

## 28 No. 2 PIABA B.J. 309

PIABA Bar Journal

2021

Melanie Cherdack, Sara Hanley

Copyright © 2021 by PIABA; Melanie Cherdack, Sara Hanley

## RECENT ARBITRATION AWARDS

This issue's featured arbitration awards include cases in which FINRA arbitration panels granted noteworthy relief, including big dollar awards and one wherein the statutory attorney's fees, interest and cost awarded was well in excess of the compensatory damages awarded. Two of the awards contain six figure discovery sanctions--both in cases where no liability was found. There are also a number of awards involving traditionally online firms. One dealt with an operational issue in timely opening an account wherein the panel awarded damages for precluding the Claimant from participating in a market run up. Another involved large damages awarded to a number of Claimants as a result of high frequency trading issues. In another, a *Pro Se* Claimant was awarded \$300,000 after only a two-day hearing. These cases may portend things to come, as more online and discount trading firms are offering more services to their customers.

### **Beverly B. Schottenstein, Individually and as a Co-Trustee under the Beverly B. Schottenstein Revocable Trust U/A/D April 5, 2011, as Amended v. J.P. Morgan Securities, LLC, Evan A. Schottenstein, Avi Elliot Schottenstein**

Case No. 19-02053

Boca Raton, Florida

Hearing Dates: October 2020- January 2021

Award Date: February 4, 2021

Counsel:

Counsel for Claimants:

Scott C. Ilgenfritz, Esq. and Guy Burns, Esq., Johnson Pope Bokor Ruppel & Burns LLP, Tampa Florida.

Counsel for Respondents:

Gabrielle L. Gould, Esq., Elizabeth Zito, Esq. and Melissa Brumer, Esq., Goodwin, Procter LLP, New York, New York and for Respondent J.P. Morgan Securities, LLC and Carl S. Burkhalter, Esq., Peter S. Fruin, Esq., Jonathan J. Brennan, Esq. and Grace J. Posey, Esq., Maynard, Cooper, Gale, New York, New York for Respondent Evan A. Schottenstein and Avi Elliot Schottenstein.

\*310 Arbitration Panel:

Donna Greenspan Solomon, Presiding Chairperson, James M. Scutti, Public Arbitrator, and David Rich, Public Arbitrator

Investments at Issue:

Multiple auto-callable structured notes and various other securities for which Respondent JPM was a market maker, including Apple stock, as well as initial public offerings and follow-on offerings.

Claimants' Causes of Action in Statement of Claim:

- (1) Constructive Fraud/Abuse of Fiduciary Duty
  
- (2) Fraudulent Misrepresentations and Omissions
  
- (3) Violation of Chapter 415, Fla. Statutes.

Relief Requested:

- (1) Compensatory damages in excess of \$10,000,000;
  
- (2) Punitive damages in the amount of at least three times the compensatory damages awarded;
  
- (3) Interest;
  
- (4) Rescission of the investment in the Coatue;
  
- (5) Disgorgement of all commissions and revenues received by Respondent JPM from all trading activity;
  
- (6) Costs of the arbitration;
  
- (7) Attorneys' fees;

(8) Filing fees;

(9) Expert witness fees;

(10) Arbitrator fees;

(11) Any other costs; and such relief as deemed just and proper by the Panel.

Relief Requested Post Hearing:

(1) \$69,185,860.00

Award:

(1) Respondents JPM, EAS and AES are liable on the counts of constructive fraud/abuse of fiduciary duty and fraudulent misrepresentations and omissions.

(2) Respondents JPM and EAS are further liable for elder abuse in violation of Chapter 415, Fla. Statutes.

(3) Respondent JPM is liable for and shall pay to Claimants the sum of \$4,708,550.00 in compensatory damages, plus interest at the Florida legal rate that begins to accrue as of the date of service of this Award.

(4) Respondent EAS is liable for and shall pay to Claimants the sum of \$9,000,000.00 in compensatory damages, plus interest at the Florida legal rate that begins to accrue as of the date of service of this Award.

**\*311** (5) Respondent EAS is liable for and shall pay to Claimants the sum of \$602,251.00 in compensatory damages, plus interest at the Florida legal rate that begins to accrue as of the date of service of this Award.

(6) Claimants' request for rescission of the Coatue investment is granted. As such, in addition to the amount awarded in Paragraph 3 above, Respondent JPM shall rescind the Coatue investment and pay Claimant \$4,291,450.00, plus interest at the Florida legal rate that begins to accrue as of the date of service of this Award.

