

**Award
NASD Dispute Resolution**

COPY

In the Matter of the Arbitration Between:

Howard W. Marcus & Lottie R. Marcus, TTEES FBO Howard & Lottie Marcus Trust
HSP and TTEES FBO Howard & Lottie R. Marcus Trust WSP, Claimants v. Banc of
America Investment Services, Inc. and Robin L. Chaffey, Respondents

Case Number: 05-04082

Hearing Site: San Diego, California

Nature of the Dispute: Customers v. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

Howard W. Marcus
Personal Representative
San Diego, California

For Respondents:

Jennifer Wood Burke, Esq.
Lubiner & Schmidt
Cranford, New Jersey

CASE INFORMATION

Statement of Claim filed: August 1, 2005

Claimants' Joint Uniform Submission Agreement signed: October 10, 2005

Joint Statement of Answer filed by Respondents: November 18, 2005

CASE SUMMARY

Claimants alleged misrepresentations, non-disclosures, and omission of facts. Claimants' claims involved the purchase of Class B and/or C shares in the following mutual funds: Van Kampen Global Franchise, Capital World Growth, Allianz Pimco, Columbia Acorn, American Balanced Fund Inc., Income Fund America Inc., and Growth Fund America Inc.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimants requested \$11,786.05 in compensatory damages and \$574.56 in interest.

Respondents requested dismissal of Claimants' Statement of Claim in its entirety, expungement of this matter from Respondent Robin L. Chaffey's registration record maintained by the NASD Central Registration Depository ("CRD"), attorney's fees, and filing fees.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents Banc of America Investment Services, Inc. and Robin L. Chaffey did not file with NASD Dispute Resolution properly executed submission agreements, but are required to submit to arbitration pursuant to the Code and, having answered the claim, are bound by the determination of the Arbitrator on all issues submitted.

The parties agreed that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the Arbitrator decided in full and final resolution of the issues submitted for determination as follows:

- 1) Claimants' claims are denied in their entirety and dismissed with prejudice.
- 2) Respondent Robin L. Chaffey's request for expungement is denied.
- 3) The parties shall bear their respective costs, including attorney's fees.
- 4) All other relief requested and not expressly granted is denied.

STATEMENT OF DECISION

The Report of the Joint NASD/Industry Task Force on Breakpoints, July 2003, (the "Report") observes:

It is critical that investors are afforded the opportunity to receive the full panoply on benefits offered to them; delivery of breakpoint discounts in the sale of front-end sales load mutual funds is no exception. . . [B]roker/dealers and mutual funds have an obligation to deliver the appropriate breakpoint discounts to investors. *Id.* at 24.

Whether that obligation has been met by both the Member, Banc of America Investments Services, Inc., as the successor in interest by merger of Quick & Reilly, ("BAI") and by the Associated Person, Robin L. Chaffey, ("Chaffey") raises largely questions of fact, not of law. In this regard, the Claimants assert that "the broker in question never advised us of 'breakpoints' or possible savings in brokers commissions," while Respondents deny these charges and state that they in fact did discuss the possible benefit of "breakpoints" with the Claimants, but that the Claimants "chose to invest in no-load shares (B or C shares)." There was a relatively sparse factual record in this matter on both sides. The only "evidence" submitted for the Arbitrator's consideration was the Claimants' NASD Arbitration Uniform Submission Agreement, revised 10/10/2005, and the Respondents' Statement of Answer and Request for Expungement. Both sides waived their right to a hearing unless the Arbitrator felt that one was needed for him to reach a decision. In a matter in which the Associated Person seeks expungement, at a minimum the Arbitrator would have expected that Chaffey would have submitted a declaration or affidavit on her own behalf. In addition, the Respondents did not introduce any documentary evidence that they ever expressly apprised the Claimants of any **specific** discount opportunities or provided a written disclosure statement to the Claimants at least annually and instituted a standardized checklist system to demonstrate that they communicated breakpoint information to the investors as Recommendations E and I of the Report suggest. See also NASD, Breakpoints Checklist and Worksheets, *available at* <http://www.nasd.com/RulesRegulation/ComplianceTools/BreakpointsChecklistWorksheets/> NASDW_009678.

