 session
November 29, 2011 1 session
December 12, 2011 1 session

Eleven (11) Hearing sessions @ \$1,125.00/session = \$12,375.00
Hearing Dates: December 19, 2011 2 sessions
December 20, 2011 2 sessions
December 21, 2011 2 sessions
December 22, 2011 3 sessions
December 23, 2011 2 sessions

Total Hearing Session Fees = \$16,200.00

The Panel has assessed hearing session fees in the amount of \$1,125.00 to Claimant in connection with the pre-hearing conference conducted on November 29, 2011.

The Panel has assessed the balance of hearing session fees in the amount of \$15,075.00 to Respondent.

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

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ARBITRATION PANEL

Marc Kalish	-	Public Arbitrator, Presiding Chairperson
Kathryn J. Toronto	-	Public Arbitrator
Jane L. Lawless	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures



Marc Kalish
Public Arbitrator, Presiding Chairperson

1/6/2012

Signature Date

Kathryn J. Toronto
Public Arbitrator

Signature Date

Jane L. Lawless
Non-Public Arbitrator

Signature Date

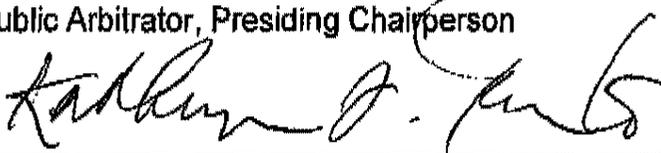
Date of Service (For FINRA Dispute Resolution office use only)

ARBITRATION PANEL

Marc Kalish	-	Public Arbitrator, Presiding Chairperson
Kathryn J. Toronto	-	Public Arbitrator
Jane L. Lawless	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

Marc Kalish
Public Arbitrator, Presiding Chairperson


Signature Date

1-7-12

Kathryn J. Toronto
Public Arbitrator

Signature Date

Jane L. Lawless
Non-Public Arbitrator

Signature Date

Date of Service (For FINRA Dispute Resolution office use only)

