

**Award**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant  
Callas Foundation, Inc.

Case Number: 10-00606

vs.

Respondent  
Morgan Keegan & Company, Inc.

Hearing Site: Atlanta, Georgia

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Nature of the Dispute: Customer vs. Member

**REPRESENTATION OF PARTIES**

For Callas Foundation, Inc., hereinafter referred to as "Claimant": James A. Dunlap, Jr., Esq., James A. Dunlap Jr. & Associates LLC, Atlanta, GA.

For Morgan Keegan & Company, Inc., hereinafter referred to as "Respondent": David King, Esq. and M. Jason Hale, Esq., Bass, Berry & Sims PLC, Nashville, TN.

**CASE INFORMATION**

Statement of Claim filed on or about: February 8, 2010.  
Claimant signed the Submission Agreement: February 4, 2010.

Statement of Answer filed by Respondent on or about: May 11, 2010.  
Respondent signed the Submission Agreement: February 23, 2010.

Claimant's Motion for Relief Against Respondent's Unauthorized Use of Private Financial Information of Non-Parties (Motion for Relief) filed on or about: May 2, 2011.  
Respondent's Response to Claimant's Motion for Relief filed on or about: May 6, 2011.  
Supplement to Respondent's Response to Claimant's Motion for Relief filed on or about: May 6, 2011.

Respondent's Motion in Limine to Exclude Evidence Relating to Claims of Fund Mismanagement filed on or about: May 25, 2011.  
Claimant's Response to Respondent's Motion to Exclude Evidence of Fund Mismanagement filed on or about: June 3, 2011.

Respondent's Motion in Limine to Exclude Evidence Relating to Time-Barred and Extinguished Claims filed on or about: May 25, 2011.  
Claimant's Response to Respondent's Motion in Limine to Exclude Evidence Relating to Time-Barred and Extinguished Claims filed on or about: June 3, 2011.

Claimant's Motion to Exclude Evidence and Testimony Due to Auditor Withdrawal of Opinion and Declaration of Unreliability of RMK Fund Financial Statements (Motion to Exclude Evidence and Testimony Due to Auditor Withdrawal of Opinion) filed on or about: June 9, 2011.

Respondent's Opposition to Claimant's Motion to Exclude Evidence and Testimony Due to Auditor Withdrawal of Opinion filed on or about: July 21, 2011.

Respondent's Motion in Limine to Exclude Regulatory Settlements filed on or about: July 1, 2011.

Claimant's Opposition to Respondent's Motion in Limine to Exclude Regulatory Settlements filed on or about: July 5, 2011.

Claimant's Motion for Sanctions and Other Relief (Motion for Sanctions) filed on or about: September 23, 2011.

Respondent's Opposition to Claimant's Motion for Sanctions and Other Relief and Respondent's Cross-Motion for Sanctions (Cross-Motion for Sanctions) filed on or about: October 7, 2011.

Claimant's Reply in Support of Motion for Sanctions, Motion to Strike Respondent's Response to Motion to Compel Production Disclosing Offers in Compromise (Claimant's Motion to Strike) and Response to Respondent's Cross-Motion for Sanctions filed on or about: October 10, 2011.

Respondent's Opposition to Claimant's Motion to Strike filed on or about: October 21, 2011.

Claimant's Reply to Respondent's Opposition to Claimant's Motion to Strike filed on or about: October 25, 2011.

Respondent's Supplement to its Opposition to Claimant's Motion for Sanctions and Other Relief filed on or about: November 17, 2011.

### **CASE SUMMARY**

Claimant asserted the following causes of action: misrepresentation and failure to disclose material facts; violation of NASD and NYSE rules; omissions; breach of fiduciary duty; constructive fraud; breach of contract; common law fraud; negligence; breach of duty to supervise; negligent supervision; violations of federal securities laws; violations of Georgia law including the Georgia Securities Act; and, respondeat superior. The causes of action relate to the purchase of shares of RMK Advantage Income Fund and RMK Multi-Sector High Income Fund in Claimant's account.

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

### **RELIEF REQUESTED**

Claimant requested compensatory damages in excess of \$343,221.27, well-managed damages if Claimant's account had been properly invested, pre- and post-judgment interest at the legal rate, statutory damages pursuant to the Georgia Securities Act, costs of arbitration including filing fees and expert witness fees, attorneys' fees, punitive damages, and such other and further relief provided by law and equity.

Respondent requested that this action be dismissed, that all FINRA costs and assessments be borne by Claimant, that Respondent be awarded its costs and attorneys' fees, and such other further and general relief to which it may be entitled.

