PIABA

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

www.piaba.org

SEC IA-BD STUDY GROUP MEETING NOTEBOOK

November 30, 2010

Securities Exchange Commission
100 F Street, NE
Washington, DC 20549

TABLE OF CONTENTS

Public Investors Arbitration Bar Association

November 15, 2010

Ms. Jennifer B. McHugh,
Senior Advisor to the Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: PIABA Meeting Request, Fiduciary Standard Study

Dear Ms. McHugh:

Public Investors Arbitration Bar Association (PIABA) is a national association of attorneys who represent public investors in securities arbitration proceedings. Since its formation in 1990, PIABA has pursued its mission of promoting and protecting the interests of public investors in all securities and commodities arbitration forums. Our members and the investors we represent have a strong interest in the laws and rules that govern financial regulation.

I write on behalf of PIABA to request an in-person meeting with you regarding the Fiduciary Standard Study currently underway at the Securities and Exchange Commission. It is our understanding that you are charged with oversight of the Study, and that the final report regarding the Study is due toward the end of 2010 or early in 2011.

<u>**In Attendance from PIABA**</u>
PIABA Board Members:

Jason Doss, Atlanta, GA
J. Pat Sadler, Atlanta, GA
Joseph Peiffer, New Orleans, LA
Peter Mougey, 2011 PIABA President, Pensacola, FL

<u>**Agenda**</u>

1. Overview of key points of PIABA Comment Letter dated September 3, 2010;

2. Benefits of uniform fiduciary standard;

3. Gaps in current standard of care; Principle-based regulatory approach provides better investor protection than transaction-based regulatory approach;

4. Limitations of using disclosures to satisfy fiduciary obligations;

5. Advertisements used by financial services companies such as broker-dealers and life insurance companies contribute to consumer confusion regarding scope of trust relationship; and

6. Written submissions by defrauded consumers and counsel evidencing that the trust relationship with financial advisors is the same regardless of business models.

Public Investors Arbitration Bar Association
2415 A Wilcox Drive Norman, OK 73069 Phone: (405) 360-8776 Fax: (405) 360-2063
Toll Free: (888) 621-7484 Website: *www.PIABA.org* Email: *piaba@piaba.org*

The above referenced members are available to meet with you in Washington, D.C. as follows:

November 29, 2010
November 30, 2010
December 1, 2010
December 6, 2010
December 7, 2010

If these dates will not coordinate with your calendar, please provide alternative date(s) that are acceptable and we will work around your availability.

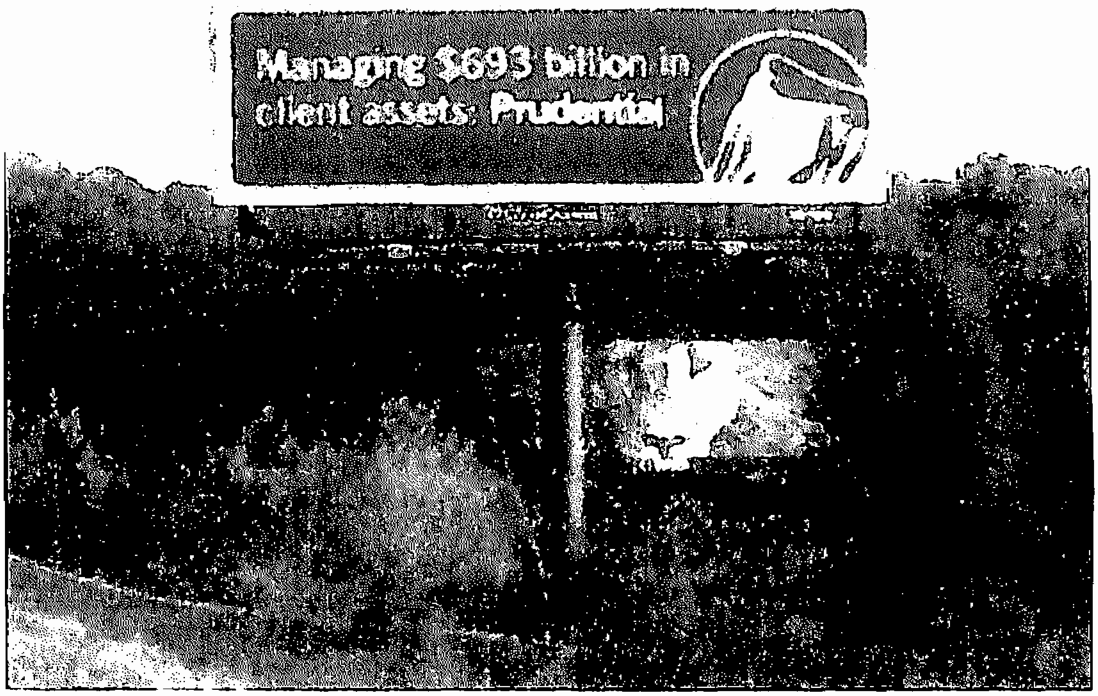
Ms. McHugh, thank you for your consideration. I look forward to hearing from you soon.

Sincerely yours,

Robin S. Ringo

Robin S. Ringo, PIABA
Executive Director

Public Investors Arbitration Bar Association
2415 A Wilcox Drive Norman, OK 73069 Phone: (405) 360-8776 Fax: (405) 360-2063
Toll Free: (888) 621-7484 Website: *www.PIABA.org* Email: *piaba@piaba.org*



Picture Taken On November 20, 2010, Marietta Georgia

Ameriprise Financial has more than 10,000 financial advisors. Linda is one of them.

We'll help you reach all your *milestones.* And your *mile-pebbles.*

Helping people achieve what they want in life is something we've focused on for the past 115 years. It's the goal of each of our over 10,000 advisors. And that may be why we've become America's largest financial planning company.

Our advisors take the time to listen to you and understand your dreams. We apply our disciplined approach, considering your dreams, all aspects of your finances as well as economic conditions. Only then can we find the appropriate financial solutions that can help you reach your individual goals. What's more we track your progress over time, adjusting your plan along the way. And that's how we help you reach life's milestones.

Meet us at ameriprise.com

Our Advisors. Your Dreams.
MORE WITHIN REACH

Ameriprise Financial

2

Merrill Lynch Wealth Management
A subsidiary of Bank of America Corporation

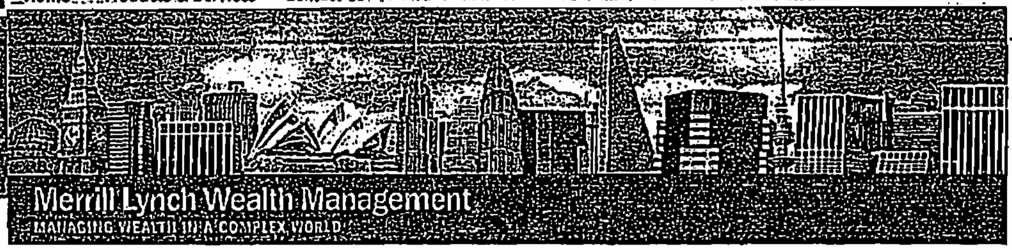
ML Home Client Login

Individual Investors

Home Products & Services Contact Us

Español | 中文 | 한국어

GLOBAL PRODUCTS AND SERVICES
From developing a strategy to monitoring your progress, Merrill Lynch offers you a partnership that provides a full spectrum of financial advice, products and resources.



Home > Products & Services > Advice & Market Intelligence

Advice & Market Intelligence

Access to global opportunities. A disciplined planning approach. A network of specialized expertise. These are merely the beginning of Merrill Lynch's commitment to you. As we develop a deep understanding of you and your aspirations, we will put those strengths to work for you around the world to help you meet your goals.

While it has become easier for private investors to access world financial markets, the nature of global investing has become more complex. The ability to understand and take advantage of emerging trends and opportunities is essential to sustaining and growing your wealth.

Your Merrill Lynch Financial Advisor will take the time to gain a deep understanding of your unique situation, priorities and goals. Drawing on Merrill Lynch's best-in-class Global Research, your Financial Advisor will help to identify new opportunities in changing markets and present wealth management strategies that are aligned with your objectives. Working closely with you, your Financial Advisor will employ a Wealth Management Process that looks far beyond investments — and borders — to create tailored strategies and deliver solutions to help you achieve long-term goals for you and your family.*

* Not available in all jurisdictions.

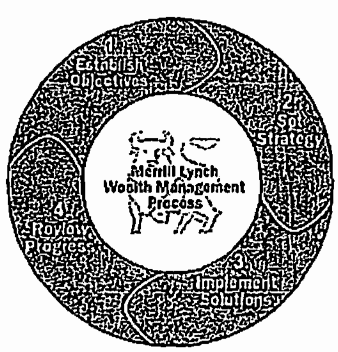
Advice and Marketing Intelligence Products and Services:

Skilled Experts:
At Merrill Lynch, your personal Financial Advisor provides the highest-calibre advice and guidance to help you manage wealth in the global investment marketplace. Drawing on the depth of Merrill Lynch's resources and expertise in 40 countries around the world, your Financial Advisor acts as your single point of contact to help you take advantage of global opportunities and find investment solutions that work for you.

Leading Global Research:
With a presence in financial markets around the world, Merrill Lynch provides in-depth analyses of macroeconomic trends, asset allocation strategies, global credit structures, equities and fixed income securities. Our BAS-ML Equity Research analysts provide detailed equity research on more than 2,850 companies in more than 20 industries worldwide. We conduct thorough analyses of fixed income products and instruments, including U.S. Treasury Inflation Index Notes and zero coupon bonds. Our analysts also provide extensive coverage of G-11 and E-10 currencies, including daily reviews of major market themes and a more comprehensive biweekly analysis of currency trends and issues.

Wealth Management Process:
Based on a comprehensive understanding of your unique needs and circumstances, your Financial Advisor will work with you to assess and analyze your current assets and liabilities, short- and long-term investment objectives, and tolerance for risk.

To put the right investments to work for your situation, your Financial Advisor will use a disciplined Wealth Management Process that follows four key steps. Throughout this process, your Financial Advisor will create a tailored investment strategy and will help you to select solutions from a broad platform of institutional-grade financial products that are aligned with your investment objectives. The four steps of the process are as follows:



1) **Establish Objectives:** During the first phase, your Financial Advisor will work closely with you to identify and prioritise your short- and long-term goals.

2) **Set Strategy:** Once your objectives, risk tolerance and investing time horizon are defined, your Financial Advisor will develop an asset allocation strategy to set you on track to achieving your goals.

3) **Implement Solutions:** In this step, your Financial Advisor will propose investments and solutions that are consistent with your strategic asset allocation.

4) **Review Progress:** Your Financial Advisor will meet with you periodically to review your objectives, strategies and performance, assessing your ongoing ability to achieve your financial goals and making adjustments as necessary.

Global Investment Strategy:
Your Merrill Lynch Financial Advisor will also employ a systematic approach to global asset allocation, carefully diversifying your portfolio in order to manage global risk. During this process, your Financial Advisor will help you select a combination of cash and cash equivalents, securities, investment funds and structured products that are consistent with your risk-return profile.

ML Online Preview
Preview our online service for account information and investment research.
PREVIEW

RISK TOLERANCE EVALUATOR
Calculate your risk-tolerance score.
START

OTHER ML SITES
Select a Site

GLOBAL OFFICE LOCATOR
Locate a Merrill Lynch Office Near You.
more

GLOBAL RESEARCH HIGHLIGHTS
Macro Focus Reports from our Global Research Team
Available in:
English

GWM SPOTLIGHTS

Jun 22, 2010
Merrill Lynch Global Wealth Management and Capgemini Release 14th Annual World Wealth Report Wealth Recovery Nearly Compensates for 2008 Losses - HNWI Population Growing at 17.1 Percent While HNWI Wealth Reaches $39 Trillion
› More

Jun 15, 2010
BofA Merrill Lynch Fund Manager Survey Finds Investor Confidence Eroded But Fears Over Euro Have Peaked Record Move Out of Energy Stocks in Wake of Gulf Spill
› More

May 18, 2010
BofA Merrill Lynch Fund Manager Survey Finds Investors Retreating to U.S. Equities as Growth Fears Rise
› More

3

Home | Our Story | Wealth Management | Investing | Tools | Site Search | Contact Us

Morgan Keegan

Quick Quote: Enter Symbol Here

Client Access: Preview
Enter Client ID
Enter Password

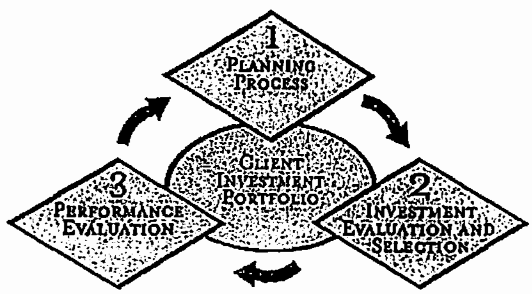
Getting Started | Financial Planning | Investment Planning | Executive Services | Retirement Plans | RMK Trust

Need Help Navigating?