(7) Pursuant to [Section 415.1111, Fla. Stat.](#), Respondent JPM is liable for and shall pay to Claimants costs in the amount of \$172,630.50.

(8) Pursuant to [Section 415.1111, Fla. Stat.](#), Respondent EAS is liable for and shall pay to Claimants costs in the amount of \$172,630.50.

(9) Pursuant to [Section 415.1111, Fla. Stat.](#), Respondent JPM is liable for and shall pay to Claimants one-half of their attorneys' fees, in an amount to be determined by a court of competent jurisdiction.

(10) Pursuant to [Section 415.1111, Fla. Stat.](#), Respondent EAS is liable for and shall pay to Claimants one-half of their attorneys' fees, in an amount to be determined by a court of competent jurisdiction.

(11) Respondent AES's (CRD Number 5708665) request for expungement of his CRD records is denied.

(12) Any and all claims for relief not specifically addressed herein, including any requests or punitive damages, are denied.

Analysis:

This intra-family dispute resulted in a noteworthy award to Claimants for significant recovery of both compensatory and rescission damages as well as an award of attorneys' fees, costs and interest. Interestingly, the Award specifies that two of the Respondents, EAS and JPM, were to each pay half of Claimants' attorneys' fees and costs. Also of note is that this case was conducted virtually over Zoom Video Conference over Respondents' objection. Ultimately, after 43 hearing sessions, the Panel found Respondents liable on the counts of constructive fraud/abuse of fiduciary duty, fraudulent misrepresentations and omissions and elder abuse in violation of Chapter 415, Fla. Statutes. The Panel awarded attorneys' fees and costs pursuant to [Florida Statute Section 415.1111](#).

**\*312 Guillermo Lopez Perez v. OFS Securities, Inc. and Oriental Financial Services Corp.**

Case No. 16-02549

San Juan, Puerto Rico

Hearing Dates: January 18, 2021- February 8, 2021

Award Date: February 12, 2021

Counsel:

Counsel for Claimants:

Peter J. Mougey, Esq. and Michael Bixby, Esq., Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A., Pensacola, Florida and John F. Nevares, Esq., John F. Nevares & Associates, Attorneys at Law, San Juan, Puerto Rico.

Counsel for Respondents:

Alfredo Fernandez Martinez, Esq., Pedro Hernandez-Freire, Esq. and Carlos Baralt Suarez, Esq., Delgado Fernandes, LLC, San Juan, Puerto Rico.

Arbitration Panel:

Erika Deutsch Rotbart, Presiding Arbitrator, John G. Sciandra, Public Arbitrator, and Robert Sullivan Tyler, Public Arbitrator

Investments at Issue:

Puerto Rican securities and closed-end bond funds.

Claimant's Causes of Action in Statement of Claim:

- (1) Breach of fiduciary duty;
- (2) Violation of industry rules;
- (3) Breach of contract;
- (4) Negligence;
- (5) Fraud;
- (6) Violation of § 12(a)(2) of the Securities Act of 1933;
- (7) False inducements to inaction;

(8) Negligent supervision;

(9) Violation of Article 1802 of the Civil Code of Puerto Rico, 31 Laws of Puerto Rico Annotated [L.P.R.A.] §§5141, 3020 and 3021.

Relief Requested:

(1) \$15,000,000.00;

(2) Interest on Claimant's losses or any award made herein;

(3) Costs;

(4) Reasonable legal fees and expenses;

(5) Punitive damages; and

(6) Additional damages and relief (whether disgorgement of profits, unjust enrichment, rescission, restitution, non-monetary, declaratory **\*313** judgement, equitable or otherwise) which the Panel deems just and equitable.

Award:

(1) Respondents' Motion to Dismiss Claimant's Statement of Claim was granted with prejudice as to the counts for Fraud, Violation of § 12(a)(2) of the Securities Act of 1933; False Inducement to Inaction, Negligent Supervision and Violation of Article 1802 of the Civil Code of Puerto Rico, 31 Laws of Puerto Rico Annotated [L.P.R.A.] §§5141, 3020 and 3021.

(2) Respondents' Motion to Dismiss Claimant's Statement of Claim is denied as to the counts for Breach of Fiduciary Duty, Violation of Industry Rules, Breach of Contract and Negligence. However, the Panel found no liability for these claims.

