

**Award  
FINRA Dispute Resolution**

In the Matter of the Arbitration Between:

Name of the Claimant  
Joseph E. Mercer

Case Number: 09-03285

Name of the Respondent  
Morgan Keegan & Company, Inc.

Hearing Site: Orlando, Florida

Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

For Joseph E. Mercer, hereinafter referred to as "Claimant": Peter Mougey, Esq. and Kristian P. Kraszewski, Esq., Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A., Pensacola, Florida, and Brian Smiley, Esq., Smiley Bishop & Porter, LLP, Atlanta, Georgia.

For Morgan Keegan & Company, Inc., hereinafter referred to as "Respondent": George Sullivan, Esq., Greenberg Traurig, P.A., White Plains, New York; Kelly Moore, Esq., Greenberg Traurig, P.A., Denver, Colorado and Jennifer Tomsen, Esq. Greenberg Traurig, P.A., Houston, Texas.

**CASE INFORMATION**

Statement of Claim filed on or about: June 2, 2009.

Claimant signed the Submission Agreement: June 22, 2009.

Statement of Answer filed by Respondent on or about: October 8, 2009.

Respondent signed the Submission Agreement: July 21, 2009.

Motion to Exclude Irrelevant and Inadmissible Regulatory Materials filed by Respondent on or about: October 5, 2010.

Opposition to Motion in Limine to Exclude Irrelevant and Inadmissible Regulatory Materials filed by Claimant on or about: October 15, 2010.

**CASE SUMMARY**

Claimant asserted the following causes of action: (1) breach of fiduciary duty; (2) violation of NASD and NYSE rules, breach of contract and negligence; (3) fraud; (4) violation of the Florida Securities Investor Protection Act; and, (5) violation of the Tennessee Consumer Protection Act of 1977 ("TCA"). The causes of action relate to Claimant's investments in RMK Multi-Sector High Income Fund, RMK Advantage Income Fund and RMK Strategic Income Fund.

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

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### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested: (1) actual damages of approximately \$458,043.58; (2) damages pursuant to TCA §47-18-109(a)(3)(4); (3) interest on Claimant's losses at the legal rate; (4) costs, legal fees and expenses; (5) punitive damages; and (6) such other and additional damages and relief deemed just and equitable by the undersigned arbitrators (the "Panel").

At the close of the hearing, Claimant requested compensatory damages in the amount of \$572,540.00 under Chapter 517 of the Florida Statutes.

Respondent requested: (1) dismissal of this action; (2) assessment of all costs to Claimant; (3) preparation costs and travel expenses; (4) attorneys' fees; (5) expert witness fees; and, (6) such other further and general relief to which it may be entitled.

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

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

Respondent filed a Motion to Exclude Irrelevant and Inadmissible Regulatory Materials in which Respondent asserted, among other things, that regulatory complaints and allegations are inadmissible in this private arbitration proceeding because they are legally, factually and procedurally irrelevant to Claimant's allegations of misconduct. On or about October 20, 2010, the Panel issued an Order that granted Respondent's motion.

During the evidentiary hearing, FINRA Dispute Resolution provided the Panel with a copy of Claimant's response to Respondent's previously filed Motion to Exclude Irrelevant and Inadmissible Regulatory Materials, in which Claimant stated, among other things, that the motion is wrong on the law and the facts. The Panel, on its own initiative, revisited Respondent's Motion to Exclude Irrelevant and Inadmissible Regulatory Materials, which had been granted. Upon reconsideration, and after considering Claimant's opposition papers, which the Panel did not have before it earlier, the Panel vacated the previous Order and denied the motion. No objection was raised by Respondent.

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 on the claims of: violation of Chapter 517 of the Florida Statutes on three claims relating to purchases after March, 2004; breach of fiduciary duty; unsuitability and failure to supervise (Chapter 517 of the Florida Statutes and FINRA

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Rules of Conduct); violation of the Tennessee Consumer Protection Act on three claims relating to purchases after March, 2004; and fraud (Chapter 517 of the Florida Statutes). Accordingly, Respondent shall pay to Claimant compensatory damages in the amount of \$444,978.00, inclusive of pre-judgment interest in accordance with Chapter 517 of the Florida Statutes.

Claimant is the prevailing party on its Chapter 517 claim. As such, Respondent is liable for and shall reimburse Claimant attorneys' fees in an amount to be determined by a court of competent jurisdiction.

Respondent is not liable on the claims of violation of Chapter 517 of the Florida Statutes or the Tennessee Consumer Protection Act relating to the March, 2004 purchase, as these claims are time-barred by the respective five-year Statutes of Repose.

Respondent is also not liable on the claims of breach of contract, negligence or violation of NYSE rules.

Respondent is not liable to Claimant for punitive damages, or for treble damages under the Tennessee Consumer Protection Act.

Any and all relief not specifically addressed herein, including Claimant's request for punitive damages and Respondent's request for attorneys' fees, is denied.

**FEES**

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

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

**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:

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Two (2) Pre-hearing sessions with the Panel @ \$1,125.00/session = \$2,250.00  
Pre-hearing conferences: November 2, 2009 1 session  
April 12, 2010 1 session

Ten (10) Hearing sessions @ \$1,125.00/session = \$11,250.00  
Hearing Dates: October 25, 2010 2 sessions  
October 26, 2010 2 sessions  
October 27, 2010 2 sessions  
October 28, 2010 2 sessions  
October 29, 2010 2 sessions

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Total Hearing Session Fees = \$13,500.00

The Panel has assessed \$6,750.00 of the hearing session fees to Claimant.  
The Panel has assessed \$6,750.00 of the hearing session fees to Respondent.

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

**ARBITRATION PANEL**

Frank Brenner - Public Arbitrator, Presiding Chairperson  
J. Porter McClean - Public Arbitrator  
Arthur DeStefano - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

          /s/            
Frank Brenner  
Public Arbitrator, Presiding Chairperson

November 2, 2010  
Signature Date

          /s/            
J. Porter McClean  
Public Arbitrator

November 2, 2010  
Signature Date

          /s/            
Arthur DeStefano  
Non-Public Arbitrator

November 3, 2010  
Signature Date

November 3, 2010  
Date of Service (For FINRA Dispute Resolution office use only)

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Frank Brenner  
Public Arbitrator, Presiding Chairperson

11-2-2010  
Signature Date

\_\_\_\_\_  
J. Porter McClean  
Public Arbitrator

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Signature Date

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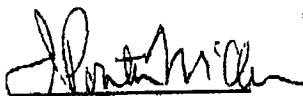
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Public Arbitrator, Presiding Chairperson

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Signature Date

  
J. Porter McClean  
Public Arbitrator

11/2/10  
Signature Date

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The Panel has assessed \$8,750.00 of the hearing session fees to Claimant.  
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Signature Date

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Arthur DeStefano  
Non-Public Arbitrator

11-3-2010  
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Signature Date

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