WEALTH MANAGEMENT – OUR PROCESS

Morgan Keegan is committed to a comprehensive approach of providing an array of financial services to our clients. Through our Wealth Management Consulting process, we coordinate investment planning, financial planning and estate planning services by addressing four primary areas:

- Creating and Growing Wealth
- Protecting and Preserving Wealth
- Planning for the distribution of wealth during life in the most tax advantaged way
- Planning for the distribution of wealth at death in the most tax advantaged way



Our Wealth Management Consulting approach can be split into two primary components – investment planning process and financial planning process. Once appropriate investments have been selected, the focus turns to addressing the financial planning side of the equation.

After the investment plan has been designed and implemented, we remain your long-term partner by providing ongoing monitoring of your investment portfolio and periodic assessments of the plan to assure that it continues to be appropriate moving forward.

This unique process allows us to provide an unparalleled level of service for our clients. The end result is a complete, customized plan that is designed to meet your long-term financial goals.

Private Client Group Home | Our Story | Wealth Management | Investing | Tools | Career Opportunities | Contact Us | Site Map

Please send questions or comments to mkinfo@morgankeegan.com.

Morgan Keegan Terms and Conditions | Morgan Keegan Privacy Policy | New Account Information | Dow Jones Terms of Use

Change Font Size on this Site: A A A A

Working With A Financial Advisor

What's It Like to Be With Wells Fargo Advisors?
Well, for us it's a commitment. It's about honoring our relationship with you and being fully invested in your success. It's about being with you every step of the way - through every life event, every stage of the investment planning process, every triumph and every challenge.

Our commitment to you will not change. That's what it means to be with Wells Fargo Advisors. So, who are you with?

To talk with a financial advisor about getting started with your own personalized investment plan, call (866) 927-0812.

Our Process
Life is a process. So that's how we approach working with you, realizing change is constant and your investment plan must evolve and adapt to keep up. Learn about our in-depth investment planning process .

Listen, Understand, Clarify

We'll listen closely to what you have to say. We want to understand what's important to you and what you have planned for your life. This will help us clarify your specific goals.

Intelligent Financial Solutions

Once we've clarified your goals, we'll work closely with you to develop intelligent financial solutions that make sense for your unique situation.

In-Depth Analysis & Regular Feedback

We'll help you stay on track to meet your goals and help you make changes to your investment plan and asset allocation when appropriate.

We're With You Every Step of the Way

Your needs and goals will change over time, and when they do, we'll help you make adjustments to your investment plan as needed. We want to make sure you're living your life the way you want to live it.

Until Zaha Hadid reinvented architecture, she would not rest. Nor would Patrik Schumacher, her business partner (London, 1993)

Until my client *knows* she comes first.

Until I understand what drives her.

And what slows her down.

Until I know what makes her leap out of bed in the morning.

And what keeps her awake at night.

Until she understands that I'm always thinking about her investments.

(Even if she isn't.)

Not just at the office.

But at the opera.

At a barbecue.

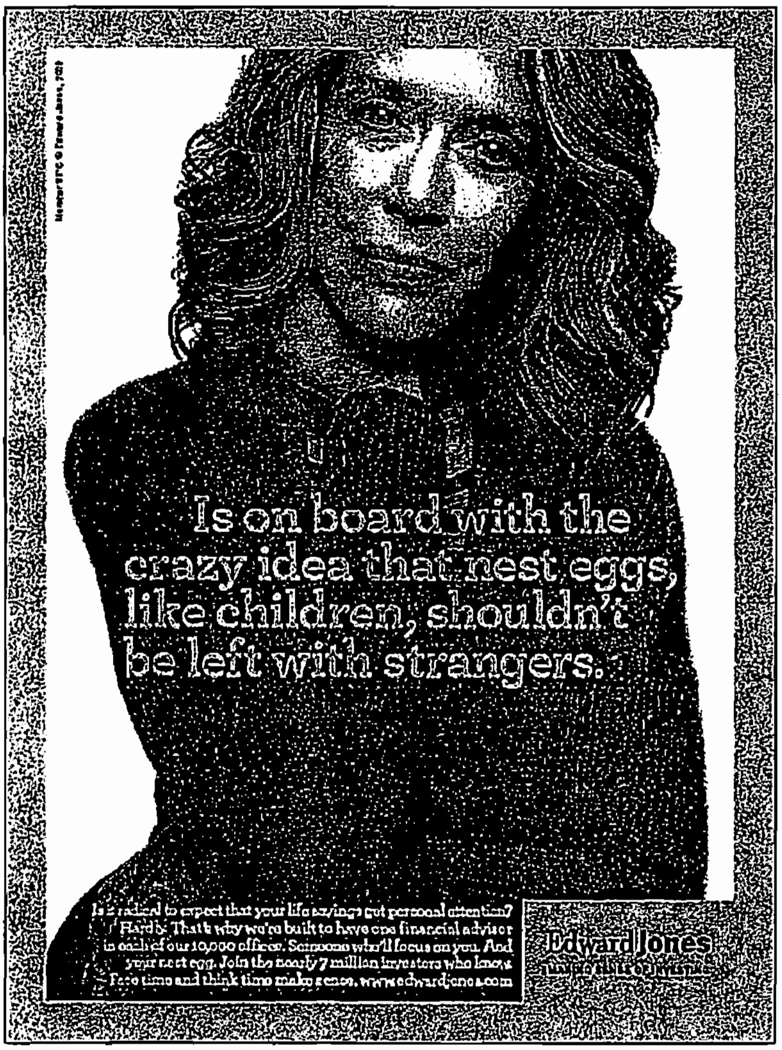
In a traffic jam...

Until *her* ambitions feel like my ambitions.

Until then...

Ads Archive / Print, Magazine & Newspaper Ads

Edward Jones: Crazy idea



Please subscribe to download hi-resolution digital version

View this advert

Download high resolution version

Released: October 2009
Brand name: Edward Jones
Agency: CRAMER-KRASSELT

Credits & Description:

Advertising Agency: Cramer-Krasselt/Chicago, USA
CCO: Marshall Ross
Creative Directors: Gary Doyle, Christina Calvit, Sherry Scharschmidt
Executive Producer: Sergio Lopez
Director: Jeffery Plansker
Producer: Kira Carstens
Production Company: Supply & Demand
Editor: Noah Herzog

Advertising campaign: Edward Jones (Time Matters)

Edward Jones: Crazy idea
Print ads
Brand: Edward Jones
By CRAMER-KRASSELT
In USA

Edward Jones: Audacity to believe
Print ads
Brand: Edward Jones
By CRAMER-KRASSELT
In USA

Latest Edward Jones Ads & Commercials

8

Our Principles
Who Should Invest With Us
Our Financial Advisors
Who They Are
Day In the Life
Recruiting & Training
Your Community Branch
How They Work
Choose
Awards & Recognition
Our History

Our Financial Advisors

At Edward Jones, we like to say that our financial advisors have a good bedside manner. What exactly do we mean by that?

Personal Attention
Just like when you go to the doctor, our financial advisors believe in providing one-on-one service in the privacy of their own offices - or even your home, if you prefer. They listen to your needs and goals and offer a personal "diagnosis" in language that you understand. And long after your appointment, you can count on them to be familiar with your history and provide answers to future questions and concerns.

We realize that our level of service might seem a little unconventional. But why should you expect anything less than personalized, one-on-one attention when it comes to your financial security? Choose the following to learn more about the way we serve our clients.

Who They Are
You've probably seen your financial advisor in your neighborhood from time to time. But if not, you can learn all about him or her here.

Day in the Life
It takes a great deal of dedication to be a successful financial advisor. Get a closer look at how our financial advisors spend their days.

Recruiting & Training
We look for specific qualities in our potential financial advisors. Learn more about what makes an ideal candidate, and what we do to train them.

Your Community Branch
We prefer convenience. That's why our branch offices are located next to the grocery store rather than in high rise office buildings. Learn why.

How They Work
We walk up and greet people with a smile and a handshake. It's a little old-fashioned, but we think it's the best way to start building relationships. Find out why.

Over 10,000 offices.
Find one near you.

Street Address
City
State Zip FIND

RELATED LINKS

Interested in a career with Edward Jones?

CONFESSIONS OF WORKING WEALTH

My daughter just moved out. Now my mother wants to move in.

Not exactly the retirement I planned.

You've never run from responsibility. That's just the kind of person you are. Whether it's your family, your friends, or your coworkers—people have always relied on you. But how will you balance the promises you've made to others with the promises you've made to yourself?

Perhaps it's time to throw out your notions of what you can talk about with a Financial Advisor. At Smith Barney, we can help you plan and navigate tough family issues that may affect everything from your cash flow and investment choices to your estate plan.

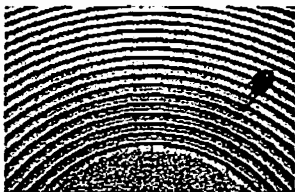
To talk to a Financial Advisor near you or to receive a free copy of our brochure, call 1.800.Smith Barney or visit us online at smithbarney.com/workingwealth

**Come to Smith Barney.
Where wealth works.**

Oppenheimer Asset Management

Overview

With half a century of experience, Oppenheimer Asset Management has earned a reputation for creativity, innovation and superior investment management. At Oppenheimer Asset Management, our clients have access to a team of specialists whose expertise spans many disciplines – from hedge funds to mutual funds, from domestic investments to offshore opportunities. We integrate traditional and non-traditional portfolios into a unified solution while offering ready access to managers we believe to be among the best in the investment management universe – both within and outside the firm. Oppenheimer Asset Management's team has the experience and training to address the diverse needs of our clients and help them move closer to their financial goals.



At Oppenheimer Asset Management, we carefully evaluate your financial goals, expectations, investment history and risk tolerance in designing your investment plan because we believe your portfolio should stand on a solid foundation of our knowledge of you. We provide personalized investment solutions because we ask the right questions and have the integrated resources necessary to respond with the answers we believe are right for you. We provide a comprehensive wealth management product to you based on an understanding of your complete financial situation. It is only with this depth of insight that we can create a portfolio designed to meet your investment needs.

Oppenheimer Asset Management is the name under which Oppenheimer Asset Management Inc. does business. Oppenheimer and Oppenheimer Asset Management Inc. are affiliates. Please refer to Overview for more details.

Investment Products & Services

- Overview
- Managing Your Wealth
- Wealth Planning
- Investment Products & Services

>> Consulting Group

>> Oppenheimer Investment Advisers

>> Alternative Investments Group

>> Private Equity

>> Advantage Bank Deposit Program

>> Mutual Fund Services

>> Executive Services

>> OMEGA

>> Equities & Fixed Income

>> Exchange Traded Funds

>> Options

>> Auction Rate Securities

We provide wealth management solutions tailored to your financial objectives. From personal planning to performance reporting, we can assist you at every phase of accumulating, protecting, preserving and transferring your wealth. We bring together the right team of professionals, each well-versed in their investment disciplines, to help craft an integrated investment strategy tailored to your unique needs.

Delivering unbiased advice and providing access to a wide range of traditional and nontraditional investment products is the foundation of our business. From traditional investments including equity and fixed income to more specialized products such as hedge funds for qualified investors and separate accounts, we can help you fulfill an entire asset allocation strategy or just a portion of your portfolio.

12

Managing Wealth
Put Fidelity's expertise behind your portfolio

If you are an investor with a larger, more complex portfolio, you need an experienced, strategic partner to provide guidance and specialized service to help meet your individual needs and goals. Our exclusive services help grow your assets, protect what you've built, minimize taxes, and pass on your wealth to your heirs.

For customers with $250,000 or more in assets, our wealth management services offer such benefits as:

- A personal relationship with an Account Executive who'll provide you with one-on-one guidance consultations, supported by a team who will help you with your day-to-day account needs
- Everyday low pricing on brokerage trades as well as certain fees waived, including annual fee and most low-balance fees for mutual funds.*
- Full range of investment products and solutions backed by access to a dedicated team of experienced professionals, including Fixed Income.
- Advanced performance reporting and automated e-mail alerts to help keep your financial goals on track
- Special access to Fidelity insights through conference calls and seminars

We also offer other additional services and entitlements to help you with your long-term financial needs.

Our complimentary wealth management services are designed to enhance your experience with us, giving you the guidance, investments choices, and the service you want all for a great value.

If you prefer to manage your portfolio on your own, take advantage of our sophisticated trading tools and support via our Active Trader Services (for customers with $25,000+ in assets and 120+ trades in a rolling 12 month period). We have a dedicated trading specialist available to help with your trades and to answer your questions 800-503-3407.

Eligibility requirements may apply for services.

CALL 800-343-3548 TO DISCUSS YOUR FINANCIAL PLANS WITH A REPRESENTATIVE.

TOP CUSTOMER QUESTIONS

How can I try to make my income last in retirement?

Would you benefit from a Roth 2010 Conversion?

Get a complimentary consultation
Call Fidelity **800-343-3548**

Find an Investor Center

WE INVITE YOU

Experience our exclusive wealth management research and events
Listen to a recent podcast

PORTFOLIO ADVISORY SERVICES

Have our professionals manage your portfolio for you

LEARN MORE ABOUT

Trusts & estate planning

Charitable giving options

How insurance can help

Your complimentary portfolio review

*Low balance fee for Index Funds still applies, and other fees and expenses may apply. Other fees and expenses applicable to continued investment are described in the fund's current prospectus.

