

PUBLIC

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Robert and Marjorie Klinker

91-03351

Name of Respondent

Edward Forst, Jr.

REPRESENTATION

Claimants' Robert and Marjorie Klinker ("Claimants") appeared pro se.

Respondent Edward Forst, Jr. ("Respondent") appeared pro se.

CASE INFORMATION

Statement of Claim filed on: October 23, 1991.

Claimants' Submission Agreement signed on: November 6, 1991.

Claimants' Motion to Amend the Statement of Claim filed on: June 16, 1992.

Claimants' Second Motion to Amend the Statement of Claim filed on: August 6, 1992.

Statement of Answer filed by Respondent on: January 17, 1992.

Respondent's Submission Agreement signed on: January 16, 1992.

Respondent's Response to Claimants' First Motion to Amend the Claim filed on: June 29, 1992.

HEARING INFORMATION

Hearing Dates/Sessions: June 9, 1992, one session.
September 16, 1992, one session.

Hearing Location: NASD offices in New York City, New York.

CASE SUMMARY

Claimants alleged that they rolled over their New York City Board of Education 403-b Tax Deferred Annuity to Righttime Funds sole Mutual Fund ("RIT") and Respondent appeared at Claimants' house and "sold" Claimants an idea of going in and doing better in this fund. Claimants further alleged they were solicited strongly by Respondent to diversify from RIT to other funds which were newly formed and made out to be very stable and a "smart" diversify move and shortly afterward they all started down and appeared consistently at the Wall Street Journal Bottom 10 list. Claimants further alleged had they been left alone and not strongly solicited, Claimants would be ahead jointly \$25,000 to \$30,000.

Respondent maintained that Claimants chose the Righttime Fund as an appropriate investment alternative to achieve their stated goals and to reduce risk and Claimants retained total control of their funds. Respondent further maintained Claimants did not incur a loss while the account was under Respondent's management.

Claimants alleged in their Motion to Amend the Statement of Claim that had Claimants been left in NYC 403-b Plan they would have jointly accrued \$240,000.

Respondent alleged in his response to the Motion to Amend the Statement of Claim that Claimants had full knowledge of costs and risks of the Righttime Funds before transferring their funds from NYC 403-b plan.

Respondent alleged in their Reply to Claimants' Motion to Amend the Statement of Claim that Claimants experienced a gain of \$77,000 since 1986 and Claimants' failed to substantiate their claim.

Claimants alleged in their Second Motion to Amend the Statement of Claim that the Motion arose from new documents received from Respondent.

RELIEF REQUESTED

Claimants requested \$25,000 to \$30,000 in compensatory damages.

Respondent requested all claims be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

The panel denied Claimants' Motion to Amend the Statement of Claim and Claimants' Second Motion to Amend the Statement of Claim.

At the hearing the Claimant requested Respondent be enjoined from soliciting New York teachers which the panel denied.

AWARD

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

1. All claims by Claimant be and hereby are dismissed in their entirety.
2. Each party shall bear their own costs.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

2 sessions x \$300 = \$600 less \$300 hearing session deposit = \$300 net due.

Claimants be and hereby are liable and shall pay to the NASD the sum of \$300 to represent forum fees.

The NASD shall retain the \$100 filing fee and \$300 hearing session deposit previously deposited by the Claimants.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrator's Signature:

Name

Public/Industry


Martin Fogelman, Esq./Chairman

Public Arbitrator

Date of Decision: October 9, 1992

ADDENDUM

Claimants assert that after they rolled over their N.Y.C. Board of Education 403-b Tax Deferred Annuity to Righttime Funds, they were "strongly multiple solicited" * * * and caved in" to exchange that investment to Righttime Blue Chip Fund, Righttime Growth Fund and Righttime Government Securities Fund. Claimants assert that Respondent Forst "preponderantly betrayed a 'fiduciary trust' (403-b)" in so soliciting them, and they assert that had they not been so solicited and had they not "caved in" they would have been ahead \$25,000 to \$30,000. They seek to be "made whole back to the original generic RTT (Righttime) Fund as if no strong multiple solicitation occurred." They also assert that the investments were unsuitable for them.

As to suitability, at the hearing the Arbitrator asked Claimant Klinker what his (and his wife's) net worth and assets were at the time of the subject transactions, and he declined to answer, and said that such were irrelevant, and berated Respondent for revealing that his assets were about \$2 million dollars. I find that the amount and nature of assets of the investor are relevant on the question of suitability - for prospective retirees as well as others - and that Claimant Klinker did tell Respondent that such were his assets, and therefore Respondent was justified in believing that the subject investments amounted to about 10% of the total assets of both Claimants.

Claimants have been clients of Kidder, Peabody & Co. since 1975, and Claimant Robert Klinker has also been a client of Ramirez & Co., Inc. for over eighteen years (Claimant's Exhibits 4 and 5). While his investments with those firms was in municipal bonds, it nevertheless appears that with two different brokers, and with significant investment assets - which Claimants revealed to Respondent - it would not be appropriate to regard Claimants as fiscal neophytes who were totally inept and unaware of what they and Respondent were saying, proposing and doing concerning the subject funds.

I do not find that any of the relevant investments were unsuitable in this case, and find for the Respondent on that issue.

I find no breach of trust by Respondent. I find no improper solicitation was made. Full disclosures were made by Respondent, specifically including those relating to the two year "no contribution" rule.

In addition to the foregoing, it is significant that Claimants are not only college graduates (Columbia for the husband; the wife attended Manhattanville and St. John's University), but Mr. Kleiner also has a master's degree in management from the Columbia University School of Business, and his wife has a graduate degree from Brooklyn College, plus 30 additional post-graduate credits. I find that they are intelligent people, who have been successful in investments, and although apparently most of their investments are in bonds, they have had, as Mr. Klinker testified, at least some experience with stocks, (and indeed, the Variable A Portfolio units held by Claimant in the Teachers

Retirement System were stock investments) and knew what they were doing when they sought out Respondent's firm, and invited Respondent (whose firm is located in Wyncote, Pennsylvania) to their home in New York, following their hearing the firm being mentioned favorably in by John Scheuer on a WMCA radio program. In short, Claimants were not wholly unsophisticated persons. I find that the intent of Claimants in seeking out and dealing with Respondent was their hope of increasing their yield on investments. Further, it is relevant that the exchanges here complained of were free exchanges, made with no acquisition cost charged to Claimants. Indeed, Claimants did not incur any acquisition costs in connection with any investment made through Respondent's firm, Lincoln Investment Planning, Inc.

I find that Claimants account was not discretionary, and that Claimants determined and timed all investments, and did so after receiving not only advice and information about the risks involved, *inter alia*, from Respondent, but after consulting others, including at least one of their consultant-brokers (possibly one from Shearson). I find that Claimants were properly and timely supplied with the appropriate prospectus prior to their investments.

It is unfortunate that the Claimants' hopes for higher yields were not fully realized, and one can understand their chagrin when the market seemed to be on the road to recovery after Claimants transferred out of the subject stock funds and into money market funds. I find that Respondent made no guarantees, and Claimants - whatever their experience in the stock market - are quite sufficiently intelligent to fully understand what they had been seeking when they contacted Respondent's firm, what they were doing, and what had been recommended to them, and the vagaries of the market, and what the risks were.

The total of Claimants investments was \$214,715.33. The value of their accounts earlier this year totaled about \$73,000 more than that. Under no proper view of this case are Claimants entitled to recover the equivalent of any alleged lost additional profits they might have realized had they made or retained investments other than the subject ones.

Claimant's request made at the hearing that the arbitrator enjoin Respondent from soliciting New York teachers is denied.