In the Matter of the Arbitration Between:

Claimants
Gordon Boone
Estate of Gloria Levin
Stanley Friedler
Gail Friedler
Richard Friedler
Philip Konits
Cindy Konits
Paul Levin
Michael Stern
Wendy Stern
Milan Wister
Amy Wister

vs.

Respondents
Stifel, Nicolaus & Co., Inc.
Kenneth David Blumberg
Coleman Joseph Devlin
Michael Francis Molloy
Stifel Financial Corp.

Case Number: 17-03299

Hearing Site: Baltimore, Maryland

Nature of the Dispute: Customers vs. Member, Associated Persons, and Non-Member

This case was decided by an all public panel.

REPRESENTATION OF PARTIES


For Respondents Kenneth David Blumberg, Coleman Joseph Devlin, Michael Francis Molloy, and Stifel, Nicolaus & Co., Inc. (“The Stifel Respondents”): Edwin A. Zipf, Esq., Bressler, Amery & Ross, P.C., Florham Park, New Jersey.

Respondent Stifel Financial Corp. did not enter an appearance in this matter.
CASE INFORMATION

Statement of Claim filed on or about: December 8, 2017.
Amended Statement of Claim filed on or about: April 24, 2019.
Estate of Gloria Levin signed the Submission Agreement: November 8, 2017.
Stanley Friedler signed the Submission Agreement: November 16, 2017.
Gail Friedler signed the Submission Agreement: November 16, 2017.
Richard Friedler signed the Submission Agreement: November 16, 2017.
Philip Konits signed the Submission Agreement: November 9, 2017.
Cindy Konits signed the Submission Agreement: November 9, 2017.
Paul Levin signed the Submission Agreement: November 8, 2017.
Wendy Stern signed the Submission Agreement: November 8, 2017.
Milan Wister signed the Submission Agreement: November 7, 2017.
Amy Wister signed the Submission Agreement: November 7, 2017.

Joint Statement of Answer filed by The Stifel Respondents on or about: March 2, 2018
Kenneth David Blumberg signed the Submission Agreement: March 5, 2018.
Coleman Joseph Devlin signed the Submission Agreement: March 5, 2018.
Michael Francis Molloy signed the Submission Agreement: March 5, 2018.
Stifel, Nicolaus & Co., Inc. signed the Submission Agreement: March 2, 2018.

Respondent Stifel Financial Corp. did not file a Statement of Answer or sign the Submission Agreement.

CASE SUMMARY

Claimants asserted the following causes of action: breach of contract, breach of duty, professional negligence, breach of fiduciary duty, violation of the Securities Exchange Act of 1934 and SEC Rule 10b-5, negligent supervision, misrepresentation and omission of facts, and fraud. The causes of action relate to various securities.


Unless specifically admitted in the Statement of Answer, The Stifel Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested compensatory damages in the amount of $20,000,000.00, punitive damages in the amount of $30,000,000.00, costs, attorneys’ fees, interest and any and all other relief that the Panel deems just and appropriate. Claimants also requested that upon conclusion of the hearing, the Panel issue an opinion providing the reasons for its award.
In the Amended Statement of Claim, Claimants Michael Stern, Wendy Stern, Paul Levin, and Estate of Gloria Levin requested consequential damages no less than $8,000,000.00, punitive damages in the amount of $30,000,000.00, damages set forth in §11-703(b) of the Corporations and Associations Article of Maryland Code to be proven at hearing, costs, attorneys’ fees and interest. Claimants also requested that upon conclusion of the hearing, the Panel issue an opinion providing the reasons for its award.

In the Statement of Answer, The Stifel Respondents requested that Claimants’ Statement of Claim be denied with prejudice and that the cost of the arbitration be assessed against Claimants. The Stifel Respondents objected to Claimants’ request for an explained decision.

At the close of the hearing, Claimant requested $1,524,176.00 in compensatory damages.

**OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

Respondent Stifel Financial Corp. is not a member of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to Claimants’ claims against Respondent Stifel Financial Corp.

On March 19, 2019, Claimants withdrew their claims against Respondent Michael Francis Malloy.

On March 19, 2019, Claimants filed a Motion to Sever the claims of Michael Stern, Wendy Stern, Paul Levin, and Estate of Gloria Levin from this arbitration. On March 29, 2019, Respondents Stifel Nicolaus & Co. Inc., Coleman Joseph Devlin and Kenneth David Blumberg opposed the motion. On April 2, 2019, Claimants filed a Reply in support their motion. By Order dated April 9, 2019, the Panel granted the motion and ordered Claimants to file an Amended Statement of Claim in this arbitration with Michael Stern, Wendy Stern, Paul Levin, and Estate of Gloria Levin as Claimants, and Stifel Nicolaus & Co. Inc., Stifel Financial Corp., and Kenneth David Blumberg as Respondents. All other Claimants were ordered to file their claim in a separate arbitration, including claims against Respondent Coleman Joseph Devlin.

The parties present at the hearing have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.
AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Stifel Nicolaus & Co., Inc., is liable for and shall pay to Claimants Michael Stern, Wendy Stern, Paul Levin, and Estate of Gloria Levin, the sum of $1,524,176.00 in compensatory damages.

2. Claimants’ request for an explained decision is denied.

3. Respondent Kenneth David Blumberg's request for expungement of his CRD records is denied.

4. Any and all claims for relief not specifically addressed herein, including punitive damages, attorneys’ fees and costs, are denied.

FEES

Pursuant to the Code of Arbitration Procedure, the following fees are assessed:

**Filing Fees**
FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

| Initial Claim Filing Fee | =$ 2,250.00 |

*The filing fee is made up of a non-refundable and a refundable portion.*

**Member Fees**
Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Respondent Stifel, Nicolaus & Co., Inc. is assessed the following:

| Member Surcharge     | =$ 4,025.00 |
| Member Process Fee   | =$ 7,000.00 |

**Postponement Fees**
Postponements granted during these proceedings for which fees were assessed or waived:

February 4-8, 2019, postponement by Respondents.  

| Total Postponement Fees | =$1,500.00 |
The Panel has assessed $750.00 of the adjournment fees jointly and severally to Claimants.
The Panel has assessed $750.00 of the adjournment fees jointly and severally to Respondents.

**Discovery-Related Motion Fee**
Fees apply for each decision rendered on a discovery-related motion.

One (1) decision on a discovery-related motion on the papers with one (1) arbitrator @ $200.00/decision = $ 200.00

Respondents submitted one (1) discovery-related motion

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Total Discovery-Related Motion Fees = $200.00
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The Panel has assessed the $200.00 discovery-related motion fees jointly and severally to The Stifel Respondents.

**Hearing Session Fees and Assessments**
The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) pre-hearing sessions with the Panel @ $1,500.00/session = $4,500.00
Pre-hearing conferences:  
April 3, 2018  1 session  
January 16, 2019  1 session  
April 9, 2019  1 session

Nine (9) hearing sessions @ $1,500.00/session = $13,500.00
Hearing Dates:  
August 6, 2019  2 sessions  
August 7, 2019  2 sessions  
August 8, 2019  2 sessions  
August 9, 2019  2 sessions  
August 19, 2019  1 session

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Total Hearing Session Fees = $18,000.00
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The Panel has assessed $9,000.00 of the hearing session fees jointly and severally to Claimants.
The Panel has assessed $9,000.00 of the hearing session fees jointly and severally to The Stifel Respondents.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.
I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

Catherine Esther Bocskor  
Public Arbitrator, Presiding Chairperson

Edward J. Gutman  
Public Arbitrator

John Leslie Coker  
Public Arbitrator

October 03, 2019  
Date of Service (For FINRA Office of Dispute Resolution office use only)
ARBITRATION PANEL