Guidance provided by Fidelity is educational in nature, is not individualized and is not intended to serve as the primary or sole basis for your investment or tax-planning decisions.

Fidelity Brokerage Services LLC, Member NYSE, SIPC. 900 Salem Street, Smithfield, RI 02917
539773.3.1 530773.4 (p)

Fidelity INVESTMENTS

13

The Hartford enters its third century.

After standing by its clients for two centuries, The Hartford enters its third century remaining committed to meeting their protection and wealth management needs. With two centuries of strength to draw on, The Hartford looks ahead to a future of growth and prosperity for the organization and its clients.

TRUSTED 200 YEARS THE HARTFORD

This material is authorized for distribution only when accompanied or preceded by a prospectus and a current applicable performance flyer for the annuities being offered. The prospectus contains investment objectives, risks, fees, charges, expenses, and other information regarding the variable annuity contract and the underlying investments, which should be considered carefully before investing. You should read the prospectus carefully before investing money.

This information is written in connection with the promotion or marketing of the matter(s) addressed in this material. The information cannot be used or relied upon for the purpose of avoiding IRS penalties. These materials are not intended to provide tax, accounting or legal advice. As with all matters of a tax or legal nature, you should consult a tax or legal counsel for advice.

"The Hartford" is The Hartford Financial Services Group, Inc. and its subsidiaries, including the issuing companies of Hartford Life Insurance Company and Hartford Life and Annuity Insurance Company.

Taxable distributions (including certain deemed distributions) are subject to ordinary income taxes, and if made prior to age 59½, may also be subject to a 10% federal income tax penalty. Early surrender charges may also apply. Withdrawals will reduce the death benefit, cash surrender value, and Benefit Balance. Distributions from the Contract prior to the Annuity Commencement Date, including distributions from the Personal Pension Account, are taxable to the extent of income on the Contract. Excess withdrawals may impact contract value, death benefit, and any optional guaranteed amounts in an amount more than the actual withdrawal.

If you are investing in a variable annuity through a tax-advantaged retirement plan such as an IRA, you will receive no additional tax advantage from a variable annuity. Under these circumstances, you should only consider buying a variable annuity if it makes sense because of the annuity's other features, such as lifetime income payments and death benefit protection.

The issuing insurance companies are not investment advisers nor registered as such with the SEC or any state securities regulatory authority. They are not acting in any fiduciary capacity with respect to your investment. This information does not constitute personalized investment advice or financial planning advice.

Hartford's Personal Retirement Manager B-Share is a flexible premium variable annuity issued by Hartford Life Insurance Company, Simsbury, CT or Hartford Life and Annuity Insurance Company, Simsbury, CT: HL/LA-VA03, HL/LA-VA03(Rev. 01-10), HL/LA-VA03(30), HL/LA-VA03(CA), HL/LA-VA03CO, HL/LA-VA03CT, HL/LA-VA03(20), HL/LA-VA03FL(01-09), HL/LA-VA03(P), HL/LA-VA03ID, HL/LA-VA03(20)KS, HL/LA-VA03(30P), HL/LA-VA03(20P), HL/LA-VA03(30)MD, HL/LA-VA03MN, HL/LA-VA03(20P)MO, HL/LA-VA03(30)MT(Rev. 09-09), HL/LA-VA03ND, HL/LA-VA03(30)NH, HL/LA-VA03(20)NM, HL/LA-VA03OK, HL/LA-VA03(30)OR, HL/LA-VA03(20)PA, HL/LA-VA03(20P)SC(Rev. 09-09), HL/LA-VA03TX(01/08), HL/LA-VA03-1, HL/LA-VA03(20)WI(Rev.08-09), HL-VA03NY. Hartford's Personal Retirement Manager B-Share is underwritten and distributed by Hartford Securities Distribution Company, Inc.

All statements qualified by final prospectus and Contract and are subject to change without notice. In the event of a conflict between this information and that contained in the prospectus and/or Contract, the prospectus and Contract shall prevail.

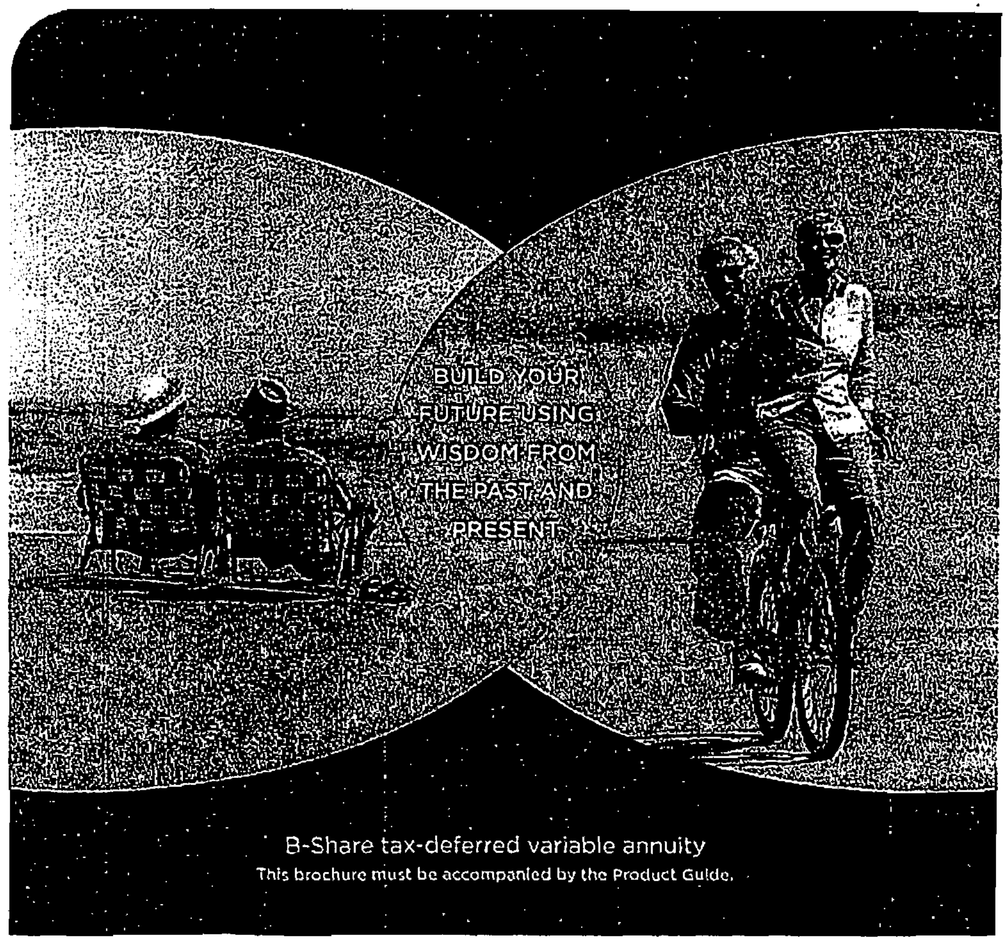
All information herein is as of 8/2010, unless otherwise noted.

14

TRUSTED 200 YEARS THE HARTFORD

HARTFORD'S PERSONAL RETIREMENT MANAGER Variable Annuity

Including the Personal Pension Account annuity option.



I, WENT TO 3
DIFFERENT SEMINARS. RETURNS
WERE RUNNING 10% & UP.
THE BIGGEST SELLING POINT
MCFADDEN HAD WAS, AND I QUOTE,
"ANYONE CAN MAKE MONEY IN A
BULL MARKET, OUR JOB IS
TO PROTECT YOUR MONEY IN A
DOWN MARKET"

AIN 1998 I Started with $354,000, My First
Check Started IN March at the
Rate of $30,000 A YEAR. AT THE
END OF 2 YEARS, SOMETIME
IN MARCH, MY ACCOUNT
PEAKED AT $504,000.
WHEN MY ACCOUNT REACHED
$200,000 I CALLED AND SAID TO
PUT THE REST IN SAFETY-
I DONT WANT TO LOSE AN
OTHER PENNY. I DREW
LESS & LESS MONEY UNTIL
Social Security Came in, then
I QUIT Drawing on it.
I ROLLED OVER $127,000 INTO
MY CREDIT UNION.

1

WHAT EFECT IT HAD ON MY LIFE:
I HAD TO SELL MY ACRE AND ONE TENTH with A Mobil Home. I WAS DEPRESSED, Awake IN THE NIGHT, BAD Dreams after BAD Dreams. I Knew THAT I Couldnt Make it on Social Security Money AND I NEEDED TO LET THE Rest of MY MONEY Grow. So I MOVED IN WITH SOME ONE AND SHARED EXPENSES. WHEN A PERSON BRINGS HOME $1400 A MONTH I COULD NOT TAKE MACFADDENS ADVICE (WHEN I CALLED ABOUT THE VALUE OF MY INVESTMENT I CAN'T AFFORD TO "GO FISHING"

ATT:

FACTS SPECIFIC TO THE CLAIMS OF

was born on

November 3, 1944 in Shorterville, Alabama.

His wife, , was born on

November 26, 1944 in Midway, Alabama.

They each separately followed their families

to Haines City, Florida as small children.

married in 1962.

They have six children, twelve grandchildren and five great grandchildren.

both attended Oakland High School, but neither graduated. After he completed ninth grade, ' parents told him they could no longer support him and he would have to find food and shelter for himself. As his father told him, "it was time for him to be a man." could not stay in high school and make enough money for food and rent. In order to survive, left high school and began working full time as a citrus and apple field hand. While was at Oakland High, she met and they fell in love. When she was in the eleventh grade she became pregnant with child. was forced out of high school as a result of the pregnancy. After 6 years of working the fields and taking care of their children, moved to Sodus, New York to look for work and be with mother. In 1969, began working at Xerox in assembly. In 1970, began working at Xerox in shipping and receiving. Ultimately, both moved into the area of product inspection. In November 1999, after 29 and 30 years, they both retired from Xerox at the age of 55, based on the advice of Isabella.

Both have great cases. They overcame tremendous challenges in life to become wonderful people and productive citizens. They do not have a lot of education, but through hard work, grit and determination they both were able to accumulate sizable retirement accounts. Because of Isabella's advice to both of them they now have little left and worry about making small purchases or traveling (even by car) to meet their great-grandchildren. If you have any doubts about either of them, then I urge you to meet them.

. first heard about Isabella from ., Shop Chairman at Xerox. *See* Ex. A, ACT Notes, October, 21, 1999. They contacted Isabella to set up an appointment to "see how they stand financially" and discuss the possibility of retiring. *See Id.* Isabella put mind at ease by mentioning the many people at Xerox he was working with. *See id.* In October 1999, met with Isabella to discuss their options at his office. *See id.* at October 29, 1999. At the time, was earning approximately $40,000 a year and had approximately $365,000 to contribute to retirement. was also earning approximately $40,000 and had approximately $340,000 to contribute.

At the meeting, the shared their average monthly expenses. Isabella showed them a projection and determined that the "numbers work" and they had enough to retire. *See Id.* at October 29, 1999. He told them that their principals would be maintained and that they could afford to withdraw from their retirement accounts at the rate of 10% per year.

In November 1999, both retired and opened an IRA account with Morgan Stanley. Had Isabella told the the truth, that a sustainable withdrawal rate was 3-5% and that a 10% withdrawal rate would almost certainly deplete their accounts, they would have continued working until at least age 62, another 7 years, at their Xerox positions that were not at risk.

4

In December 1999, rolled over approximately $368,000 into his IRA account managed by Isabella. In January 2000, James began taking systematic withdrawals under Rule 72(t) at the rate of $30,000 per year or $2,500 per month. In October 2009, there was approximately $118,000 remaining, representing an account decline of approximately $250,000. This loss would have been greater had not reduced his systematic withdrawals to $1,250 in May 2007 and to $1,000 in November 2008. Morgan Stanley's report will undoubtedly reduce the value of claim by $18,900 due to extraordinary withdrawals. The reduction in systematic withdrawal rate more than makes up for the "extraordinary" withdrawals As such, $250,000 represents a fair measure of loss.

Similarly, in December 1999, rolled over approximately $338,000 into her IRA account managed by Isabella. In January 2000, began taking systematic withdrawals under Rule 72(t) at the rate of $30,000 per year or $2,500 per month. In October 2009, there was approximately $45,000 remaining, representing an account decline of approximately $293,000. This loss would have been greater had not reduced her systematic withdrawals to $1,250 in May 2007 and to $1,000 in November 2008. As it will for Morgan Stanley's report will reduce the value of claim by $16,000 due to "extraordinary" withdrawals. reduction in systematic withdrawals more than make up for her extraordinary withdrawals. As such, $293,000 represents a fair measure of loss.