While I conclude that, more probably than not, the Claimants could have benefited from taking advantage of breakpoints in their purchase of mutual funds, that fact alone does not establish that the Respondents can be held personally responsible for the Claimants' failure to realize such savings. To the contrary, based on the evidentiary record before me, I must conclude that the Claimants have failed to meet their burden of proving their alleged entitlement to damages. First, the trust established by Dr. Marcus and his wife was a substantial one, and I have no basis to question the Respondents' assertion that the Claimants were "educated and experienced investors."

Second, the confirmation letters and "Purchase Acknowledgement[s]" that the Respondents introduced as exhibits at least provide some evidence that the Claimants in fact "were advised of the various reduced sales charge strategies that may be available, such as breakpoints, letters of intent and rights of accumulation" and that "Mutual funds may offer reduced front-end sales charges (also known as breakpoints) for purchase of Class A shares if certain dollar amounts are invested." Respondents' Exhibit "C." While these and similar disclosures were undeniably generic and non-specific, at a minimum, they should have caused a reasonably prudent and sophisticated investor to inquire of his broker whether such investment strategies could benefit him.

Most importantly, in a letter that the Claimants wrote to BAI on April 15, 2005 and which is attached to their Submission Agreement, the Claimants expressly state:

It is true, that my Financial Advisor explained to me - - when I purchased my first American Fund Shares, that there is a substantial difference in front load and holding time required between A and B shares. It is also true, that my Financial Advisor sent written material about the funds each time after I had made a purchase over the phone. (Emphasis in original).

While the Claimants expressly assert that they "never even heard of 'available breakpoint opportunities' until very recently," in the absence of any convincing evidence which would dictate a contrary result, the admissions quoted above are ultimately fatal to the Marcus's claims.

On the other hand, I must also conclude that Chaffey's request for expungement should be denied. "NASD recognizes that expungement of a CRD record under any circumstances is an extraordinary remedy and should be used only when the expunged information has no meaningful regulatory or investor protection value. . . [and] the fact that a person prevailed in an arbitration is not, in and of itself, an appropriate ground for expunging information about the proceeding from the CRD system." NASD Dispute Resolution Arbitrator Training, Mini-Course #3: Expungement, pp. 5-6. While the Arbitrator notes that over the 18 years that Coffey has been a registered representative, she has had an unblemished disciplinary record, based upon the facts as they have been presented to me, I cannot conclude that the "extraordinary remedy" of expungement should be granted here. Finally, the Respondents have not advanced any statutory or contractual basis upon which the Arbitrator could base an award of attorney's fees in this case. Accordingly, the Respondents' request for attorney's fees is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$ 125.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Banc of America Investment Services, Inc. is a party and the following fees are assessed:

Member Surcharge = \$ 425.00
Total Member Fees = \$ 425.00

Forum Fees and Assessments

The Arbitrator assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

1 Pre-hearing conference session with one arbitrator @ \$ 450.00/session = \$ 450.00
Pre-hearing conference: February 14, 2006 1 session

Forum Fee for Arbitrator's Decision on the Paper Record = \$ 300.00

Total Forum Fees = \$ 750.00

1. The Arbitrator waived \$450.00 of the forum fees.
2. The Arbitrator assessed \$150.00 of the forum fees jointly and severally to Claimants.
3. The Arbitrator assessed \$150.00 of the forum fees jointly and severally to Respondents.

Fee Summary

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 125.00
Forum Fees	= \$ 150.00
Total Fees	= \$ 275.00
Less payments	= \$(425.00)
Refund Due Claimants	= \$(150.00)

2. Respondent Banc of America Investment Services, Inc. is charged with the following fees and costs:

Member Fees	= \$ 425.00
Less payments	= \$(425.00)
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 150.00
Less payments	= \$(0.00)
Balance Due NASD Dispute Resolution	= \$ 150.00

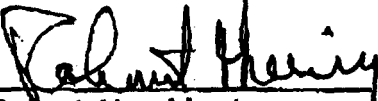
All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATOR

Robert Alan Merring

Public Arbitrator, Presiding Chair

Arbitrator's Signature


Robert Alan Merring
Chair, Public Arbitrator

9/5/06
Signature Date

9/5/06
Date of Service