(3) The Panel felt strongly regarding Respondents' spoliation of evidence. Therefore, although the Panel did not find Respondents liable for Claimant's claims in the matter, it is clear that Respondents' conduct should not go unnoticed or unaddressed accordingly. Having previously found gross negligence and willful misconduct by Respondents in connection with spoliation of evidence and prolonged discovery abuse, the Panel hereby assesses

sanctions pursuant to Rules 12511 and 12212 of the Code. Specifically, Respondents are jointly and severally liable and shall pay to Claimant the sum of \$195,000.00 in attorneys' fees and \$45,000.00 in costs for all work associated with Claimant's various Motions to Compel Discovery and the August 28, 2020 Motion for Sanctions. As an additional penalty and in recognition of Respondents' flagrant discovery violations and spoliation of evidence, Respondents' are assessed all of FINRA's fees associated with this matter, including all pre-hearing and evidentiary hearing session fees.

(4) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and other related attorneys' fees and costs are denied.

Analysis:

This award is noteworthy because of the significant discovery sanctions and procedural history of discovery abuses set forth by the Panel in the Award. Claimant filed a Motion for Sanctions Regarding Respondents' Spoliation of Evidence asserting that Respondents deliberately destroyed more than 10,000,000 emails from the time-period relevant to this matter. Claimant requested a default judgment and assessment of all fees relating to the Motion to Respondents, or, alternatively, that the Panel draw adverse inferences against Respondents and assess substantial monetary sanctions against them. \*314 In their response, Respondents asserted, among other things, that they had a systematic approach to document preservation and document retention that was followed without individual intervention to willfully destroy any relevant evidence. Following oral argument by the parties, the Panel issued an Order that granted Claimant's Motion. Specifically, the Panel ordered any and all reasonable attorneys' fees and costs associated with Claimant's Motions to Compel Discovery relating to electronically stored information and the spoliation of the same be assessed 100% to Respondents, including, but not limited to, those fees and costs associated with the neutral auditor involved in this matter.

Claimant next filed a Motion to Preclude Respondents from Offering Evidence and Testimony at the final hearings asserting that because of Respondents' spoliation, Claimant would be left handicapped and without access to the most significant evidence necessary to establish Respondents' wrongdoing or rebut Respondents' arguments. Respondents argued that granting the Motion would give preferential treatment to Claimant and would carry the most severe penalty of denying Respondents of their due process right to a final hearing. The Panel denied Claimant's Motion, without prejudice, specifically maintaining its discretion of excluding evidence and/or making any adverse inferences as may be necessary at the final hearing. The order further stated that the evidence, testimony and/or lack thereof may also allow the Panel to further determine the scope of the sanction award, given the Panel's prior findings and rulings. Ultimately the Panel ruled that Respondents' conduct, which was no less than clear and convincing as to its spoliation of evidence and prolonged discovery abuses, should not go unnoticed and it assessed sanctions pursuant to Rules 12511 and 12212 of the Code against Respondents in the amount of \$195,000.00 in attorneys' fees and \$45,000.00 in costs for all work associated with Claimant's various Motions to Compel Discovery and Motion for Sanctions.

**\*315 JC McCall Revocable Trust by Trustee JC McCall v. First Standard Financial Company LLC, William C. Gennity, Philip J. Sparacino, Robert F. Spiegel, Jeffrey Baber, Jodi Fauci, Jonathan Stanley McCormack and Carmine Berardi**

Case No. 18-04014

Des Moines, Iowa

Hearing Dates: December 8-10, 2020

Award Date: February 3, 2021

Counsel:

Counsel for Claimants:

Gail E. Boliver, Esq., Boliver Law Firm, Marshalltown, Iowa.

Counsel for Respondent:

Craig A. Riha, Esq., Finkelstein & Feil, P.C., Bohemia New York for Respondents First Standard Financial Company LLC, and William C. Gennity, Philip J. Sparacino, Robert F. Spiegel, Jeffrey Baber, Jodi Fauci, and Jonathan Stanley McCormack. Martin H. Kaplan, Esq. and Robyn D. Paster, Esq. for Gusrae Kaplan Nusbaum PLLC New York, New York for Respondent Carmine Berardi.

Arbitration Panel:

Alain Frecon (Sole Public Arbitrator)

Investments at Issue:

Unsuitable trading activity, including churning of shares in Chesapeake Energy Corp., AK Steele, Transocean Ltd., Seadrill and Energous.

Claimants' Claims:

Causes of Action in Statement of Claim:

- (1) Breach of Fiduciary Duty;
- (2) Unauthorized trading;
- (3) Negligence;
- (4) Breach of Contract;
- (5) Misrepresentation, including negligent misrepresentation;
- (6) Constructive fraud;



- (7) Fraudulent non-disclosure;
- (8) Failure to Supervise/respondeat superior;
- (9) Violation of industry standards;
- (10) Respondeat superior and control person liability.