Throughout the existence of the Morgan Stanley accounts the were concerned about the accounts' declining value. *See* Ex. A, ACT Notes, June 6, 2002. In June 2002, Isabella's advice seemed to be to start "hoping" the accounts go up. *See Id.* The remember Isabella telling them that "they had to be in it for the long haul" and that "they had to ride out the bad market." Morgan Stanley was quick to blame the investment environment for their losses. *See id.* at January 23, 2006. Isabella also told the to consider reducing their withdrawal rate. *See id.* at November 6, 2002, October 6, 2003 and October 21, 2004. As the retired based on Isabella's advice that they could withdraw $2,500 per month, they felt that they had to withdraw $2,500 per month. Ultimately, the reduced their withdrawal rate as soon as they could afford to.

Not surprisingly, despite the fact that reduced their withdrawal rate, the are now in terrible financial shape without much hope of getting better. They cannot believe and do not understand how their combined assets of $706,000 have plummeted to $163,000 in under 10 years. They currently survive on social security and the money they pulled out of Morgan Stanley. Finding jobs at 65, without a high school diploma does not seem likely.

Staying as close to their extended family as possible is very important to

They have family throughout the southeast which they had planned on visiting in their "golden years." As put it, "when you are concerned about having enough money to buy your husband a fishing license this year, you certainly don't have enough money to go south." It breaks heart knowing that they have great grandchildren that they have not even met because they have not had enough money to go visit them.

This is not the retirement the worked so hard for or the one sold to them by Isabella. The financial situation is bleak with no prospects for improvement. Their situation is a result of Isabella's gross mismanagement of their accounts and his fraudulent advice that they could afford to retire early.

6

To: U. S. Attorney

From:

Walker, Louisiana 70785

Re: David McFadden
Sentencing

We have been asked to write a "victim impact statement" for the Judge presiding over the David McFadden sentencing. To say we have worried over dates, meetings, conversations and the consequences of his actions is an understatement. To express how this has impacted us is painful.

My wife and I worked, raised four children, paid taxes and bills, yet managed to save for our retirement. Life savings, monies saved by two people working paycheck to paycheck, living frugal, honest lives. We met David through what we now know were his recruitment tactics. Knowing little of stocks and investments we cautiously placed everything we had saved on his promises for our future. He abused our trust and squandered our life's work.

I continue to work although we have numerous medical problems. My wife is now disable and the stress associated with finical worries often irritates medical issues. What concerns us most is we have yet to feel the long-term effects of Mr. McFadden's treachery. Abuse of the elderly is a criminal offence but that is what he is guilty of. Victim, the word says it all and the abuse continues.

God tells us to forgive him and we were taught that our treasures on earth should be used to bless others. My wife and I had planned to spend our retirement on travel, family and community. Mr. McFadden's actions have taken those choices from us. He took away our dreams.

We do forgive him. We will try to live our days with dignity and integrity, something Mr. McFadden has no knowledge of. Please treat him with the same respect he has shown.

Thank You

Victim Impact Statement

I am , I worked for and retired from Exxon after 30+ years of service. My wife . and I planned and saved for retirement from the beginning of my employment. We contributed the maximum amount allowable to the Exxon Thrift Plan, invested routinely in Exxon stock, and saved whatever else we could afford. We lived a comfortable, conservative life style. We always planned, saved and paid cash for all major needs such as cars, appliances, with the exception of our first home, which was financed and paid off. We designed, built and paid for our second and present home. We did 90% of the building ourselves along with the help of friends and family. It was paid for the day we moved in. I worked as much overtime as possible to be able to pay for the things we wanted or needed. In hindsight I realize I probably sacrificed valuable family time while working to guarantee a comfortable retirement. We received a small inheritance when my father passed away. We put this money away for retirement. To make a long story short, we worked hard, saved, lived a conservative lifestyle and when retirement time came we felt we had achieved our goals. We retired feeling comfortable about the future.

We talked with several retirement planners and managers and after a short stint with another firm we moved to DFS and David McFadden. McFadden painted a rosy picture and since he was managing a large group of other Exxon retirees we felt comfortable with putting our retirement future in his hands. Shortly after going to DFS we began to see a decrease in our portfolio, but were assured by McFadden that it was just the market and that everything was well placed and there was no need to worry. After loosing most of the inheritance money we had invested we were forced to go into our personal savings to tide us over for about a year until we could start to draw from our retirement investments. As our worries increased and sleepless nights became common, we began to make monthly visits to DFS for updates and reviews. At this time we began to see less and less of McFadden and our portfolio was handed over to another DFS employee. My wife became stressed to the point that she could hardly bring herself to make these monthly review meetings. Fortunately Exxon offered me a short term assignment, so I returned and worked to build up some money to reinforce our dwindling savings. It finally came to a point where I asked "do you guys know what you're doing"? Again we were reassured that everything was under control and that recovery was assured. We were naive in believing that McFadden and DFS were reputable and honest. In the end that proved to be a false belief.

I vividly recall the last time we visited DFS and saw McFadden. As we were leaving the office, McFadden gave my wife a little hug, patted her on the shoulder and said "don't worry, everything is going to be all right". That last meeting and comment haunts until today. Shortly after that we left DFS and moved to another company for retirement management. We joined into the second suit against McFadden and DFS and with the help of some great attorneys, we were able to recover some of our lost retirement. Our future is no longer what we had planned for, and we live every day with some degree of fear for the future. I feel like I let my wife down, and did not fulfill my husbandly requirement by trusting in McFadden. It hurt deeply the day my wife told me "I wish you had never retired", but I understood how she felt. As I am writing this, I asked my wife for the date of my retirement. As she was going through the paperwork she came across some old DFS correspondence and told me "it just makes me want to cry every time I see this stuff or think about it". It hurts to hear he say that.

In an effort to help insure our future, and provide some additional comforts, I along with another McFadden investor formed a small home maintenance company. We don't make a lot, but it helps. We lost somewhere around $1,000,000.00 with McFadden. The suit attorneys did a great job of representing us and after paying their fee we managed to recover a bit less than half of what we had invested. McFadden's parent company, Securities America, paid the suit award and we are thankful for that. McFadden on the other hand has done nothing to show any remorse for the damage he has done to our family. There is no monetary amount that can pay for the years of hard work and the emotional damage he has inflicted on and me, especially . That's something I'll have to live with every day. As I said, we did have some partial monetary recovery from the suit, but I feel the difference between what we initially invested and what we recovered is still owed to us by David McFadden. Not Securities America, not the employees of DFS, it is owed us solely by David McFadden.

As I started writing this I had no idea of what to write or how to convey the losses we have suffered at McFadden's hands. I wish I had the ability to better say what I feel but I don't. I appreciate you reading this. I hope it will give you a cleared picture of David McFadden and will assist you in making your decision in his sentencing.

Respectively,

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
(IN ARBITRATION)

Claimant,

v.

MCDONALD INVESTMENTS, INC., DAVID H. HOHIMER, and MICHELLE M. HANSEN,

Respondents.

No.

STATEMENT OF CLAIM

The is a tribal government organized under federal law. Its principal offices are located in Seattle, Washington. Under NASD procedures this hearing should be held in Seattle, Washington.

McDonald Investments, Inc. ("McDonald Investments") is a NASD member firm, with its principal place of business in Cleveland, Ohio. The branch office involved in the transactions at issue here is located in Seattle, Washington.

Michelle M. Hansen and David H. Hohimer are, and were at the times of these events, registered representatives employed by McDonald Investments in its Seattle office. Ms. Hansen was an "Advisor" in McDonald Investments' "Wealth Management Group", and Mr. Hohimer was a Senior Vice President of Investments.

Hansen and Hohimer were acting within the scope of their employment in connection with the events at issue here, and the Respondents are jointly and severally liable for all damages suffered by the Claimant as a result of Hansen and Hohimer's conduct.

I. INTRODUCTION

The , entrusted the short-term investment of its 2004 operating budget to McDonald Investments, and Hohimer and Hansen. Since that money was needed to provide basic services for members of within a 9 month period, required short-term, very conservative investments. Completely contrary to investment objectives, McDonald Investments selected closed-end funds that were long-term investments, of considerable to speculative risk, and which carried high sales charges. McDonald Investments misrepresented the nature of these funds and failed to disclose the risks and fees involved. Due to the nature of the investments chosen by McDonald Investments, Hohimer and Hansen, suffered significant losses within 6 months, and the Nation withdrew its funds.

II. FACTS

Each year receives its operating budget from the Federal Bureau of Indian Affairs and the Indian Health Service. This money is used to operate over 100 programs within , including social services, police, medical services, and forestry and fisheries management. In late 2003 on anticipated receiving about $9 million for its 2004 operating budget. This money was disbursed throughout the year as needed. anticipated that all of the 2004 operating budget would be spent in that year.

Prior to 2004, had invested its operating budget in short term instruments through DA Davidson. The instruments were designed to disburse cash each month. The investments chosen were very conservative, since any capital loss would lead directly to a shortfall in the budget of one or more of the programs that are vital to operating and providing for its members.

had a banking relationship with Key Bank, and in late 2003 its contact there encouraged to hear a proposal from Key Bank-affiliated McDonald Investments for investing some of the 2004 operating budget. agreed to do so.

McDonald Investments, through Hansen and Hohimer, proposed in a December 19, 2003 letter to create an investment strategy for .[1]. It stated:

> The attached proposal outlines a strategy we recommend for the purpose of investing the nine million of grant funds. The recommendation consists of providing the maximum yield with safety and preservation of capital. In addition, it allows for a monthly draw-down of one million in principal, and interest if needed.
>
> This is an ultra-conservative, short-term strategy, designed to release funds monthly over a nine-month period. Funds that are not needed can be rolled into the floating rate fund each month in order to maximize the total return of the funds.

Based on that representation, chose to invest approximately half of its grant funds with McDonald Investments. It understood that the investments would be short-term and low-risk, as the nature of the operating budget required. was the main contact between . and McDonald Investments.

On August 8, 2003, representatives of , including signed a McDonald Investments Active Asset Corporate Account Application[2]. That Application describes investment objective as follows: "Income: Assets are allocated to provide a current stream of income and/or preservation of capital. This strategy is suited for the investor willing to assume risk commensurate with the level of income required." This objective carries the lowest risk of any of the Application's four possible objectives.

---

[1] A copy of that letter is attached as Exhibit 1 to this Statement of Claim. Unfortunately, the Nation is unable to locate a copy of the proposal that was attached to and referenced in the letter.

[2] Exhibit 2.

made several investments with McDonald Investments prior to investing the 2004 operating budget. On September 4, 2003 transferred $1,573,090 to McDonald Investments account number 62683790. On September 10, 2003, Hohimer and Hansen recommended that invest $1,000,000 in a Safeco Spinnaker Advisor Variable Annuity, with a guaranteed income of 3%. On September 30, McDonald Investments allocated the remaining balance to two funds, the First Trust Four Corner Senior ($300,005.00) and the Western AST Claymore US Treasury ($273,080). Most of this money was distributed for short term cash needs by the end of 2003, and these securities are not at issue n this case.

transferred $3,000,000 to McDonald Investments account number 6268379 on January 6, 2004 and an additional $500,000 on January 29. The five closed-end funds to which McDonald Investments, Hansen and Hohimer allocated that money are at issue in this case because:

1) Hansen and Hohimer misrepresented and omitted material facts about the nature of those investments to ; and
2) Those investments were unsuitable for . in that they
    a. Exposed to far more market risk than was appropriate, and
    b. Had long-term time horizons when time horizon was only nine months.

Hohimer and Hansen did not discuss the risks, the sales charges, or any other information about the closed-end funds that they recommended to . or any other representative of ı. McDonald Investments did not provide prospectuses for the funds to until after the purchases were complete. relied on McDonald Investments' representations that the investments would be ultra-conservative and short-term, and believed that the individual funds fit that description.

Closed-End Funds were, by their nature, wrong for . A closed-end fund differs from the more common open-end fund in the way in which it is valued. A closed-end fund issues a fixed number of shares in an actively managed portfolio of securities. The shares are traded in the market like common stock, and the market price of the shares is determined by supply and demand and not by net-asset value (NAV) as are open-end funds. This is significant because it makes the share price generally more volatile than an open-end fund. Because closed-end shares are traded on an exchange, they cannot be simply redeemed from the fund company as with an open-end fund, which makes them generally less liquid. The nature of closed-end funds, generally more volatile and less liquid, made such funds an inherently unsuitable choice for investors such as the Nation who are seeking short-term investments.

The Five Closed-End Funds

Calamos Strategic Total Return Fund. Hohimer and Hansen recommended that purchase $315,006.00 of the Calamos Strategic Total Return Fund ("Calamos") on March 30, 2004. The March 25, 2004 Prospectus cautions "Because the fund is newly organized, its common shares have no history of public trading. Shares of closed-end funds frequently trade at a discount from their net asset value. The risk of loss due to a market discount may be greater for initial investors expecting to sell their shares in a relatively short period after completion of the public offering[3]." It goes on to state "[a]n investment in the Fund may be speculative in that it involves a high degree of risk and should not constitute a complete investment program."