Catherine Esther Bocskor  
Public Arbitrator, Presiding Chairperson
Edward J. Gutman  
Public Arbitrator
John Leslie Coker  
Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

Catherine Esther Bocskor  
Public Arbitrator, Presiding Chairperson

Signature Date

John Leslie Coker  
Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

Edward J. Gutman  
Public Arbitrator

Signature Date

October 3, 2019

Date of Service (For FINRA Office of Dispute Resolution office use only)
This Complaint alleged Respondent Blumberg et al “violated their fiduciary duties and defrauded Claimants by purchasing excessive and unsuitable investments in their accounts by deceiving Claimants by misrepresenting and/or omitting material facts concerning their accounts and the transactions executed in them. These actions were taken with knowledge, evil motive, ill will and fraudulent intent necessary.”

These accusation were based on the principle brokers who concentrate their client’s investments in a few thinly traded holdings of one asset class and in one or two industries, as Respondents clearly did in this case, subject their clients to “catastrophic losses and thus, the broker to liability.”

A 5-day hearing was conducted to show Respondents purchased excessive and unsuitable investments in Claimants’ accounts, violated their fiduciary duties, and defrauded Claimants by purchasing excessive and unsuitable investments in their accounts concentrated in individual technology and biotech/healthcare securities, in the biotech/healthcare and technology sectors; deceiving Claimants by misrepresenting and/or omitting material facts concerning their accounts and the transactions executed in them, taken with “knowledge, evil motive, ill will and fraudulent intent necessary.”

Yet, the majority panel decision found no finding on these allegations or financial losses attributed to these claims. Rather, the financial recovery to Claimant was based solely upon a violation of Restatement Second Section 209 “if the trustee fails to sell trust property which is his duty to sell (because, e.g., the trust so directs or diversification so required,) the beneficiary can charge him with the amount he would have received by timely sale.

The majority of the panel (Catherine Bocskor and John Coker) found the evidence showed a Complainant (Stern) had directed Respondent Blumberg to sell one of the holdings in his portfolio and he did not in violation of his duty to sell under Restatement Second Section 209, and awarded Complainants damages based on the difference in value between the value at the time of the “order” to sell and the value at the time of sale. They made no finding nor was there evidence of “catastrophic losses” for which the broker was liable.

Rather, the 5-day hearing resulted in a decision and award of damages based solely on a finding that Blumberg failed to sell a portfolio holding upon the investor’s order.

While the evidence did reveal Complainant, Stern conferred with Blumberg about selling one of the holdings in his portfolio, that Blumberg counseled against selling referencing Warren Buffet’s investment philosophy; yet the evidence failed to produce evidence Stern “ordered or directed” Blumberg to sell.

That the evidence Blumberg did not refuse to sell upon an order to sell, and the majority’s conclusion may have been defective, may be validated by the evidence of what happened or didn’t happen next. True, Blumberg didn’t sell but had the customer ordered or directed him to sell as the majority found and he did not sell, there was no explanation why a day later, a week later or at
any time had there been no sale. Stern would have not called him and questioned why a sale had not been consummated or reiterated an order to sell. So, while the Restatement may be clear as to a broker’s duty, the facts must show a violation and they did not.

In addition, I found no basis in law or fact that Complainants whose claim is based on “unsuitability” is entitled to what the majority described as “lost profits” from an “unsuitable over concentrated investment portfolio,” especially inconsistent with their recurring claims Blumberg subjected them to “catastrophic” losses, “astronomical risk,”

Yet, while the Complaint alleged unsuitability, the portfolio earned as profit. Thus, the majority opinion was not based on placing the Complainants in an unsuitable portfolio as alleged, rather, it was the broker’s failure to sell the alleged “unsuitable” portfolio at its highest point of profit. A finding unsupported by the evidence produced in a 5 days hearing.

I dissent

Edward J. Gutman