Relief Requested:

- (1) \$90,198 compensatory damages;
- (2) interest;
- (3) attorneys' fees;
- (4) costs and expert fees; and
- (5) such other relief as the arbitrator may decide is appropriate.

**\*316** Relief Requested Post Hearing:

- (1) \$127,000 in compensatory damages; and
- (2) at least \$1,000,000.00 in punitive damages.

Award:

- (1) First Standard, Gennity, Sparacino, Spiegel, McCormack, and Berardi are jointly and severally liable for and shall pay to Claimant the sum of \$100,000.00 in compensatory damages.

(2) First Standard, Gennity, Sparacino, Spiegel, McCormack, and Berardi are jointly and severally liable for and shall pay to Claimant the sum of \$14,157.55 in costs for expert fees.

(3) First Standard, Gennity, Sparacino, Spiegel, McCormack, and Berardi are jointly and severally liable for and shall pay to Claimant the sum of \$225.00 in costs as reimbursement for the non-refundable portion of Claimant's filing fee.

(4) Claimant's request for specific bankruptcy language in the Award is denied.

(5) William Christian Gennity's (CRD Number 4913490) request for expungement of the above-captioned arbitration (Occurrence Number 2010695) from his CRD records is denied.

(6) Philip Joseph Sparacino's (CRD Number 3243960) request for expungement of the above-captioned arbitration (Occurrence Number 2011471) from his CRD records is denied.

(7) Robert Frank Spiegel's (CRD Number 5861656) request for expungement of the above-captioned arbitration (Occurrence Number 2010696) from his CRD records is denied.

(8) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages and attorneys' fees are denied.

Analysis:

This award is noteworthy because Claimant alleged that the annual turnover for the account was 34.26 and the annualized costs to equity was 103.50%. Claimant was awarded a large percentage of the claimed compensatory damages as well as expert fees. Interestingly, in Claimant's Post-Hearing Written Closing Argument and Trial Brief, Claimant requested that the Award include language as follows: "The Award entered in this proceeding is a debt for the violation of securities laws or any S.E.C., regulation or order issued under such laws, as set forth in [Section 523\(a\)\(19\) of the Bankruptcy Code](#), [11 U.S.C. § 523\(a\)\(19\)](#)." Claimant's request for specific bankruptcy language in the Award was denied despite Claimant prevailing on his claims. Also interesting in this case is the assessment of fees in this matter. Respondents in this case filed a Motion to Dismiss, which was \*317 denied. Respondents then filed a Motion to Reargue and Request for Oral Argument on the Motion to Dismiss, which was also denied. Respondents were Ordered to pay Claimant for defense of the Motion to Reargue. Claimant's request for a virtual hearing was also granted over Respondents' objections.

**Howard Barron, individually and as trustee of the Howard Barron Revocable Living Trust U/A/D 10/11/95, and Howard B. Young, as trustee of the Restated Howard B. Young Revocable Trust Dated 6/28/93 v. Arete Wealth Management, LLC**

Case No. 19-01143

Detroit, Michigan

Hearing Dates January 11-14, 2021

Award Date: January 28, 2021

Counsel:

Counsel for Claimants:

Brian Levin, Esq., Levin Law, P.A. and Jeffrey B. Kaplan, Esq., Dimond Kaplan & Rothstein, P.A., Miami, Florida

Counsel for Respondent:

Linda Ieleja Gerstman, Esq. and UnBo Chung, Esq. Arete Wealth Management LLC, Chicago, Illinois

Arbitration Panel:

Patrick R. Sughroue, Presiding Chairperson, Raymond J. Sterling, Public Arbitrator, and Frank Todd Aiello, Non-public Arbitrator

Investments at Issue:

GPB Automotive Portfolio, LP

Claimants' Causes of Action in Statement of Claim:

- (1) Negligence;
- (2) Breach of Fiduciary Duty;
- (3) Negligent Supervision;
- (4) Breach of Contract; and
- (5) Violation of Michigan Securities Act.

Relief Requested:

- (1) Compensatory damages of \$225,000;
- (2) Prejudgment interest on all such damages at the statutory rate;
- (3) Reasonable attorneys' fees; and
- (4) Punitive damages in an amount sufficient to punish a corporation with Respondent's net worth and income.

Relief Requested Post Hearing:

- (1) \$105,305.05 in compensatory damages to Howard Barron;
- (2) \$31,118.55 in statutory interest to Howard Barron;
- \*318** (3) \$81,333.24 in compensatory damages to HBY Trust; and
- (4) \$27,656.41 in statutory interest to HBY Trust.