Calamos, like the other five funds at issue in this case charged a 4.5% sales load on the initial offering price[4]. This meant that the net asset value was reduced immediately following the initial offering, so not all of investment went towards the purchase of the various securities chosen by fund managers. Calamos is a closed-end fund, and valued at the market price rather than NAV. However, even in a closed-end fund, NAV is one of the chief factors that determine market price, and the two often correspond. In the case of Calamos, the price dropped approximately 13% within the first month after its initial offering. This initial price drop is common with closed-end funds. "[I]t almost never makes sense to buy closed-end mutual funds via an initial public offering

[3] March 25, 2004 Prospectus at p.1.

[4] March 25, 2004 Prospectus at p. 14.

(IPO). Like most stock IPOs, these investments nearly always trade lower shortly after their offerings, as the impact of sales loads and the normalizing of demand runs its course[5]." did not have the time to wait until the success of the fund made up for the impact of the initial sales charge because its time horizon was much shorter than the investors that Calamos was intended for. The same is true for all of the funds discussed below.

Cohen & Steers Select Utility Fund, Inc. Hohimer and Hansen recommended that purchase $225,006 of Cohen & Steers Select Utility Fund, Inc. (the "Utility Fund") on March 30, 2004. The March 25, 2004 Prospectus describes it as a "recently organized, non-diversified, closed-end management investment company designed primarily as a long-term investment and not as a trading vehicle[6]." The Utility Fund charged a 4.5% sales load on its initial offering price[7].

Dreman Claymore Dividend and Income Fund. Hohimer and Hansen recommended that purchase $500,006.00 of the Dreman Claymore Dividend and Income Fund ("Dreman") on January 30, 2004. The January 27, 2004 Prospectus states that "The Fund is intended for investors seeking a high level of current income and capital appreciation over the long term[8]." Dreman Claymore is a value fund, which aims to identify and invest in stocks "that are trading below what the Investment manager perceives to be their true market value . . .[9]" By definition, this type of value investing requires a long time horizon because such undervalued stocks take time to appreciate. time horizon was a mere 9 months, no where near long enoug' to justify this kind of investment. Dreman charged a 4.5% sales load on its initial offering p ce[10].

---

[5] Matthew Emmet, *Bad Investment Advice*, Motley Fool, October 21, 2005.

[6] March 25, 2004 Utility Fund Prospectus at p.12.

[7] March 25, 2004 Utility Fund Prospectus at p.25.

[8] January 27, 2004 Dreman Prospectus at p. 29.

[9] January 27, 2004 Dreman Prospectus at p. 5, 19.

[10] January 27, 2004 Dreman Prospectus at p.17.

ING Clarion Global Real Estate Income Fund. Hohimer and Hansen recommended that purchase $510,006 of the ING Clarion Global Real Estate Income Fund ("ING") on February 27, 2004. "The [Fund] is a non-diversified, closed end management investment company designed primarily as a long-term investment and not as a trading vehicle[11]." Its "primary investment objective is high current income[12]." Its Prospectus states "[d]ue in part to the risk involved in investing in preferred securities of non-investment grade quality, an investment in the [Fund] should be considered speculative." ING charged a 4.5% sales load on its initial offering price[13].

Western Asset/Claymore US Treasury Inflation Protected Securities Fund. Hohimer and Hansen recommended that purchase $1,300,001.00 of the Western Asset/Claymore US Treasury Inflation Protected Securities Fund ("Western Asset") on February 27, 2004. The September 25, 2003 prospectus[14] states: "Shares of closed-end management investment companies frequently trade at a discount from their net asset value, and the Fund's shares may trade at a price that is less than the initial offering price. Net asset value will be reduced immediately following the initial offering by a 4.5% sales load charge and offering costs paid by the fund. The risk of investing in a newly-organized, closed-end investment company may be greater for investors who sell their shares in a relatively short period after completion of the public offering. The Common shares are designed for long-term investors and should not be treated as trading vehicles[15]."

The five funds dropped in value consistently over the five months following fisrt purchase. On June 22, 2004 and another employee, held a teleconference with Hohimer and Hansen to discuss the losses in account.

---

[11] February 24, 2004 ING Prospectus at p. 24.

[12] February 24, 2004 ING Prospectus at p. 1.

[13] February 24, 2004 ING Prospectus at p.15.

[14] The Prospectus that McDonald Investments provided to the Nation was for a previous fund with the same name, symbol WIA, and not for the fund that the Nation purchased at the February 2004 IPO price, symbol WIW.

[15] September 25, 2003 Western Asset Prospectus at p. 26.

asked how these losses could have occurred in an account that was intended to be "ultra-conservative, short-term strategy." Neither of the McDonald Investments representatives could offer any answer to question.

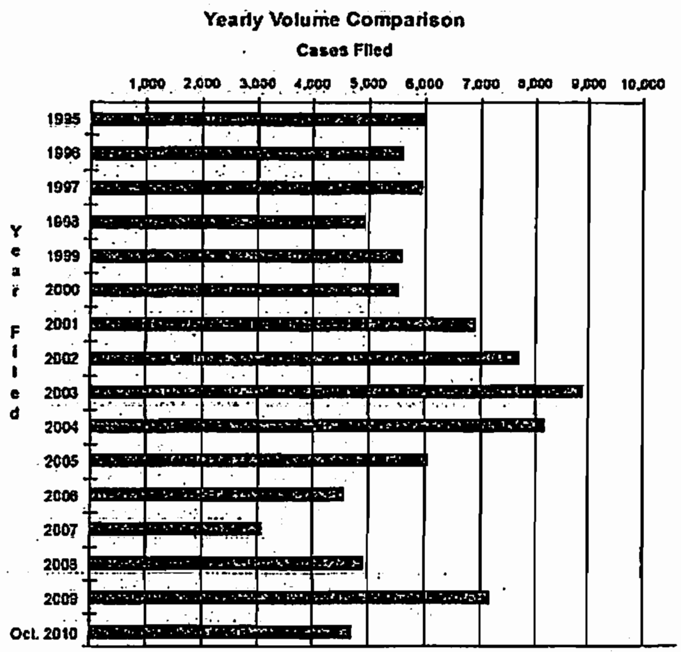
On July 28, 2004, wrote a letter requesting that McDonald Investments liquidate its investments and wire the funds to banks account[16]. By the end of August 2004, all but approximately $500,000 of the account was wired out. The money that remained was in cash equivalent securities, and was wired out on September 3, 2004. sustained losses in the following amounts:

Fund	*Cost/Date*	*Sale Price/Date*	*Loss*	*Time Held*	*Percentage Loss*
Calamos Strategic Total Return Fund	$315,006.00 on 3/30/04	$264,925 on 7/30/04	($50,080.24)	4 months	15.8%
Cohen & Steers Select Utility Fund, Inc.	$225,006.00 on 3/30/04	$179,946.23 on 7/30/04	($45,059.77)	4 months	20.0%
Dreman Claymore Dividend and Income Fund	$500,006.00 on 1/30/04	$411,768.31 on 7/30/04	($88,237.69)	6 months	17.6%
ING Clarion Global Real Estate Income Fund	$512,006.00 on 2/27/04	$302,706.90 on 7/30/04 $118,761.14 on 8/27/04	($88,537.96)	6 months	17.2%
Western Asset/Claymore US Treasury Inflation Protected Securities Fund	$1,300,011.00 on 2/27/04	$617,431.50 on 7/30/04 $464,788.98 on 8/27/04	($217,792.00)	6 months	16.7%
			Total: ($489,707.66)		

[16] Exhibit 3.

Balance of Statement of Claim redacted

1996	5,631	2004	8,201
1997	5,997	2005	6,074
1998	4,938	2006	4,614
1999	5,608	2007	3,238
2000	5,558	2008	4,982
2001	6,915	2009	7,137
2002	7,704	Through October 2010	4,766



Arbitration Cases Served by Controversy Involved

Type of Controversy*	2006	2007	2008	2009	October 2010
Margin Calls	103	45	64	128	71
Churning	257	133	212	306	238
Unauthorized Trading	242	174	248	478	341
Failure to Supervise	1,425	830	1,029	2,691	2,002
Negligence	1,619	891	1,602	3,405	2,300
Omission of Facts	588	275	1,201	2,453	1,650
Breach of Contract	1,397	953	1,658	2,802	1,853
Breach of Fiduciary Duty	2,621	1,616	2,836	4,206	2,696
Unsuitability	1,347	695	1,181	2,473	1,673

FINRA DISPUTE RESOLUTION

Claimants, FINRA-DR NO.:10-00838

- versus -

AMERIPRISE FINANCIAL SERVICES, INC.
F/K/A H&R BLOCK FINANCIAL ADVISORS,

Respondent.

ANSWER OF RESPONDENT, AMERIPRISE FINANCIAL SERVICES, INC. F/K/A H&R BLOCK FINANCIAL ADVISORS

Ameriprise Financial Services, Inc. f/k/a H & R Block Financial Advisors ("H & R Block") submits this answer to the Statement of Claim filed by individually, and on behalf of the (" Trust") and , individually and on behalf of the Revocable Trust (" Trust") (collectively the "Claimants").

Claimants seek to hold H & R Block liable in an amount exceeding $250,000 as compensation for a decline in the value of securities they maintained in their H&R Block accounts.[1] Specifically, Claimants allege that H & R Block's recommendations that Claimants invest in reverse convertible notes ("RCNs") and various mutual funds were unsuitable given Claimants' investment objectives and risk tolerance. In making these

[1] Claimants have not yet specified the compensatory damages they are seeking, apart to note that they are requesting in excess of $250,000. Claimants also seek pre-judgment interest, costs, attorneys fees, and punitive damages.

10.

Respondent owed no fiduciary duties to Claimants and, even if it did, no such duties were breached.

11.

To the extent Claimants seeks to assert claims for alleged violations of NASD, FINRA, or NYSE rules, no such private right of action exists to pursue such claims.

12.

Claimants' claims are barred, in whole or in part, by the equitable doctrines of laches, due diligence, unclean hands, and estoppel.

13.

Claimants' claims are barred, in whole or in part, by their own fault and by the applicable rules of comparative fault.

14.

Claimants are not entitled to recover attorneys' fees under applicable law.

15.

Claimants' claims are barred, in significant part, by applicable statutes of limitations.

16.

Some or all of Claimants' claims, including derivative claims, are not arbitrable under the FINRA rules or any arbitration agreement.

17.

Claimants are not entitled to punitive damages under applicable laws as they fail to state a cause of action that would allow the Panel to grant this type of award.

2

FINANCIAL INDUSTRY REGULATORY AUTHORITY
DISPUTE RESOLUTION

In the Matter of the Arbitration of Claimants, -against- MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED Respondents.	FINRA-DR Arbitration Case No. STATEMENT OF ANSWER

Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") and (collectively, "Respondents"), by their attorneys, Krebsbach & Snyder, P.C., hereby submit their Answer to Claimants' Statement of Claim. Respondents deny Claimants' substantive allegations and deny that they are liable to Claimants for any damages. All factual allegations not specifically admitted herein are denied.

PRELIMINARY STATEMENT

From the opening paragraphs of their Statement of Claim, Claimants' allegations are stunningly at odds with the facts and the truth. In crafting a fable of unsuitability, breach of fiduciary duty and fraud, they accuse their Merrill Lynch financial advisor, Steven Flagg, of placing them in high quality, investment grade, fixed income vehicles that they now claim were incompatible with their purported objective of "safety," based solely on performance in the tumultuous down market that began in the latter part of 2008 as a result of the credit and

3

also have no legal authority to prosecute a claim for violation of industry rules regarding suitability. In other words, the existence of SRO rules and internal policies of a brokerage firm does not create a duty running from the brokerage firm to the customer, and any purported violation does not provide a private right of action. Thus, any purported claim for violation of industry rules must be dismissed for failure to state a valid cause of action.

THERE WAS NO NEGLIGENCE OR BREACH OF FIDUCIARY DUTY

Claimants' CMA was an unmanaged, self-directed account. Mr. Flagg had no discretion to initiate transactions in the CMA, whether purchases or sales. All securities transactions had to be and were reviewed and approved by Claimants in advance.

Claimants have no claim against Respondents premised upon an alleged breach of fiduciary duty or any other duty of care. *See, e.g., Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293 (2d Cir. 2002). In *Kwiatkowski*, Bear Stearns had been sued by its client, Kwiatkowski, for millions of dollars in losses in a non-discretionary securities brokerage account, alleging common law negligence and breach of fiduciary duty for failing to warn him of risks, failing to keep him informed of market forecasts and for negligent advice concerning the timing of his trades. The Second Circuit ruled that in a non-discretionary securities account, there is no ongoing duty of reasonable care that requires a brokerage firm to give advice or monitor information beyond the limited transaction-by-transaction duties that are implicated in executing its customer's instructions. *Id.*, 306 F.3d at 1305-07.

