

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

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In the Matter of the Arbitration Between:

Name of the Claimant  
James Timothy McCarver

Case Number: 08-00039

Name of the Respondent  
Morgan Keegan & Company, Inc.

Hearing Site: Tampa, Florida

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

For James Timothy McCarver, hereinafter referred to as "Claimant": Jan Douglas Atlas, Esq. and Jeffrey A. Backman, Esq., Adomo & Yoss, LLP, Ft. Lauderdale, Florida and Dale Ledbetter, Esq., Ledbetter & Associates, P.A., Ft. Lauderdale, Florida.

For Morgan Keegan & Company, Inc., hereinafter referred to as "Respondent": Shepherd D. Tate, Esq. and Robert Horton, Esq., Bass, Berry & Sims, PLC, Memphis, Tennessee.

**CASE INFORMATION**

Statement of Claim filed on or about: January 2, 2008.

Claimant signed the Uniform Submission Agreement: December 21, 2007.

Statement of Answer filed by Respondent on or about: March 27, 2008.

Respondent signed the Uniform Submission Agreement: March 25, 2008.

Emergency Motion for Leave to Amend Statement of Claim filed by Claimant on or about: December 19, 2008.

Opposition to Emergency Motion for Leave to Amend Statement of Claim filed by Respondent on or about: December 29, 2008.

Reply in Connection with Claimant's Emergency Motion for Leave to Amend Statement of Claim filed by Claimant on or about: December 30, 2008.

Sur-Reply to Claimant's Reply in Connection with Claimant's Emergency Motion for Leave to Amend Statement of Claim filed by Respondent on or about: December 30, 2008.

Supplement to Reply in Support of Emergency Motion to Amend Statement of Claim filed by Claimant on or about: December 31, 2008.

Motion for Reconsideration of Order Dated January [8], 2009, Denying Claimant's Emergency Motion to Amend Statement of Claim filed by Claimant on or about: January 12, 2009.

Response to Motion for Reconsideration of Order Dated January [8], 2009 Denying Claimant's Emergency Motion to Amend Statement of Claim filed by Respondent on or

about: January 13, 2009.

Expedited Motion to Exclude Testimony and Generally Bar the Presentation of Irrelevant Evidence Relating to Management of the Funds filed by Respondent on or about: February 6, 2009.

Opposition to Respondent's Expedited Motion to Exclude Testimony and Generally Bar the Presentation of Irrelevant Evidence Relating to Management of the Funds filed by Claimant on or about: February 16, 2009.

Motion in Limine to Exclude Testimony or Other Evidence Relating to the History of Claimant's Accounts and Other Investments Aside from the RMK Funds filed by Claimant on or about: February 16, 2009.

### **CASE SUMMARY**

Claimant asserted the following causes of action: 1) unsuitable investments; 2) misrepresentations and omissions; 3) breach of fiduciary duty; 4) negligence; 5) failure of supervision; 6) breach of contract; 7) vicarious liability; and, 8) violation of FINRA rules. The causes of action relate to Claimant's investments in the following proprietary funds: RMK High Income Fund; RMK Multi-Sector High Income Fund; RMK Strategic Income Fund; RMK Advantage Income Fund; and, RMK Select High Income Open 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, Claimant requested: 1) compensatory damages in excess of \$1,250,000.00; 2) interest on the compensatory damage amount; 3) all costs of this proceeding; and, 4) such other and further relief as deemed just and proper by the Panel.

At the close of the hearing, Claimant modified his compensatory damage request to be in the amount of \$1,628,479.00, and further requested reimbursement from Respondent of his attorneys' fees and expert witness fees.

Respondent requested: 1) that the Statement of Claim be dismissed; 2) that all costs and assessments by FINRA be borne by Claimant; and, 3) that Respondent be awarded its preparation costs, travel expenses, attorneys' fees, expert witness fees and such other further and general relief to which Respondent may be entitled.

At the close of the hearing, Respondent further requested that the Panel make a finding that Claimant's expert witness report is misleading.

**OTHER ISSUES CONSIDERED AND DECIDED**

On or about January 8, 2009, the Panel issued an Order that denied Claimant's Emergency Motion for Leave to Amend Statement of Claim.

On or about January 22, 2009, the Panel issued an Order that, among other things, denied Claimant's Motion for Reconsideration of Order Dated January [8], 2009, Denying Claimant's Emergency Motion to Amend Statement of Claim.

Oral argument by the parties on Respondent's Expedited Motion to Exclude Testimony and Generally Bar the Presentation of Irrelevant Evidence Relating to Management of the Funds was heard by the Panel at the outset of the evidentiary hearing. Thereafter, the Panel determined to deny the motion.

