

NASD DISPUTE RESOLUTION AWARD  
NASD DISPUTE RESOLUTION

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CASE: 04-03355

Michael Morra, Claimant v. Morgan Stanley DW, Inc. and Frank Castro, Respondents

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ATTORNEYS:

For Claimant Michael Morra ("Claimant") appeared Renee Pearce of John Jay Legal Services, Inc., White Plains, NY.

For Respondents Morgan Stanley DW, Inc. and Frank Castro (collectively "Respondents") appeared Harrison A. Kaugman, Esq., in-house counsel, Morgan Stanley DW, Inc., New York, NY.

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NATURE OF DISPUTE: Customer v. Member and Associated Person.

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DATE FILED: May 7, 2004.

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CASE SUMMARY: Claimant alleged that Respondents provided contradictory and misleading statements in MSDW's Prime Income Trust advertising material, and Respondent Castro's negligent misrepresentations and omissions regarding the risks involved in rolling over Claimant's Con Ed IRA into the more risky Prime Income Trust. Claimant maintained that due to Respondents' actions, the account suffered losses. Claimant's claim involved MSDW Prime Income Trust.

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ARBITRATOR'S REPORT: *See attached Exhibit A.*

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Claim Data

Claim: \$10,998.00  
Interest: at 9%  
Filing Fees: Unspecified  
Other: Unspecified

Award Data

Award: \$.00  
Interest: \$.00  
Filing Fees: \$.00  
Other: \$.00

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AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) The claims of Claimant are dismissed in their entirety. 2) All requests for interest are denied. 3) All other relief requests are denied. 4) NASD Dispute Resolution administratively waived the \$425.00 filing fee.

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OTHER FEES: Pursuant to Rule 10333 of the Code, Respondent has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

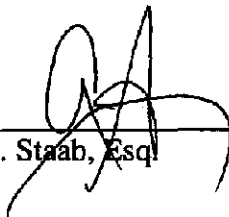
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Award 04-03355

Gary G. Staab, Esq. -

Sole Public Arbitrator

AFFIRMATION

I, Gary G. Staab, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

  
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Gary G. Staab, Esq.

12-8-04  
Signature Date

December 15, 2004  
Date of Service (For NASD-DR office use only)

**Morra v. MSDW and Castro**  
**NASD-DR Case No. 04-3355**

Explanation of Decision

At the outset, counsel for both parties should be commended for their clear and comprehensive presentations. Deference was given to Claimant's request that this case be resolved as a Simplified Arbitration under NASD Code of Arbitration Rule 10302, without a hearing.

In reaching my decision I reviewed (1) Uniform Submission Agreements submitted by all parties, (2) the Statement of Claim, dated May 5, 2004, with Exhibits A through K (the "SOC"), (3) the Statement of Answer, dated July 15, 2004, with Exhibits 1 and 2, (4) Claimant's Reply, dated September 27, 2004, with Affidavit of Ronald Filante, PhD. (the "Reply"), (5) Respondents' letter, dated September 28, 2004, and (6) Claimant's letter, dated October 6, 2004. I understand that Respondents did not file a responsive pleading to Claimant's Reply as indicated in their letter of September 28, 2004.

In my view, the claim should be dismissed for several reasons. The main reasons follow.

Whether a statement constitutes a misrepresentation must be measured at the time a statement is made. This is suggested by common sense and the second element of the cause of action: that the speaker should have known the representation was false.<sup>1</sup>

Claimant does not present any evidence that Castro should have known that his "representation" that PIT was suitable for Claimant was false in 1998.

The Yahoo Finance performance chart in Claimant's SOC Exhibit D shows some volatility beginning in 2001, but does not show anything about the performance before sometime in 1999. The "Morningstar Risk Rating" shown on another Exhibit D page is shown as "high." However, the Exhibit states that the rating is "As of 31-Mar-04," and not as of 1998 when Castro recommended PIT shares. The Exhibit states that the fund was "up" 12 years, and "down" only 2. The performance chart shows that the two years that the fund was down were 2001 and 2002. The only other evidence of prior performance of the fund appears in the sales brochure, SOC Exhibit A. The NAV History Chart in that brochure shows low volatility through September 1996. Accordingly the record does not reflect any evidence whatsoever that Castro "should have known" PIT was had an unsuitably "high" volatility or credit risk in 1998.

In addition, Claimant admits that he "read and understood" the brochure. (SOC at 4.) Although he claims to have, at least initially, wanted to roll his IRA into a "completely secure" investment that would preserve principal while generating income to supplement

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<sup>1</sup> That is just one example of the distinction between a misrepresentation claim against a broker and a claim, not made here, against the fund managers for later failing to perform as represented.



his social security, the brochure makes numerous disclosures in non-technical language that indicate somewhat different objectives and risk factors. For example, while the brochure states that the fund will "seek" to provide a high level of current income consistent with preservation of capital, it warns that there can be no assurance that the Trust will achieve its objectives. The brochure clearly states that unlike money market funds, PIT's NAV "will fluctuate." (Brochure at 2.) Further, the brochure gives several examples of how PIT investors could experience losses. In purchasing PIT shares after reading the brochure Claimant must be deemed to have modified his alleged objective of "complete" security. Claimant does not provide a rational basis for his arguments that the "emphasis in the brochure was misleading" or that he should not have been expected to understand that the NAV of PIT could fluctuate.

Claimant's expert's opinion regarding suitability appears primarily based on Claimant's statement that he wanted a "completely secure investment." But that is not all that Claimant told Castro. He "repeatedly stressed to Castro that his objectives were both the preservation of capital and income generation." (Reply at 1.) He indicated a desire to continue fixed income fund-type investing. (SOC at 2.) Before investing, he "read and understood" the brochure stating that the fund's NAV "will fluctuate." Accordingly the premise for the opinion appears faulty.

With respect to Castro's alleged oral misrepresentations listed on page 3 of the SOC, Claimant does not demonstrate that any of them were in fact false when made.

Similarly, in light of the above, Claimant's argument that MSDW misrepresented PIT in the brochure is unpersuasive. The brochure must be read as a whole. Further, it was not written for Claimant, but for any potential PIT investor. Accordingly it must be viewed objectively, and not through Claimant's subjective, selective reading.

Finally, the timing of Claimant's sale of his PIT shares raises several questions. According to SOC Exhibit K, it appears that PIT did experience some volatility in 1999. Claimant, who admits to having read and understood his account statements (SOC at 4), should have observed that (just as was disclosed in the brochure) PIT was not immune from NAV fluctuations, and could have raised issues then about his alleged misunderstanding about how the fund could perform. The Exhibit K chart also does not seem to support Claimant's allegation that the fund "started to decline by the third quarter of 2001." (See, for example the declines in January and April 2001.) Accordingly, were there liability there could be an issue about mitigation. The timing of Claimant's sale could also be viewed as a product of the sharp market decline after the 9/11 attacks.

As there was no demonstration of wrongdoing on Castro's part, there is no *respondeat superior* or failure to supervise liability, or issue about how to calculate damages.