### **OTHER ISSUES CONSIDERED AND DECIDED**

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

In the Motion for Relief, Claimant asserted, among other things, that Respondent made unauthorized and illegal use and disclosure of private financial information which belonged to non-parties. In its Response to the Motion for Relief and its Supplement thereto, Respondent asserted, among other things, the following: Respondent did not engage in unauthorized use of private information; and, Claimant's Motion for Relief is untimely.

On or about May 27, 2011, the Chairperson entered an Order concerning Claimant's Motion for Relief which stated in pertinent part as follows: "The Chairperson has interpreted this motion as a motion to preclude admission of this information at the trial of this matter. Such a decision should be made by the full Arbitration Panel at the time of trial."

In the Motion to Exclude Evidence and Testimony Due to Auditor Withdrawal of Opinion, Claimant asserted, among other things, that the RMK Funds' auditor has declared that the 2006, 2007 and 2008 RMK Funds financial statements cannot be relied upon – presumably because they were false when made. In its Opposition to Claimant's Motion to Exclude Evidence and Testimony Due to Auditor Withdrawal of Opinion, Respondent asserted, among other things, the following: the financial statements have not been found to be incorrect; and, the letter from the accountant and the Form 8-K filing go to the evidentiary weight of the financial statements and not their admissibility.

In the Motion in Limine to Exclude Evidence Relating to Claims of Fund Mismanagement, Respondent asserted, among other things, the following: the Alabama Supreme Court has determined that claims like those asserted by Claimant in this action constitute shareholder derivative claims and any evidence relating to those claims should be barred from this proceeding; the undersigned arbitrators (Panel) should apply Maryland law to determine that Claimant's fund mismanagement claims are derivative in nature because the funds at issue were incorporated in Maryland. In its Response to Respondent's Motion to Exclude Evidence of Fund Mismanagement, Claimant asserted, among other things, the following: Claimant is not asserting a shareholder derivative action; Claimant is not suing to recover for injury to the rights of the Maryland corporations that own the RMK funds; and, Respondent's effort to exclude evidence invites the Panel to commit reversible error under the Federal Arbitration Act.

In the Motion in Limine to Exclude Evidence Relating to Time-Barred and Extinguished Claims, Respondent asserted, among other things, the following: all claims related to Claimant's 2004 and 2005 purchases are barred by the applicable statutes of limitations and/or statutes of repose; Claimant's Tennessee Consumer Protection Act claims are barred by the statutes of repose; and, Claimant's Tennessee Consumer Protection Act

claims are likewise deficient as a matter of law. In its Response to Respondent's Motion in Limine to Exclude Evidence Relating to Time-Barred and Extinguished Claims, Claimant asserted, among other things, the following: statutes of limitation do not apply to arbitrations; and, Claimant's claims are tolled due to Respondent's concealment.

In the Motion in Limine to Exclude Regulatory Settlements, Respondent asserted, among other things, the following: the regulatory settlements do not remove Respondent's right to a fair hearing and to defend itself; the regulatory settlements are irrelevant and should be excluded under concepts of fairness and rules of evidence; Claimant is held to a higher standard of proof than the regulators and may not use the regulatory settlements as a means of lowering the bar; and, introduction of the regulatory settlements will unfairly prejudice Respondent and will confuse the issues and unnecessarily extend the proceedings. In its Opposition to the Motion in Limine to Exclude Regulatory Settlements, Claimant asserted, among other things, the following: the multi-state task force made findings of fact admissible under FRE 803(8)(c); federal courts hold that findings of fact and conclusions of law in an SEC consent order are admissible; the facts obtained by the regulators are clearly relevant; and, Respondent's prejudice arguments are without merit.

On or about August 11, 2011, the Panel entered an order concerning Respondent's Motion in Limine to Exclude Evidence Relating to Claims of Fund Mismanagement, Respondent's Motion in Limine to Exclude Evidence Relating to Time-Barred and Extinguished Claims, Claimant's Motion to Exclude Evidence and Testimony Due to Auditor Withdrawal of Opinion, and Respondent's Motion in Limine to Exclude Regulatory Settlements which stated in pertinent part as follows: "The Panel decided that the decision to exclude or allow any evidence or testimony will be made as each item of evidence or testimony is presented at the trial after appropriate specific verbal motions to exclude the evidence or testimony by the parties."

In the Motion for Sanctions and Reply in Support, Claimant asserted, among other things, the following: the Panel ordered Respondent to produce certain documents; Respondent did not produce a single document pursuant to the order; a failure to cooperate in the exchange of documents and information may result in monetary or other sanctions; and, the Panel can sanction a party for a failure to comply with any order of the Panel. In its Opposition to Claimant's Motion for Sanctions and the Supplement thereto, Respondent asserted, among other things, the following: Respondent has worked with Claimant to produce documents and information responsive to the Panel's order and has produced a number of documents; the new Arbitrator's Guide explains that sanctions are not proper when there is substantial justification for the failure to comply with the rules of discovery; and, the Arbitrator's Guide also warns that on occasion, parties may use the discovery process to harass or burden their opponent and arbitrators should take these discovery abuses into consideration when considering discovery issues.