Award:

- (1) Barron having tendered back to Respondent the investments at issue as of January 15, 2021, Respondent is liable for and shall pay to Barron the sum of \$105,306.05 in compensatory damages.
- (2) HBY Trust having tendered back to Respondent the investments at issue as of January 15, 2021, Respondent is liable for and shall pay to HBY Trust the sum of \$81,333.24 in compensatory damages.
- (3) Respondent is liable for and shall pay to Barron statutory interest in the amount of \$31,118.55.
- (4) Respondent is liable for and shall pay to HBY Trust statutory interest in the amount of \$27,656.41.

(5) Respondent is liable for and shall pay to Claimants the sum of \$258,775.00 in attorneys' fees, allocated among Claimants in proportion to their respective compensatory damages plus interest awards, pursuant to [MCL 451.2509](#) of the Michigan Uniform Securities Act.

(6) Respondent is liable for and shall pay to Claimants the sum of \$10,582.73 in costs, allocated among Claimants in proportion to their respective compensatory damages plus interest awards.

(7) Respondent is liable for and shall pay to Claimant \$300.00 to reimburse Claimant for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.

Analysis:

This award is noteworthy because the total amount of attorney's fees, costs and interest awarded under the Michigan Uniform Securities Act (over \$328,132.73) dwarfed the total amount of compensatory damages (\$186,640.00) awarded to the two Claimants. Additionally, the panel noted that the investments for which they awarded compensatory damages were tendered back to the Respondents. Also interesting is that an additional Trust, Settlor and Beneficiary of that Trust were added as a Claimant over Respondent's objection at the final hearings. It is also noteworthy that the Panel awarded each Claimant the exact amount of their respective demands for compensatory damages and interest.

**\*319 Gladys Veronica Anton and Alberto Jose Nieves v. Insight Securities, Inc., Pershing LLC and Carlos Legaspy**

Case No. 19-00474

New York, New York

Hearing Dates: August 17-28, 2020, November 1-5, 2020, December 28-30, 2020 and February 24, 2020

Award Date: March 20, 2021

Counsel:

Counsel for Claimants:

Jenice L. Malecki, Esq. and Darryl J. Bouganim, Esq., Malecki Law, New York, New York

Counsel for Respondent:

Sean G. Rohan, Esq. O'Hangan Meyer, LLC Chicago, Illinois for Respondent Insight Securities, Inc. and Thomas M. Farrell, Esq. and Jeffrey J. Chapman, Esq. McGuire Woods, LLP, New York, New York.

Arbitration Panel:

Edmund Timothy Donovan, Presiding Chairperson, Jack Friedman, Public Arbitrator, and Mary Ellen Burns, Public Arbitrator

Investments at Issue:

Biscayne Notes and other unspecified securities

Claimants' Causes of Action in Statement of Claim:

- (1) Breach of Contract;
  
- (2) Violation of FINRA Rules 2010- Commercial Honor and Good Faith, 3110-Supervision, 2090 Know your Customer;
  
- (3) Common law and statutory fraud;
  
- (4) Aiding and abetting;
  
- (5) Breach of fiduciary duty;
  
- (6) Aiding and abetting breach of fiduciary duty;
  
- (7) Negligence;
  
- (8) Gross negligence;
  
- (9) Failure to supervise; and
  
- (10) Negligent supervision.

Relief Requested:

(1) Compensatory damages of \$2,765,000.00;

(2) Statutory interest at a rate of 9% per annum;

(3) Punitive damages;

(4) Lost interest;

(5) Attorneys' fees; and

(6) Costs

**\*320** Award:

(1) Claimants' claims are denied in their entirety.

(2) Respondent Pershing is liable for and shall pay to Claimant \$250,000 in discovery sanctions.

(3) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and attorneys' fees, are denied.

Analysis:

This award is noteworthy because Claimants filed a Motion for Sanctions against Pershing for discovery abuse prior to the final hearing. After due deliberation, the Panel determined that it would entertain the Motion for Sanctions during the hearings when deemed appropriate. After approximately 14 days of the final hearing, Claimants filed a Notice of Settlement and Voluntary Dismissal with respect to Respondents Insight and Legaspy. The final hearing continued against Pershing. Thereafter, Claimant filed a Renewed Motion for Discovery Sanctions against Respondent Pershing. In the final award, the Panel denied Claimant's claims against Pershing but granted Claimant's Motion for Sanctions. Significantly, Pershing was required to pay Claimants' \$250,000 in discovery sanctions despite the Panel denying Claimants' claims against it.