Kwiatkowski reaffirms the long-standing weight of authority that the duties of a broker in handling a non-discretionary account are limited, and do not rise to the level of a general fiduciary duty or ongoing duty of care. *See Independent Order of Foresters v. Donaldson, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940 (2d Cir. 1998) (finding that broker-customer

4

relationship creates no general fiduciary duty); *Salzmann v. Prudential Securities Inc.*, No. 91 Civ. 4253, 1994 U.S. Dist. LEXIS 6377, at *21-22 (S.D.N.Y. 1994) (broker owes no fiduciary duty to client in a non-discretionary "typical" broker-client relationship); *accord Fekety v. Gruntal & Co.*, 191 A.D.2d 370, 595 N.Y.S.2d 190 (1st Dep't 1993); *Finkel v. Shearson Lehman Hutton Inc.*, N.Y.L.J. Dec. 20, 1994 at p.27 (Sup. Ct. N.Y. Co. 1994) (The "[m]ere unilateral reposal of trust and confidence in reliance upon the expertise of another . . . is insufficient as a matter of law to create a fiduciary relationship"). At the end of the day, Mr. responsibility was to make suitable recommendations, but Claimants made all of the investment decisions and were charged with the responsibility to inform Mr. of any disputes or concerns.

Respondents did not stand in a fiduciary relationship with Claimants. Claimants have not alleged and cannot prove any facts to support a claim that Respondents breached any duty of care to them whatsoever. Accordingly, Claimants' claims for breach of fiduciary duty and for negligence must be dismissed.

CLAIMANTS' PURPORTED CLAIM FOR FAILURE
TO SUPERVISE FAILS AS A MATTER OF LAW

Claimants' purported claim for failure to supervise fails to state a valid claim for relief. *Simply stated, there is no common law claim for failure to supervise.* The obligation to supervise is a regulatory requirement, not a common law duty. Under applicable regulations, broker-dealers are charged with the responsibility of having reasonable supervisory systems in place that are reasonably implemented. Although Merrill Lynch reasonably monitored Claimants' accounts and acted properly in accordance with applicable rules, there is no factual issue regarding supervision that needs to be addressed in this case because, as discussed below, there is no private right of action for a purported failure to supervise.

5

LAW OFFICES
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ
A PROFESSIONAL CORPORATION
FIRST TENNESSEE BUILDING
165 MADISON AVENUE
SUITE 2000
MEMPHIS, TENNESSEE 38103
(901) 526-2000
FACSIMILE
(901) 577-2303

CLINTON J. SIMPSON
Direct Dial: 901.577.2314
Direct Fax: 901.577.4233
E-Mail Address: csimpson@bakerdonelson.com

May 26, 2009

Via Fed Ex Delivery

Joan M. Pendergast
Case Administrator
FINRA
Boca Center Tower 1
5200 Town Center Circle, Suite 200
Boca Raton, Florida 33486-1015

Re: v. Morgan Keegan & Co., Inc.
FINRA Dispute Resolution Arbitration No. 09-01592
Morgan Keegan's Answer to Statement of Claim

Dear Ms. Pendergast:

Respondent, Morgan Keegan & Co., Inc. ("Morgan Keegan") submits the following Answer to the Statement of Claim filed by Claimant, ("Claimant").

I. INTRODUCTION

In this case, Claimant alleges that he is the victim of a "theft" perpetrated by Mr. Richard Aaron Paul, a former financial advisor for Morgan Keegan. Claimant's basic contention is that Morgan Keegan failed to properly supervise and monitor Mr. Paul's activities with Claimant which subsequently caused Claimant to incur damages. However, Claimant is simply mischaracterizing the facts of this case to not only create a cause of action against Morgan Keegan but to also bolster his alleged claims. This Panel should reject Claimant's Statement of Claim and dismiss all claims asserted against Morgan Keegan in their entirety.

Claimant alleges that Mr. Paul advised him to invest in a company called the DVS Group ("DVS") on a couple of occasions. DVS is a self-proclaimed group of specialists based in Kansas City, Kansas who connect "entrepreneurs and capital with business opportunities having an enterprise value between $1 Million and $20 Million." *See* www.thedvsgroup.com (An insert from DVS' website is attached hereto as Exhibit 1). Claimant invested in Convertible Balloon Promissory Notes with DVS. The basic structure of these investments was for interest to accrue for the first 36 months of the note

3. **Statute of Frauds** – Claimant's breach of contract claim(s) are barred, in whole or in part, by the applicable statute of frauds.

4. **Unclean Hands** – Claimant's claims, in whole or in part, are barred by the doctrine of unclean hands.

5. **Waiver, Ratification, Laches and Estoppel** – The equitable doctrines of waiver, ratification, laches, estoppel and prior breach operate to bar Claimant from recovering any damages in this action:

- Claimant represented himself as a knowledgeable investor who understood the risks associated with this investment choices and the duties he undertook as Trustee for the subject accounts;
- Claimant authorized all transfers from the subject accounts for which he served as Trustee;
- Claimant never notified Morgan Keegan that any improper or unauthorized activity had occurred in his accounts;
- Claimant received timely reports of the transactions in which he engaged and waived any cause of action by accepting the reports without objection; and
- Claimant had a contractual duty, as well as duty under the reasonable investor standard, to monitor his investments and to promptly object to any improper trades or activity.

6. **Statute of Limitations** – Claimant's claims are barred by all applicable statutes of limitations, both federal and state.

7. **Failure to Mitigate Damages** – Claimant's claims are barred because Claimant failed to mitigate his damages.

8. **Punitive Damages** – Morgan Keegan avers that Claimant's claims for punitive damages are barred because Claimant cannot prove by clear and convincing evidence that Morgan Keegan acted with malice relative to Claimant. Morgan Keegan further avers that the claims for punitive damages or other extra contractual damages are not constitutionally permissible under either the Tennessee State Constitution or the United States Constitution.

9. **Fiduciary Duty** – Morgan Keegan avers that it did not owe Claimant any fiduciary duty as alleged and stated by Claimant in his Statement of Claim. In the alternative, the acts in question were fair and equitable to Claimant and Morgan Keegan acted in the upmost good faith.

10. **Good Faith** – At all times Morgan Keegan acted in good faith with reasonable belief and lawfulness of its acts.

BEFORE THE FINANCIAL INDUSTRY REGULATORY AUTHORITY
DISPUTE RESOLUTION

In the Matter of the Arbitration between Claimants, v. WELLS FARGO ADVISORS, LLC, Respondent.	FINRA CASE NO. 09-07145 RESPONDENT'S STATEMENT OF ANSWER

STATEMENT OF ANSWER
OF RESPONDENT WELLS FARGO ADVISORS, LLC

Respondent Wells Fargo Advisors, LLC ("Wells Fargo" or "Respondent") hereby submits its Answer to the Statement of Claim filed by Claimants and ("the " or "Claimants"). Respondent specifically and generally denies all allegations of wrongdoing and denies any liability to Claimants for damages in any amount under any theory. Any allegation in the Statement of Claim not specifically addressed herein is denied.

I. PRELIMINARY STATEMENT

Claimants are wealthy individuals, successful real estate investors and business owners who maintained several accounts, including the joint account made the subject of this dispute, with First Union Brokerage Services and Wachovia Securities

8

the period in question. It was Claimants – not Respondent – who had full control of their investment decisions. In turn, it was the sudden and dramatic price declines in these two investments – not Respondent – that caused the losses in Claimants' joint account. None of Mr. Wall's or Wells Fargo's alleged omissions caused the drop in the price of these stocks. Nor did they cause Claimants to make – or not make – any investment decisions. Therefore, Mr. Wall's or Wells Fargo's alleged omissions were not the proximate cause of Claimants' alleged losses.

For all of these reasons, Claimants' fraud claims must be rejected by the Panel.

E. Claimants' Breach of Fiduciary Duty Claim Has No Merit

Claimants' breach of fiduciary duty claim fails. Recent case law conclusively confirms that a broker does not owe a fiduciary duty to a client who maintains a non-discretionary account. *See De Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1302 (2d Cir. 2002). In fact, with respect to non-discretionary accounts, "[t]he broker's duties ordinarily end after each transaction is done, and thus do not include a duty to offer unsolicited information, advice or warnings concerning the customer's investments. A non-discretionary customer by definition keeps control over the account and has full responsibility for trading decisions." *Id.* at 1302.

Claimants' accounts were non-discretionary investment accounts where Claimants made all of the investment decisions and Wells Fargo accurately and promptly followed all of their instructions. Thus, there was no fiduciary relationship between Claimants and Respondent. Moreover, the overwhelming evidence will establish that no breach of any such purported obligation occurred or caused any alleged damages.

Therefore, Claimants' breach of fiduciary duty claim should be dismissed.

9

LAW OFFICES
KEESAL, YOUNG & LOGAN
A PROFESSIONAL CORPORATION
400 OCEANGATE
LONG BEACH, CA 90802
P.O. BOX 1730
LONG BEACH, CA 90801-1730
(562) 436-2000
FACSIMILE:
(562) 436-7416
www.kyl.com

SAMUEL A. KEESAL, JR.
STEPHEN YOUNG
MICHAEL M. GLESS
PETER R. BOUTIN
SCOTT T. PRATT
TERRY ROSS
JOHN D. GIFFIN
WILLIAM H. COLLIER, JR.
PHILIP A. McLEOD
NEAL SCOTT ROBB
BEN SUTER
ALBERT E. PEACOCK III§
CAMERON STOUT
ROBERT J. STEMLER
LISA M. BERTAIN
ROBERT J. BOCKO*†
MICHELE R. FRON

ELIZABETH P. BEAZLEY
JOSEPH A. WALSH II
HERBERT H. RAY, JR.*†
JODI S. COHEN
PHILIP R. LEMPRIERE*†
JULIE L. TAYLOR
STACEY MYERS GARRETT
JON W. ZINKE*
DOUGLAS R. DAVIS*†
GORDON C. YOUNG
ELIZABETH H. LINDH
KELLY J. MOYNIHAN
CARA L. FINAN
SARAH TONG SANGMEISTER
MARC R. GREENBERG
JULIE A. KOLE
DAVID D. PIPER

GLEN R. PIPER
SANDOR X. MAYUGA
ESTHER E. CHO
CHRISTOPHER A. STECHER
AUDETTE PAUL MORALES
SCOTT E. HINSCHE
MELANIE L. RONEN
BENTLEY P. STANSBURY III
JOHN D. KIMMERLEIN†
EVELYN C. BEST
GARRETT R. WYNNE
JOHN COX
DAVID A. TONG
STEFAN PEROVICH
ALLAN LIU
NICOLAS J. VIKSTROM†
JAMES F. KUHNE, JR.

ANNE M. MORIARTY
TARA B. VOSS
NATHAN R. JASKOWIAK
JAMES A. MARISSEN
KENDRA S. CANAPE
JEREMY M. JOSEPH
JENNIFER L. MEEKER
JENNIFER M. PORTER
MOLLY J. HENRY†
ANTHONY N. BANKER*
ROBERT M. CREA
JESSICA R. MATHER
HELEN D. HSUEH
MICHAEL T. WEST
JAMES F. ALEXANDER
NICOLE ZAJACK

OF COUNSEL
ROBERT H. LOGAN
RICHARD A. APPELBAUM•
REAR ADMIRAL, U.S.C.G. (RET.)
ELIZABETH A. KENDRICK
DAVID W. TAYLOR•
NANCY HARRIS§†
FRANCES L. KEELER

* ADMITTED IN ALASKA
† ADMITTED IN WASHINGTON
‡ ADMITTED IN WASHINGTON & CALIFORNIA
§ ADMITTED IN ALASKA & CALIFORNIA
• ADMITTED IN DISTRICT OF COLUMBIA & FLORIDA
• REGISTERED FOREIGN LAWYER WITH THE LAW SOCIETY OF HONG KONG & ADMITTED IN NEW YORK
* SOLICITOR ADMITTED IN ENGLAND, WALES AND NORTHERN IRELAND

ALL OTHERS ADMITTED IN CALIFORNIA

May 24, 2010

Via Facsimile and UPS

Derek L. Sorrells
FINRA Dispute Resolution
300 S. Grand Avenue, Suite 900
Los Angeles, CA 90071-3135

Re: *v. UBS Financial Services Inc., et al.*
FINRA Case No.:

Dear Mr. Sorrells:

Respondents UBS Financial Services Inc. ("UBS") and Gregory Geller ("Geller") (collectively, "Respondents") hereby submit their Answer to the Statement of Claim filed by Claimants and (collectively, the " " or "Claimants").

I.
GENERAL DENIAL

Respondents deny each and every allegation of wrongdoing and liability set forth and/or implied in Claimants' Statement of Claim. Respondents further deny that Claimants have been injured in the amount claimed, or in any other amount, by Respondents.