In the Cross-Motion for Sanctions, Respondent asserted, among other things, the following: Claimant's Motion for Sanctions is predicated on false statements and deliberate misrepresentations to the Panel; Claimant is trying to force an economically irrational settlement of this case; and, the statements made in Claimant's Motion for Sanctions are false and Claimant's counsel knew they were false when he made them. In its Response to the Cross-Motion for Sanctions, Claimant asserted, among other things, the following: Respondent seeks sanctions against Claimant because Claimant's counsel tried to settle

the case and resolve Respondent's refusal to comply with the Panel's order; and, Respondent's Motion for Sanctions is without merit and should be denied.

In Claimant's Motion to Strike and the Reply thereto, Claimant asserted, among other things, the following: Respondent's response to Claimant's motion to compel should be stricken for improperly disclosing confidential settlement discussions and offers in compromise made by Claimant's counsel; Respondent disclosed offers in compromise clearly privileged under federal and state law; details of a settlement demand are privileged and should not be disclosed; and, Respondent never provided evidence on the issue of costs. In its Opposition to the Motion to Strike, Respondent asserted, among other things, the following: settlement discussions may be offered for a purpose other than proving liability of a claim; and, both federal and state law recognize exceptions to the rules of evidence when the settlement discussion is offered for a purpose other than proving liability for a claim such as to show bad faith of a party.

On or about November 22, 2011, the Panel issued an Order which denied Claimant's Motion for Sanctions, Respondent's Cross-Motion for Sanctions, and Claimant's Motion to Strike.

During the evidentiary hearing, the Panel considered Claimant's Motion for Relief, Claimant's Motion to Exclude Evidence and Testimony Due to Auditor Withdrawal of Opinion, Respondent's Motion in Limine to Exclude Evidence Relating to Claims of Fund Mismanagement, Respondent's Motion in Limine to Exclude Evidence Relating to Time-Barred and Extinguished Claims, and Respondent's Motion in Limine to Exclude Regulatory Settlements. The motions were considered by the Panel as they were raised during the hearing in whole or in part and rulings were made as necessary.

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, 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 compensatory damages in the sum of \$231,336.76 plus interest at the rate of 7% accruing from November 15, 2009 until the date of payment of the Award.

The Callas Foundation, Inc. (Claimant) is a charitable foundation administered primarily by Maria Callas (Ms. Callas). When Claimant opened its account at Morgan Keegan & Company, Inc. (Respondent) in 2003, the primary investment objective was growth and the form reflects two years experience in stocks and mutual funds with no experience in any type of bonds. A majority of the account was in cash and certificates of deposit. The registered representative assigned to Claimant's account (Registered Representative) was told by Claimant that it did not want to lose money. After originally recommending one of the RMK funds that was rejected, a recommendation was made to invest in the RMK Advantage Income Fund on December 29, 2004. That

recommendation was accepted and the RMK Advantage Income Fund, described as speculative with the possibility of loss of some or all of the investment, was accepted by Claimant. Subsequently in January of 2006, the RMK Multi-Sector High Income Fund was recommended by the Registered Representative and Claimant invested maturing certificates of deposit in the sum of \$247,845.00 in the RMK Multi-Sector High Income Fund. This transformed a charitable fund from over 60% in cash and certificates of deposit to over 60% in speculative bond funds. Claimant made inquiry when the two funds' value was beginning to decrease and was consistently told, including after the appointment of a new fund manager, to ride out the downturn. Ultimately, after the two funds lost hundreds of thousands of dollars, Claimant liquidated the two funds and transferred the proceeds to an account at another broker-dealer in November 2009. The total invested was \$327,478.59 with income of \$96,141.83 resulting in a cash loss in the account of \$231,336.76.

At no time, although Ms. Callas had some experience, was she advised or admonished that, while the two funds and their manager had achieved great success, high yield bond funds that were diversified with a majority of their investments in below investment grade or junk bonds, could be highly volatile. No communication from Respondent provided any recommendation as to the proper concentration of high yield bond funds in a charitable foundation which, as a result of its acquisition of the two funds, now had a majority of its holdings in high yield, high risk speculative bond funds. Although this was a charitable foundation, no exception report was generated and the account just sat with recommendations to ride out the downturn. When Ms. Callas made requests for information to the Registered Representative in 2008, calls were not returned and Ms. Callas was referred to links in the RMK reports for information by the Registered Representative's assistant. There was no discussion as to the goal of income and preservation of capital. This had been eliminated as a criteria on the account form. Preservation of capital was also not discussed with Ms. Callas as an objective.