**Cynthia Jo Gruchalski (Claimant) vs. Charles Schwab & Co., Inc. (Respondents)**

Case No. 20-01474

Milwaukee, Wisconsin

Hearing Dates: March 2, 2021 - March 3, 2021 via videoconference

Award Date: March 24, 2021

Counsel:

Counsel for Claimant:

Timothy J Andriga, Esq., Cramer, Multhauf & Hammes, LLP Waukesha, Wisconsin.

Counsel for Respondent:

Kevin H. Lewis, Esq., Charles Schwab & Co., Inc., San Francisco, California and Samantha D. Parrish, Esq., Keesal, Young & Logan, Long Beach, California.

Arbitration Panel:

Leon Fox, Sole Public Arbitrator

Investments at Issue:

The causes of action relate to Charles Schwab's failure to timely transmit the paperwork for Claimant's IRA rollover, resulting in an almost two- **\*321** month delay in Claimant's ability to access the funds in her account and causing the majority of her account to remain in cash during a market run-up.

Claimants' Claims:

In the Statement of Claim, Claimant requested \$69,410.63 in compensatory damages, attorneys' fees, and filing costs.

Additional Relief Sought at Hearing:

Claimant requested compensatory damages in the amount of \$90,500.00 for the loss of expected investment value, filing fees, and attorneys' fees.

Relief Requested:

(1) Loss of expected investment value;



(2) Filing Fees; and

(3) Attorneys' fees.

Award:

(1) Respondent is liable for and shall pay to Claimant the sum of \$35,000 in compensatory damages.

(2) Respondent is liable for and shall pay to Claimant the sum of \$225.00 in costs as reimbursement for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.

(3) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, are denied.

Analysis:

This award is noteworthy because it awarded a type of “speculative” damages not often seen in FINRA arbitration. While the Claimant, an IRA account holder, did not actually invest in any securities, this operational snafu by Schwab, which caused an almost two month delay in the opening of the rollover retirement account, was deemed enough to tag Schwab with a \$35,000 damage award.

**\*322 Stephen W. Apt, Pamela N. Apt, Benjamin Capdevielle, Emilie Dawson, Bryce J. Dawson, Nadine Dawson, Tony Eason, Christine Eason, Brandon Ehrlich, Natasha Ehrlich, Patricia Hamilton, Carol Hilton, Ian Hilton, Joann LaCanfora, Robert LaCanfora, Irene Leon Guerrero, Peter Leon Guerrero, Shannon A. McQuery, David Miller, Carrie Miller, Stephen Naramore, Diana Naramore, Holly Robinson, Eugene T. Rogers, Gary Wyatt and Martha Wyatt (Claimants) v. Charles Schwab & Co. Inc. and Interactive Brokers LLC. (Respondents)**

Case No. 19-03250

Seattle, Washington

Hearing Dates: November 30, 2020-December 11, 2020, December 14, 2020, December 17, 2020 and March 10-11, 2021

Award Date: March 26, 2021

Counsel:

Counsel for Claimants:

Timothy B. Fitzgerald, Esq. and Gregory J. Hollon, Esq., McNaul Ebel Nawrot & Helgren PLLC, Seattle, Washington; John A. Bender, Esq., Bender Law PLLC, Seattle, Washington.

Counsel for Respondents:

For Respondent Charles Schwab Kevin H. Lewis, Esq. San Francisco, California; For Respondent Interactive Brokers: David Luger, Esq., Katten Muchin Rosenman, LLP, Chicago, Illinois.

Arbitration Panel:

Katherine H. O'Neil, Presiding Chairperson, David Gonzalez, Public Arbitrator Frederick Allan Kaseburg, Public Arbitrator (dissenting)

Investments at Issue:

The causes of action relate to an alleged high-frequency trading strategy in unspecified securities within Claimants' retirement accounts.

Claimants' Claims:

- (1) Breach of contract;
- (2) Breach of Covenant of Good Faith and Fair Dealing;
- (3) Negligence;
- (4) Unsuitability;
- (5) Violations of the Washington Consumer Protection Act; and
- (6) Violations of the Washington State Securities Act.