Oral argument by the parties on Claimant's Motion in Limine to Exclude Testimony or Other Evidence Relating to the History of Claimant's Accounts and Other Investments Aside from the RMK Funds was heard by the Panel during the evidentiary hearing. Thereafter, the Panel determined to deny the motion.

At the close of Claimant's case-in-chief, Respondent moved to dismiss Claimant's failure to supervise claim, to which Claimant objected. The Panel heard oral argument by the parties on Respondent's motion and thereafter determined to grant the motion.

The parties have agreed that the Award in this matter may be entered in counterpart copies or that a signed handwritten 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 on the claim of negligence and shall pay compensatory damages to Claimant in the amount of \$100,000.00, plus interest at the legal rate, accruing from February 21, 2009 until the date the award is paid in full.

The parties' respective requests for attorneys' fees are denied.

Any and all claims for relief not specifically addressed herein, including Respondent's request for the Panel to make a finding that Claimant's expert witness report is misleading, are denied.

**FEES**

Pursuant to the Code of Arbitration Procedure (the "Code"), the following fees are assessed:

**Filing Fees**

FINRA Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$1,800.00

*\*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 that employed the associated person at the time of the events giving rise to the dispute. Respondent is a party to this dispute and a member firm.

Accordingly, the following fees have been assessed:

Member surcharge = \$2,800.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$5,000.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

No adjournment fees were incurred during this proceeding.

**Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

No three-day cancellation fees were incurred during this proceeding.

**Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

No injunctive relief fees were incurred during this proceeding.

**Discovery-Related Motion Fees**

Fees apply for each decision rendered on a discovery-related motion.

Eight (8) Decisions on discovery-related motions on the papers  
with one (1) arbitrator @ \$200.00/decision = \$1,600.00

Claimant submitted seven (7) discovery-related motions

Respondent submitted one (1) discovery-related motion

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Total Discovery-Related Motion Fees = \$1,600.00

The Panel has assessed \$1,000.00 of the discovery-related motion fees to Claimant.  
The Panel has assessed \$600.00 of the discovery-related motion fees 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.

No contested motion for issuance of subpoena fees were incurred during this proceeding.

**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:

Four (4) Pre-hearing sessions with a single arbitrator @ \$450.00/session = \$ 1,800.00

Pre-hearing conferences: August 14, 2008 1 session  
October 27, 2008 1 session  
November 3, 2008 1 session  
December 10, 2008 1 session

Two (2) Pre-hearing sessions with the Panel @ \$1,200.00/session = \$ 2,400.00

Pre-hearing conferences: May 6, 2008 1 session  
January 14, 2009 1 session

Nine (9) Hearing sessions with the Panel @ \$1,200.00/session = \$10,800.00

Hearing Dates: February 16, 2009 1 session  
February 17, 2009 2 sessions  
February 18, 2009 2 sessions  
February 19, 2009 2 sessions  
February 20, 2009 2 sessions

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Total Hearing Session Fees = \$15,000.00

The Panel has assessed \$7,500.00 of the hearing session fees to Claimant.  
The Panel has assessed \$7,500.00 of the hearing session fees to Respondent.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during this proceeding.

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

**ARBITRATION PANEL**

<i>William Glaser</i>	-	<i>Public Arbitrator, Presiding Chairperson</i>
<i>Richard Rudolph</i>	-	<i>Public Arbitrator</i>
<i>Marshall Wright</i>	-	<i>Non-Public Arbitrator</i>

**Concurring Arbitrators' Signatures**

      /s/        
William Glaser  
Public Arbitrator, Presiding Chairperson

February 24, 2009  
Signature Date

      /s/        
Richard Rudolph  
Public Arbitrator

February 24, 2009  
Signature Date

      /s/        
Marshall Wright  
Non-Public Arbitrator

February 24, 2009  
Signature Date

February 24, 2009  
Date of Service (For FINRA Dispute Resolution office use only)

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William Glaser  
Public Arbitrator, Presiding Chairperson

2-24-09

Signature Date

Richard Rudolph  
Public Arbitrator

Signature Date

Marshall Wright  
Non-Public Arbitrator

Signature Date

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William Glaser  
Public Arbitrator, Presiding Chairperson

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Signature Date

*Richard A. Rudolph*  
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Richard Rudolph  
Public Arbitrator

*2/24/09*  
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Signature Date

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Non-Public Arbitrator

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Signature Date

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Richard Rudolph  
Public Arbitrator

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Signature Date

*Marshall Feltton Wright*  
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Marshall Wright  
Non-Public Arbitrator

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

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