Both the investment for Claimant and the customer specific analysis should have resulted in the recommendation of a substantially less speculative fund or group of funds for Claimant, but the RMK funds were the "hot" success item at the time. Maria Callas was a business woman who had limited investment experience. Little due diligence, if any, occurred to determine her degree of investment sophistication. Nevertheless, Ms. Callas followed the "ride out" recommendations, but ultimately, and late in the game, exercised her discretion in November of 2009 to liquidate the account and stop the bleeding from the two funds.

Although Ms. Callas was given written materials (brochure and prospectus) there was no clear evidence that she was adequately briefed and understood the risks of these investments. No evidence was presented showing a recommended diversified portfolio across various asset classes appropriate for Claimant's objectives of growth, income, and preservation of capital. There was no evidence presented that this account was adequately supervised since it was over weighted with high risk investments, and inappropriate for the objectives of Claimant. There was no evidence that Ms. Callas was adequately presented with other options at the time the investments declined. She felt unable to communicate with her advisor when she needed his help. The Panel believes that the loss would have been substantially smaller if Claimant had a diversified or less concentrated allocation in its portfolio. There was no testimony that a

diversification recommendation option or the risks of concentration were ever discussed with Ms. Callas.

The investment recommendation for Claimant was unsuitable and allowing a charitable trust to have a majority concentration in speculative bond funds while it had a known primary objective of growth was improper. While there were requests for statutory relief under the Georgia Securities Act, attorneys' fees, expert witness fees, costs of the proceeding, and punitive damages, the Panel concludes that Claimant bears some responsibility for the losses and not liquidating earlier. The Panel declines to award attorneys' fees and expert witness fees and concludes that the parties should each be responsible for half of the FINRA fees and costs incurred in this arbitration.

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

Any and all relief not specifically addressed herein, including Claimant's request for punitive damages, is 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 process fee = \$ 750.00

Hearing process fee = \$2,750.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

June 13-17, 2011, adjournment by Respondent = \$1,125.00

The Panel has assessed the total adjournment fee of \$1,125.00 to Respondent.

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

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

The Panel has assessed \$100.00 of the contested motion for issuance of subpoena fee to Claimant.

The Panel has assessed \$100.00 of the contested motion for issuance of 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:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00/session = \$ 900.00  
Pre-hearing conferences: May 26, 2011 1 session  
December 9, 2011 1 session

Six (6) Pre-hearing sessions with the Panel @ \$1,125.00/session = \$6,750.00  
Pre-hearing conferences: July 8, 2010 1 session  
June 2, 2011 1 session  
August 11, 2011 1 session  
August 22, 2011 1 session  
November 22, 2011 1 session  
November 29, 2011 1 session

Nine (9) Hearing sessions @ \$1,125.00/session = \$10,125.00  
Hearing Dates: December 12, 2011 2 sessions  
December 13, 2011 2 sessions  
December 14, 2011 2 sessions  
December 15, 2011 3 sessions

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Total Hearing Session Fees = \$17,775.00

The Panel has assessed \$8,887.50 of the hearing session fees to Claimant.

The Panel has assessed \$8,887.50 of the hearing session fees to Respondent.

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

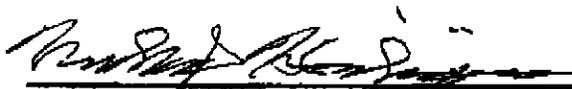


**ARBITRATION PANEL**

Michael M. Hachigian	-	Public Arbitrator, Presiding Chairperson
Henry L. Dahl, Jr.	-	Public Arbitrator
Charles W. Herf	-	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**

  
\_\_\_\_\_  
Michael M. Hachigian  
Public Arbitrator, Presiding Chairperson

January 5, 2011  
Signature Date

\_\_\_\_\_  
Henry L. Dahl, Jr.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Charles W. Herf  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

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

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**Concurring Arbitrators' Signatures**

Michael M. Hachigian  
Public Arbitrator,  
Presiding Chairperson

Signature Date

Henry L. Dahl, Jr.  
Public Arbitrator



Jan 6, 2012  
Signature Date

Charles W. Herf  
Non-Public Arbitrator

Signature Date

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

**ARBITRATION PANEL**

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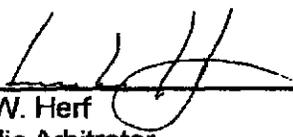
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\_\_\_\_\_  
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Signature Date

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