II.
INTRODUCTION

Claimants have enjoyed a long and profitable relationship with Respondents. Indeed, Claimants worked with Geller for nearly 15 years and never expressed dissatisfaction with the handling of their accounts. To the contrary,

SAN FRANCISCO OFFICE
450 PACIFIC AVENUE
SAN FRANCISCO, CA 94133
(415) 398-6000
FACSIMILE:
(415) 981-0136 • (415) 981-7729

ANCHORAGE OFFICE
SUITE 650
1029 WEST THIRD AVENUE
ANCHORAGE, AK 99501-1954
(907) 279-9696
FACSIMILE: (907) 279-4239

SEATTLE OFFICE
SUITE 1515
1301 FIFTH AVENUE
SEATTLE, WA 98101
(206) 622-3790
FACSIMILE: (206) 343-9529

HONG KONG OFFICE
1603 THE CENTRE MARK
287 QUEEN'S ROAD CENTRAL
HONG KONG
(852) 2854-1718
FACSIMILE: (852) 2541-6189

10

Re: v. UBS Financial Services Inc., et al.
FINRA Case No.:

B. CLAIMANTS CANNOT STATE A COMMON LAW CLAIM FOR FRAUD.

Claimants' cause of action for fraud based on misrepresentation and omission fail. A claim for misrepresentation requires: (1) a misrepresentation or concealment and non-disclosure; (2) knowledge of the falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damages. 5 WITKIN, SUMMARY OF CALIFORNIA LAW, "Torts," § 676, p. 778 (9th ed. 1988); *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 110 (1976); *Okun v. Morton*, 203 Cal. App. 3d 805, 828 (1988) (stating "[a]ll of these elements must be present if actual fraud is to be found; one element absent is fatal to recovery").

Likewise, for an alleged omission to be material and therefore actionable, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S. Ct. 978, 983, 99 L. Ed. 2d 1 (1988), citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449-450, (1976) (internal quotations omitted) (holding materiality is appropriately decided as a matter of law).

Claimants cannot satisfy these elements. Indeed, two of the primary elements for a claim of fraud are that the wrongdoer must have ***known*** the statements were false ***and*** must have actually ***intended*** to defraud. The evidence will show that Respondents provided accurate information to Claimants, and that Claimants used their investment experience and sophistication to evaluate the information provided, and make informed, independent decisions. Moreover, Claimants' have failed to state their fraud claim with the requisite particularity.

C. RESPONDENTS DID NOT BREACH ANY FIDUCIARY DUTIES TO CLAIMANTS.

Claimant's beach of fiduciary claim is without merit. A broker does not owe a fiduciary duty to a client who maintains a non-discretionary account. *See De Kwiatkowski v. Bear, Stearns & Co. Inc.*, 306 F.3d 1293, 1302, 1307 (2d Cir. 2002). *See also Marchese v. Nelson, et al.*, 809 F. Supp. 880, 894–895 (D. Utah 1993). The uncontradicted evidence will establish that Claimants' accounts at issue

11

were non-discretionary, that they controlled the accounts, and that Respondents did not breach any duty owing to Claimants that caused them any damages.

Claimants' investment decisions, do not give rise to any breach of duty (fiduciary, contractual or otherwise) on the part of Respondents: "[a] nondiscretionary customer by definition keeps control over the account and has full responsibility for trading decisions. . . ." *De Kwiatkowski v. Bear, Stearns & Co, Inc., supra,* 306 F.3d at 1302.

Moreover, even if Respondents owed Claimants a fiduciary duty, the scope of that duty was limited and properly discharged. Both federal and state courts have recognized that a broker is not a guarantor of market performance; a brokers' duty varies depending on the sophistication of the investor and the investor's control over the account. *Duffy v. Cavalier*, 215 Cal. App. 3d 1517, 1536 n.11 (1989); *Leboce, S.A. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F.2d 605, 607 (9th Cir. 1983); *Caravan Mobile Home Sales, Inc., Retirement Trust v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 567 (9th Cir. 1985).[6]

The scope of the fiduciary duty depends on the specific facts and circumstances presented in a given case. *Duffy*, 215 Cal. App. 3d at 1536 n.11. Specifically, the focus is on: (1) the relative sophistication and experience of the customer; (2) the customer's ability to evaluate the broker's recommendations and exercise an independent judgment; (3) the nature of the account, whether discretionary or nondiscretionary; and (4) the actual financial situation and needs of the investor. *Duffy*, 215 Cal. App. 3d at 1536. So long as the customer is of sufficient intelligence and understanding to make the ultimate investment decision and does so, any duty is limited and the customer is responsible for the investment decision and must bear the resultant losses. *Duffy*, 215 Cal. App. 3d at 1536–7 n.11.

---

[6] The key in determining control over a securities account is whether the customer had the ability to independently evaluate his broker's recommendations, based on the available information and the investor's ability to interpret such information. *David K. Lindemuth Co. v. Shannon Fin. Corp.*, 660 F. Supp. 261, 265 (N.D. Cal. 1987) (citing *Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673, 677 (9th Cir. 1982)).

Re: v. UBS Financial Services Inc., et al.
FINRA Case No.:

Application of these factors to this case demonstrates that any fiduciary duty Respondents owed to Claimants was extremely limited in scope. Claimants were well-informed investors. They were more than capable of making, and in fact made, all of the investment decisions in the accounts.

The facts clearly demonstrate that Respondents appropriately discharged their duties to Claimants. Respondents communicated on a regular basis with Claimants, and they, at all times acted properly and in the best interest of Claimants. At the arbitration hearing, their breach of fiduciary duty allegation should be summarily rejected as contrary to the evidence.

D. UBS DID NOT BREACH ANY WRITTEN CONTRACTS WITH CLAIMANTS.

To prevail on a claim for breach of contract, a plaintiff must establish the following: (1) a valid contract between the parties; (2) plaintiff's performance of the contract; (3) defendant's breach of a specific term in the contract; and (4) damages to plaintiff caused by the breach. *Otworth v. South Pacific Trans. Co.*, 166 Cal. App. 3d 452, 458 (1985); *Lortz v. Connell*, 273 Cal. App. 2d 286, 290 (1969). Claimants cannot prove the existence of a contract or that Respondents breached a specified term in any contract. As set forth above, Respondents acted in good faith and in accordance with Claimants' instructions at all times. Claimants' breach of contract claim, thus, fails.

E. UBS DID NOT BREACH ANY IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Claimants cannot establish a cause of action for breach of the implied covenant of good faith and fair dealing because no such claim exists against a brokerage house. In *Trustees of Capital Wholesale Electric Company Profit Sharing and Trust Fund v. Shearson Lehman Brothers, Inc.*, 221 Cal. App. 3d 617, 624 (1990), the court of appeal concluded that a brokerage house and its customer did not have a "special relationship" similar to that of the insurer/insured to justify tort damages for breach of the implied covenant of good faith and fair dealing. As such, Claimants' claim for breach of the implied covenant of good faith and fair dealing necessarily fails.

LAW OFFICES

CASEY CIKLIN LUBITZ MARTENS & O'CONNELL

A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

LINDA DICKHAUS AGNANT, P.A.
BRUCE G. ALEXANDER, P.A.
JERALD S. BEER, P.A.
JOHN D. BOYKIN, P.A.
RAMSAY J. BULKELEY
JESSICA M. CALLOW
PATRICK J. CASEY, P.A.
RICHARD R. CHAVES, P.A.
PATRICIA M. CHRISTIANSEN, P.A.
ALAN J. CIKLIN, P.A.
ROBERT L. CRANE, P.A.
RONALD E. CRESCENZO, P.A.
JEFFREY M. GARBER, P.A.
ASHLEY N. GIROLAMO
JASON S. HASELKORN, P.A.

CHRISTINE M. HOKE
W. JAY HUNSTON, III
RICHARD A. JAROLEM, P.A.
BRIAN B. JOSLYN, P.A.
GREGORY S. KINO, P.A.
CHARLES A. LUBITZ, P.A.
RICHARD L. MARTENS, P.A.
BRIAN M. O'CONNELL, P.A.
PHIL D. O'CONNELL, P.A.
CHARLES L. PICKETT
NICHOLAS J. PURVIS
MATTHEW N. THIBAUT, P.A.
DEAN VEGOSEN, P.L.
GARY WALK, P.A.
JOHN R. YOUNG, P.A.

PHILLIP D. O'CONNELL, SR. (1907-1987)

OF COUNSEL
MICHAEL J. MONCHICK, P.A.
MICHAEL J. KENNEDY, P.A.
KEVIN D. WILKINSON, P.A.

515 NORTH FLAGLER DRIVE, STE. 1900
WEST PALM BEACH, FLORIDA 33401-4343
TELEPHONE: (561) 832-5900
FACSIMILE: (561) 833-4209

December 11, 2009

Via facsimile transmission to: 301-527-4868

Bonnie R. Simon
Senior Case Administrator
FINRA Dispute Resolution
Boca Center Tower 1 – Suite 200
5200 Town Center Circle
Boca Raton, FL 33486

Re:
v. Citigroup Global Markets, Inc.; Morgan Stanley Smith Barney; John Batista Bocchino a/k/a John Bocchino Batista; Does 1 through XX, Inclusive
FINRA Dispute Resolution Arbitration Number

Dear Ms. Simon:

This letter will serve as the initial Answer and Affirmative Defenses of Respondents Morgan Stanley Smith Barney, formerly known as Smith Barney, a division and service mark of Citigroup Global Markets, Inc. ("MSSB") and John Batista Bocchino ("Bocchino" or collectively "Respondents"), its financial consultant, in response to the Statement of Claim (the "Claim") filed by Claimant Optimum Financial Ltd. ("Optimum" or "Claimant") against Respondents.

I. GENERAL DENIAL

As required by Section 12303 of the FINRA Code of Arbitration Procedure for Customer Disputes, Respondents herein set forth all currently available defenses and relevant facts that will be relied upon at the hearing. Respondents, however, are in the process of gathering and reviewing all of operate to reduce the value of the plaintiff's securities, the plaintiff is precluded from recovery under Rule 10b-5." Id.

As set forth above, the evidence will show that Respondents made no misstatements or omissions of material fact to Claimant, that any *alleged* misstatements or omissions were not made with scienter, that Claimant did not justifiably rely on any alleged misstatement or omission, and that its losses were not proximately caused by any alleged misstatement or omission but were instead caused by an investment strategy created by Claimant's own investment advisor that proved unsuccessful.

Nor Does Claimant Have a Cause of Action Premised Upon Any Misrepresentation or Omission

Respondents never made any misrepresentations to Claimant about its investments or accounts. Yet, Claimant has included such a cause of action in its Claim. To prevail on the misrepresentation claim, (i.e., fraud), Claimant must show: (1) a false statement or misrepresentation of material fact; (2) Respondents' knowledge at the time the representation was made that such statement was false; (3) that the representation was intended to induce Claimant to act in reliance thereon; (4) Claimant's action in justifiable reliance on the representation; and (5) resulting damage or injury to Claimant in so acting. See Thor Bear, Inc. v. Crocker Mizner Park, Inc., 648 So. 2d 168, 172 (Fla. 4th DCA 1994). In general, the "false statement of fact" element must concern a past or existing fact." Id. An action for fraud may not be premised upon a promise of future action except where the promise of future action is made with no intention of performing or with a positive intention not to perform. Id.

Negligent misrepresentation is identical, except for the element directed to the respondent's knowledge related to the representation at issue. The claim for negligent misrepresentation requires Claimant to prove: (1) there was a misrepresentation of material fact; (2) the Respondents either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false; (3) the Respondents intended to induce another to act on the misrepresentation; and (4) injury resulted to the Claimant acting in justifiable reliance upon the misrepresentation. See Florida Womens Medical Clinic, Inc. v. Sultan, 656 So. 2d 931, 933 (Fla. 4th DCA 1995).

As set forth herein, the Respondents made no actionable, material, misrepresentation to Claimant. Any representation was not made with knowledge of the falsity, or negligence with regard to its truth or falsity, Claimant could not have acted in justifiable reliance thereon, and suffered no resulting damages from so acting. Accordingly, Claimant's claims for intentional and negligent misrepresentation are without merit and must be dismissed.

Respondents Have Not Breach Any Fiduciary Duties

Claimant's claim of breach of fiduciary duty fails as a matter of law and should be dismissed in its entirety. Claimant's Claim seeks to impose "fiduciary" obligations and duties on Respondents that only arise in very limited circumstances that do not exist here, i.e. where Respondents are given discretionary trading authority over Claimant's accounts.

To recover on a breach of fiduciary duty claim the Claimant must prove the following: first, that a fiduciary relationship existed, second, that Respondent breached that fiduciary duty, third, that the breach was the proximate cause of, fourth, damages to the plaintiff. Gracey v. Eaker, 837 So. 2d 348, 353, 353 n.1 (Fla. 2002). As a matter of law, Claimants cannot get past the first element of a breach of fiduciary duty claim since there was no fiduciary relationship between Claimant and Respondents. The fiduciary relationship that existed was between Posada and Claimant.

In this non-discretionary account, Respondents only had a duty to do the following: recommend a stock only after studying it sufficiently to become informed as to its nature, price and financial prognosis; carry out the customer's orders promptly in a manner best suited to serve the customer's interest; inform the customer of the risks involved; refrain from self-dealing; not to misrepresent any fact material to the transaction; and, transact business only after receiving prior authorization from the customer. Leib v. Merrill Lynch, Pierce, Fenner & Smith, 461 F. Supp. 951 (E.D. Mich. 1978); *see also* De Kwiatkowski v. Bear, Stearns & Co., Inc., 306 F.3d 1293 (2nd Cir. 2002). Respondents never made any recommendations to Claimant. Respondents followed the instructions received from Claimant's authorized representative, Posada. As such, the only conclusion that can be reached is that Respondents complied with each of these duties and responsibilities with the utmost good faith.

Respondents Have Not Breached Any Contract with Claimant

In its Claim, Claimant purports to allege several legal causes of action, including breach of contract between Claimant and Respondents. Claimant's claim based on this causes of action lacks merit. In an action for breach of contract, the burden of proof is on the Claimant to prove by a preponderance of the evidence: (1) the existence of a valid contract; (2) a material breach of one or more of the contract's terms; and (3) damages flowing from the breach. See Abbott Laboratories, Inc. v. General Electric Capital, 765 So. 2d 737, 740 (Fla. 5th DCA 2000); Carpenter Contractors of America, Inc. v. Fastener Corp. of America, Inc., 611 So. 2d 564, 565 (Fla. 4th DCA 1992). Claimant has failed to identify any contract or warranty upon which it seeks relief. It has failed to identify any contract term or warranty that was allegedly breached. In an abundance of caution, Respondents deny that they breached any existent contract term or warranty and deny that Claimant suffered any damages flowing from any alleged breach.

There Can Be No Claim for Negligent Supervision Since Respondents Were Not Responsible for Supervising Posada

Claimant also asserts a cause of action against MSSB for failure to supervise. MSSB utilizes a multi-faceted supervisory and compliance program. The program includes: (1) review and approval by the Branch Office Manager, or a delegate of all new account applications, (2) daily review by the Branch Office Manager, or a delegate, of each stockbrokers' trades, and (3) monthly review by the Branch Office Manager, or a delegate, of the activity in selected customer accounts. Furthermore, MSSB's compliance department continually reviews customer accounts to detect excessive trading and/or other significant activity. MSSB fully complied with all rules and industry practice in its handling of Claimant's accounts. As such, this claim should also be dismissed in its entirety.

Public Investors Arbitration Bar Association

September 3, 2010

VIA E-MAIL To: rule-comments@sec.gov

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: **Release No. 34-62577; IA-3058; File No. 4-606**
Study Regarding Obligations of Brokers, Dealers, and Investment Advisors

Dear Ms. Murphy:

On behalf of the Public Investors Bar Association ("PIABA"), I thank the Commission for this opportunity to comment on the above-referenced study regarding the standards of care for brokers, dealers and investment advisors when providing personalized investment advice and recommendations about securities to retail investors. PIABA is a national, not-for-profit bar association comprised of more than 460 attorneys, including law school professors and former regulators, who devote a significant portion of their practice to the representation of public investors in securities arbitrations. Accordingly, our members and their clients have a strong interest in the current standards and any action the Commission may take with regard to the standards referenced above.

PIABA recommends that the Commission create a uniform standard with regard to brokers, dealers and investment advisors when providing personalized investment advice and recommendations about securities to retail investors. Such standard should encompass the broad fiduciary duty that currently applies to investment advisors. Today, brokers[1] and investment advisors are regulated under two different regulatory schemes with different standards of conduct. Notwithstanding this distinction, the services each offers are marketed in a way that makes them indistinguishable to investors. To complicate matters further, brokers often use titles that contain the word "advisor", leaving customers with no clear guidance on what rules apply to the accounts they hold. This confusion is clearly set forth in the Treasury Department's report entitled "Financial Regulatory Reform - A New Foundation: Rebuilding Financial Supervision and Regulation"[2]:

[1] As used herein, the term broker includes dealers as well.
[2] http://www.financialstability.gov/docs/regs/FinalReport_web.pdf (June 17, 2009)

> Retail investors are often confused about the differences between investment advisers and broker-dealers. Meanwhile, the distinction is no longer meaningful between a disinterested investment advisor and a broker who acts as an agent for an investor; the current laws and regulations are based on antiquated distinctions between the two types of financial professionals that date back to the early 20th century. Brokers are allowed to give "incidental advice" in the course of their business, and yet retail investors rely on a trusted relationship that is often not matched by the legal responsibility of the securities broker. In general, a broker-dealer's relationship with a customer is not legally a fiduciary relationship, while an investment adviser is legally its customer's fiduciary.
>
> From the vantage point of the retail customer, however, an investment adviser and a broker-dealer providing "incidental advice" appear in all respects identical. In the retail context, the legal distinction between the two is no longer meaningful. Retail customers repose the same degree of trust in their brokers as they do in investment advisers, but the legal responsibilities of the intermediaries may not be the same

Case law has consistently held that the Investment Advisors Act of 1940 (IAA)[3] has established a "federal fiduciary standard to govern the conduct of investment advisers, broadly defined, see *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 17, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979)."[4] Therefore, if an account is being handled pursuant to the IAA, the adviser has a fiduciary duty to the customer. The IAA specifically exempts brokers who provide investment advice, so long as the advice is solely incidental to the brokerage services, and the broker does not receive special compensation for the advice.[5]

When it comes to the standard applicable to brokers, the answer is not as clear cut. There is no federal fiduciary standard that applies to brokers. Under the current regulatory structure, whether or not a fiduciary duty applies is dependent on state law, and as such, customers located in different states are owed different duties.

Courts have routinely held that when an account is discretionary, the broker has a fiduciary duty to the client. In *Leib v. Merrill, Lynch, Pierce, Fenner & Smith*[6], the court specifically set forth the duties a broker owed the customer when the account was a discretionary account:

> Such a broker, while not needing prior authorization for each transaction, must (1) manage the account in a manner directly comporting with the needs and objectives of the customer as stated in the authorization papers or as apparent from the customer's investment and trading history, *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 570 F.2d 38 (2d Cir. 1978); (2) keep informed regarding the changes

[3] 15 U.S.C. §80b-1 et seq.
[4] *Financial Planning Ass'n v. Securities and Exchange Commission*, 482 F.3d 481, 490 (D.C. 2007).
[5] 15 U.S.C. §80b-2(a)(11)
[6] 461 F.Supp. 951, 953 (E.D.Mich.1978)

in the market which affect his customer's interest and act responsively to protect those interests (see in this regard, *Robinson v. Merrill Lynch*, supra) ; (3) keep his customer informed as to each completed transaction; and (5) explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged, *Stevens v. Abbott, Proctor and Paine*, 288 F.Supp. 836 (E.D.Va.1968).

However, when the account is not discretionary, the standards of duty owed by a broker to a customer vary widely from state to state. Certain states recognize a fiduciary duty in every broker – customer relationship. See *Duffy v. Cavalier*, 215 Cal.App.3d, 1517, 1530 (1989). Other states vary in terms of when the broker – customer relationship is a fiduciary one. In *Marchese v. Nelson*[7], the court laid out the ways various courts have addressed this issue:

> [I]n *Leib*, the court indicated that in a nondiscretionary account, the "broker is bound to act in the customer's interest when transacting business for the account; however, all duties to the customer cease when the transaction is closed." *Leib*, 461 F.Supp. at 952-53. Notwithstanding this apparently limited duty, the *Leib* court identified six duties associated with nondiscretionary accounts: (1) the duty to recommend stock only after becoming informed about the stock; (2) the duty to promptly carry out the customer's orders; (3) the duty to inform the customer of the risks involved in a transaction; (4) the duty to refrain from self-dealing; (5) the duty not to misrepresent any fact material to a transaction; and (6) the duty to transact business only after prior authorization from the customer. *Id.* at 953.
>
> ...
>
> The *Hotmar* [*v. Listrom & Co.*, 808 F.2d 1384, 1386 (10th Cir.1987)] court, in finding no fiduciary relationship, analyzed whether the broker agreed to manage or otherwise control the account, or rather, whether he merely rendered advice. *Id.* at 1387. Finding no agreement by the broker to monitor his clients' nondiscretionary accounts, the court found no fiduciary relationship. *Id.*
>
> ...
>
> [T]he *Baker* [*v. Wheat First Sec.*, 643 F.Supp. 1420, 1429 (S.D.W.Va.1986)] court found a fiduciary relationship where the broker exerted "de facto control" over the account. *Baker*, 643 F.Supp. at 1429. To the *Baker* court, such de facto control existed when "'the client routinely follows the recommendations of the broker.' " *Id.* (quoting *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 821 (9th Cir.1980)).
>
> ...
>
> Finally, other courts assume the existence of a fiduciary relationship even if the account is [non]discretionary [sic], and then analyze the facts to determine the scope of the duty and whether the broker breached the duty. See, e.g., *Romano v. Merrill, Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir.1987) (interpreting federal securities law). Applying this analysis, the Romano court found no breach where the customer, an alert and vigilant businessman, controlled his nondiscretionary account and made all decisions regarding activity in the account. *Id.* (citations omitted).

---

[7] 809 F.Supp. 880, 893 (D. Utah 1993)

In *Leib*, the court recognized that apart from discretionary and non-discretionary accounts, there exists a hybrid-type account. "Such an account is one in which the broker has usurped actual control over a technically non-discretionary account. In such cases, the courts have held that the broker owes his customer the same fiduciary duties as he would have had the account been discretionary from the moment of its creation."[8]

In addition to the discretionary-nondiscretionary nature of the account, the type of fees a customer pays is also relevant in determining whether or not a fiduciary duty exists. As mentioned above, the IAA specifically exempts brokers who provide investment advice, so long as the advice is solely incidental to the brokerage services, and the broker does not receive special compensation for the advice. In 1999, the Commission expressed concern that the various fee structures that brokerage firms had begun to offer would make firms subject to the IAA.[9] The Commission recognized that the nature of the services offered to the customer often did not vary depending on the type of account, but rather it was only the broker's compensation that varied. In light of this view, the Commission took the position that it did not believe that Congress intended these accounts to be covered by the IAA.[10] However, in 2007, the Court of Appeals for the D.C. Circuit struck down the rule, holding that the Commission did not have authority to broaden the exception set forth in the IAA.[11] Hence, brokers who offer fee-based accounts are deemed to receive special compensation under the IAA and are required to be registered as investment advisers and as such, are subject to the fiduciary obligations of the IAA.

The duties owed by the individual a customer is doing business with will vary widely depending on the individual's title, compensation structure, and the state in which the individual is located. Customers are left with differing degrees of protection. Because the services offered are so similar, customers should be afforded the same level of protection, regardless of whether they are dealing with a broker or an investment advisor. This may be done by either eliminating the broker exclusion contained within the IAA, or by adding language to the Securities Exchange Act of 1934 which mirrors that contained in the IAA. We believe the latter would alleviate any burden on brokers to additionally register as investment advisors. We would be supportive of any effort by the Commission to create high, uniform standards for investment professionals, regardless of the capacity in which they interact with customers.

If a uniform fiduciary standard is to be adopted, it must be a true fiduciary standard. A standard which is denominated "fiduciary" is not truly such, unless it has the historical hallmarks of fiduciary status. These include: (a) the duty of loyalty; (b) the duty to make full disclosure; (c) the duty to carry out the client's instructions faithfully; (d) the duty to act in the highest good faith; and (e) the duty to place the client's interest before the fiduciary's own interest. While a

---

[8] 461 F.Supp. at 954

[9] S.E.C. Notice of Proposed Rulemaking, 64 Fed. Reg. 61,228 (Nov. 10, 1999). The Commission adopted final rule 202(a)(11)-1 under the IAA on April 15, 2005. See, *S.E.C. Rel. No. 34-51523*, available at http://www.sec.gov/rules/final/34-51523.pdf. However, the Commission did not take any actions against firms which offered fee-based accounts between the issuance of the proposed rule in 1999 and the adoption of the final rule in 2005.

[10] *Id.*

[11] *Financial Planning Ass'n v. Securities and Exchange Commission*, 482 F.3d 481 (D.C. 2007)

uniform fiduciary standard is a good idea, it must not be a watered-down standard masquerading as a fiduciary standard.

Finally, we urge the Commission to consider creating a private right of action to pursue a breach of a federal fiduciary duty. Presently, only a limited private remedy is recognized pursuant to the IAA.[12] In order for a federal fiduciary duty to be meaningful, it is essential that aggrieved customers be permitted to pursue legal remedies for a violation of that duty. Additionally, the federal fiduciary duty should represent the minimum standard to which brokers must adhere. To the extent that individual states wish to impose higher standards on brokers, it is important that states retain that right. It should be explicit that any federal fiduciary duty does not preempt any existing or forthcoming state fiduciary duty.

We thank the commission for the opportunity to share our views on this topic. To the extent the Commission has any questions or would like any further information, please do not hesitate to contact me.

Respectfully submitted,

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

/s/
Scott R. Shewan
President

<u>Mr. Shewan's Contact Information:</u>

Scott R. Shewan
Pape & Shewan, LLP
642 Pollasky Avenue
Suite 200
Clovis, California 93612
Telephone: (559) 299-4341
Facsimile: (559) 299-0920

---

[12]*Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11,24, 100 S.Ct. 242, 349 (1979) ("For the reasons stated in this opinion, we hold that there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment advisers contract, but that the Act confers no other private causes of action, legal or equitable.")