Relief Requested:

- (1) On the breach of contract cause of action: an order requiring Respondents to pay monetary damages in an amount to be determined at the hearing plus interest;

(2) On the breach of covenant of good faith and fair dealing, negligence and unsuitability causes of action: an order requiring Respondents, \*323 jointly and severally, to pay compensatory damages in an amount to be determined at the hearing plus interest;

(3) On the violations of Consumer Protection Act, RCW 48.30, et seq., cause of action:

- An order requiring Respondents, jointly and severally, to pay compensatory damages in an amount to be determined at the hearing plus interest;

- An order requiring Respondents, jointly and severally, to pay exemplary damages in an amount to be determined at the hearing plus interest; and

- An order requiring Respondents, jointly and severally, to pay attorneys' fees and costs as permitted under the Consumer Protection Act in an amount to be determined at the hearing plus interest;

(4) On the violations of Washington State Securities Act, RCW 21.20, et seq. cause of action:

- An order requiring Respondents jointly and severally, to pay compensatory damages in an amount to be determined at the hearing plus interest; and

- An order requiring Respondents, jointly and severally, to pay costs and reasonable attorneys' fees in an amount to be determined at the hearing plus interest.





(5) The total requested monetary damages and compensatory damages against all Respondents in an amount to be determined at the hearing but no less than \$4,000,000.00, plus interest; and

(6) Whatever additional relief the Panel deems just and proper.

Award:

(1) Interactive Brokers is liable for and shall pay to Claimants the sum of \$2,727,394.65 in compensatory damages.

(2) Interactive Brokers is liable for and shall pay to Claimants interest on the above-stated sum at the rate of 12% per annum from the date Award is issued through and including the date the Award is paid in full.

- (3) Charles Schwab is liable for and shall pay to Claimants the sum of \$606,087.70 in compensatory damages.
- (4) Charles Schwab is liable for and shall pay to Claimants interest on the above-stated sum at the rate of 12% per annum from the date Award is issued through and including the date the Award is paid in full.
- (5) Interactive Brokers is liable for and shall pay to the Leon Guerrero Claimants the sum of \$835,300.41 in attorneys' fees pursuant to: Washington Consumer Protection Act, [RCW 19.86.080](#);  \*324 [RCW 19.86.090](#); Interactive Brokers Advisor Client Agreement; and [RCW 4.84.330](#).
- (6) Interactive Brokers is liable for and shall pay to the Naramore Claimants the sum of \$149,056.58 in attorneys' fees pursuant to: Washington Consumer Protection Act, [RCW 19.86.080](#);  [RCW 19.86.090](#); Interactive Brokers Advisor Client Agreement; and [RCW 4.84.330](#).
- (7) Charles Schwab is liable for and shall pay to the Leon Guerrero Claimants the sum of \$278,433.47 in attorneys' fees pursuant to: Washington Consumer Protection Act, [RCW 19.86.080](#);  [RCW 19.86.090](#); Charles Schwab Account Application Agreement; and [RCW 4.84.330](#).
- (8) Charles Schwab is liable for and shall pay to the Naramore Claimants the sum of \$49,685.52 in attorneys' fees pursuant to: Washington Consumer Protection Act, [RCW 19.86.080](#);  [RCW 19.86.090](#); Charles Schwab Account Application Agreement; and [RCW 4.84.330](#).
- (9) Respondents are jointly and severally liable for and shall pay to Claimants \$600.00 as reimbursement for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.
- (10) Any and all claims for relief not specifically addressed herein are denied.

Analysis:

This seven-figure award is significant both for its size as well as its claim for damages resulting from a high frequency trading strategy. Claimants were awarded compensatory damages of over \$3 million against Interactive Brokers and over \$800,000 against Charles Schwab as a result of losses caused by the strategy in their accounts. Additionally, an attorneys' fee award totaling approximately \$1.3 million was assessed against the Respondent firms. One arbitrator (Kaseburg) dissented without comment.

**\*325 Janet Anderson et al (Claimants) v. Purshe Kaplan Sterling Investments and TD Ameritrade, Inc. (Respondents)**

Case No. 19-00519

Phoenix, Arizona

Hearing Dates: January 18-21, 2021, February 16-17, 2021, February 19, 2021 and February 22-23, 2021.

Award Date: April 8, 2021

Counsel:

Counsel for Claimants:

Adam J. Gana, Esq., Gana Weinstein LLP, New York, New York.

Counsel for Respondent/Crossclaimant PKS:

Sanay B. Panchal, Esq., O'Hagan Meyer, LLC, Newport Beach, California.

Counsel for Respondent/Crossclaimant TD Ameritrade:

Neil S. Baritz, Esq., Baritz & Colman, LLP, Boca Raton, Florida.

Arbitration Panel:

Richard D. Fincher, Presiding Chairperson, Delores Manwar, Public Arbitrator, Kenneth Layne Morrill, Public Arbitrator

Investments at Issue:

The causes of action relate to alleged fraudulent, unsuitable and excessive trading of unspecified securities within Claimants' accounts.

Claimants' Claims against Respondent PKS:

(1) Suitability;

(2) Misrepresentations and omissions in violation of federal law, Arizona's blue sky laws, and FINRA Rules 2020 and 2210;

(3) Violation of Arizona Consumer Legal Remedies Act;

(4) Violation of FINRA Rule 2010 and IM-2310-2;

(5) Respondeat superior; and

(6) Failure to supervise

Claimants' Claims against Respondent TD Ameritrade:

(1) Failure to supervise;

(2) Misrepresentations and omissions in violation of federal law, Arizona's blue sky laws, and FINRA Rules 2020 and 2210;

(3) Violation of Arizona Consumer Legal Remedies Act; and

(4) Violation of FINRA Rule 2010 and IM-2310-2.

PKS' Crossclaims against Respondent TD Ameritrade:

(1) Failure to supervise under FINRA Rule 2360

(2) Fraud;

(3) Negligence; and

(4) Equitable indemnity.

**\*326** Relief Requested:

Claimants requested the following relief from Respondents:

- (1) Compensatory damages for a sum to be determined at hearing;
- (2) Interest at the statutory rate;
- (3) Attorneys' fees;
- (4) Expert fees;
- (5) Forum fees;
- (6) Punitive damages; and
- (7) Such other and further relief the Panel deems just and proper.

PKS requested the following relief from TD Ameritrade:

- (1) Compensatory damages in an amount determined by the Panel;
- (2) Punitive damages;
- (3) Attorneys' fees; and
- (4) Pre-judgment and post-judgment interest at the Arizona statutory rate.

TD Ameritrade requested the following relief against PKS:

- (1) Dismissal of the Crossclaim in its entirety;
- (2) Attorneys' fees and costs under the doctrine of "tort of another".

Award:

(1) PKS Investments' Crossclaim is denied in its entirety.

(2) PKS Investments is liable for and shall pay to TD Ameritrade the sum of \$400,000.00 in attorneys' fees and costs pursuant to Arizona's exception to the American Rule for "tort of another" and pursuant to other provisions of Arizona law providing for attorney's fees awards.

(3) Any and all claims for relief not specifically addressed herein, including requests for punitive damages, are denied.

Analysis:

While the core claims of this case against the two Respondents were all settled by the time of Claimants' pre-hearing, PKS's Crossclaims against TD Ameritrade went to a final hearing. Because the panel found in favor of TD Ameritrade, it assessed \$400,000 in attorney's fees against PKS under Arizona's "tort of another" doctrine. This doctrine allows a party to shift fees where another is responsible for the actions causing harm. This is noteworthy in that many advisors use platforms of larger firms such as TD Ameritrade to conduct their business. While it appears from the award that TD Ameritrade settled its claims with the customer, this particular state statute allowed it to recover fees from another firm involved in the underlying transactions forming the basis of the arbitration.

**\*327 Richard Trust (Claimant) v. TD Ameritrade, Inc. (Respondent)**

Case No. 18-04020

San Francisco, California

Hearing Dates: February 11-12, 2021

Award Date: March 5, 2021

Counsel:

Counsel for Claimant: Pro Se

Counsel for Respondent: James J. Vihstadt, Esq., TD Ameritrade, Inc., Omaha, Nebraska.

Arbitration Panel:

Daniel M. Yamshom, Presiding Chairperson



Herb Schwartz, Public Arbitrator

Rosalind Ramsey Tyson, Public Arbitrator

Investments at Issue:

Unauthorized trading in unspecified securities.

Claimants' Claims:

- (1) Breach of contract
- (2) Breach of fiduciary duty;
- (3) Unauthorized trading;
- (4) Churning;
- (5) Negligence;
- (6) Negligent misrepresentation;
- (7) Equitable lien;
- (8) Unjust enrichment;
- (9) Violation of California Business and Professional Codes § 17200 and § 17500;
- (10) Promissory estoppel;
- (11) Constructive trust;

(12) Fraud;

(13) Promissory fraud;

(14) Constructive fraud;

(15) Conversion;

(16) Violation of NASD Rule 2510;

(17) Violation of FINRA rules 2010, 2020, and 4512;

(18) Violation of [17 CFR § 240.10b-5](#);

(19) Violation of the unfair competition law; and

(20) Violation of Consumers Legal Remedies Act.

Relief Requested:

(1) Unspecified compensatory damages to place Claimant in the same position as if the unauthorized trading had not occurred;

(2) Treble damages;

**\*328** (3) Attorneys' fees;

(4) Punitive damages;

(5) Statutory damages;

(6) Interest;

(7) Declaratory relief;

(8) