

RECEIVED

PACIFIC EXCHANGE, INC.
301 Pine Street
San Francisco, California 941104

PCX ARBITRATION

In The Matter Of The Arbitration Between:

PCX CASE # 02-L030

DENNIS CHODOROW,)
Trustee of the Bernard Towers,)
M.D. Trust dated July 23, 1997)
Claimant)
)
)
)
MERRILL LYNCH PIERCE FENNER)
And SMITH, INC. and)
And A. J. SAFAVI)
)
Respondents)
)

DECISION

The undersigned Arbitrators, having read and considered the Claim submitted by Claimant dated August 15, 2002 and the Answer of Respondents, dated October 7, 2002 hereby render the following Decision pursuant to Rule 12 of the Rules of the Board of Governors of the Pacific Exchange:

REPRESENTATION OF PARTIES

Of Claimant: Mitchell J. Albert

Of Respondents Stephen Young
Melanie Ronen

SUMMARY OF FACTS

Claimant states that he is the Trustee of the Bernard Towers, M.D. Trust dated July 23, 1997 (TRUST) and that Dr. Towers (TOWERS) and Claimant suffered a loss of more than \$223,000.00 as a result of the funds being invested by Respondents in unsuitable mutual funds and by failing to consider TOWERS' age, health, inexperience and risk tolerance; that by making these unsuitable investments, Respondents were negligent, breached their fiduciary duty and failed to supervise this account to Claimant's detriment.

Respondents allege that they fulfilled all obligations to Claimant by investing in diverse high quality and stable mutual funds consistent with Claimant/TOWERS objectives; that the portfolio could only be changed by Claimant and TOWERS and not Respondents; that TOWERS was pleased with the investments and neither he nor Claimant ever complained to Respondents and that even after the account reached almost 100% in equities, TOWERS did not want to change. The losses were due to market fluctuation; no transaction was done without Claimant/TOWERS approval.

ISSUES PRESENTED

Issues raised by Claimant:

1. The Respondent Safavi breached his fiduciary duty by investing in a risky unsuitable portfolio inconsistent with TOWERS' objectives and risk tolerance.
2. The Respondents were professionally negligent in making these recommendations by causing TOWERS to invest most of his funds in highly risky securities.
3. The Respondent Merrill Lynch (ML) failed to supervise Safavi in his investment of Claimant's account.
4. Respondent ML breached its contract with Claimant/TOWERS by violating the rule of law and agency/exchange regulations.

Issues raised by Respondents:

1. The Respondent followed Claimant's instructions and invested in high quality, diversified mutual funds as instructed and/or agreed upon.
2. The investments took into consideration the need for a larger return to support cash requirements.
3. Respondent Safavi met quarterly or more often with Claimant to review the account and respond to TOWERS' requests to create more return.
4. Respondent Safavi was not aware of TOWERS' falling health; TOWERS instructed Safavi not to liquidate the portfolio.
5. Neither TOWERS nor Claimant complained to Respondents.
6. The losses, if any, in Claimant's account resulted from market fluctuation.

RELIEF REQUESTED

For Claimant: Claimant alleges damages of \$223,000.00 (adjusted to \$204,371.00 plus interest of \$20,101.00, for a total of \$224,472.00). The damages result from "underperformance" by Respondents' failure to invest in a "well-managed fund" which would have earned this sum in excess of what TOWERS' actual portfolio did earn; Claimant also seeks recovery of its attorneys' fees and costs.

For Respondents: Respondents request that the claims be denied, that Safavi's CRD be expunged of reference to this claim and for their attorneys' fees and costs.

FINDINGS AND DECISION

A. Findings of fact:

After considering the argument and evidence of both the Claimant and Respondents in this matter, the undersigned Arbitrators make the following findings:

1. The Claimant and Respondents maintained a broker-customer relationship.
2. TOWERS was a renowned physician and teacher, unsophisticated and inexperienced in or familiar with financial matters including investment in securities and mutual funds; he was completely reliant on professional advice, conservative and risk-averse; at the time of opening his account with Respondents, he was in his mid-seventies, in failing health, but never incompetent prior to his death.
3. Before TOWERS invested with Respondents, he maintained a pension account with his employer University of California at Los Angeles, which had 49% invested in equities, with the balance in conservative funds or cash.
4. Mr. Safavi suggested a portfolio mix of 50% bonds, 40% equities and 10% cash; the recommended portfolio did not provide TOWERS with the \$52,000.00 a year he required; TOWERS agreed to increase the allocations to 60% equities and 40% bonds/cash.
5. Between June, 1998 and May, 2000, the investment mix changed from 64% equities to virtually 100% equities; Safavi admitted that the equity portion of the portfolio should not have exceeded 50%; the allocation did not take into consideration TOWERS' age, health, inexperience or risk aversion.
6. TOWERS' investment objective was for moderate risk and total return as set forth on his New Account Form with Respondents; investments made by Respondents in the TOWERS accounts were not consistent with that objective; Safavi never met with ML to review the TOWERS account; ML did not review the account at any time or discuss it with Safavi.
7. TOWERS died in August, 2001; Claimant then assumed control of the accounts but gave no instruction to Safavi except to sell when cash for the TRUST was needed; Claimant made no complaint to either Respondent at any time until filing of this arbitration; Claimant never reviewed the contents of the accounts

B. Decision:

After considering the argument and evidence of both the Claimant and Respondents in this matter, the undersigned Arbitrators make the final determination and decision of the issues presented, as set forth below:

Decision:

1. Claim: For Claimant and against Respondents jointly and severally.

C. Award:

1. Monetary damages: \$103,320.00
2. Punitive damages: None
3. Costs: All costs awarded to Claimant and against Respondents jointly and severally
4. Attorneys' fees: None
5. Other:
 - a. Interest: None

D. Other determinations:

1. Respondents shall reimburse Claimant's non-refundable filing fee
Yes ☒ No ☐
2. Respondent shall reimburse Claimant's hearing session deposit
Yes ☒ No ☐
3. Parties shall bear their own costs of arbitration
Yes ☐ No ☒
4. Should this matter be referred to any regulatory organization (SRO or SEC) for disciplinary investigation of rule violations or violation of federal securities laws?
Yes ☐ No ☒
5. Respondent Safavi's CRD record shall not be expunged.

- E. Forum Fees:** Respondents shall jointly and severally pay 100% of all Forum fees.

Dated: 6/29/03


Mandel E. Himmelstein, Chair

Dated: _____

Ronald L. Cameron, Public Arbitrator

Dated: _____

David D. Holt, Industry Arbitrator

RECEIVED**B. Decision:****PCX ARBITRATION**

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Dated: 6/30/03

Ronald L. Cameron, Public Arbitrator

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Mandel E. Himmelstein, Chair

Dated: _____

Ronald L. Cameron, Public Arbitrator

Dated: 6/29/03

David D. Holt, Industry Arbitrator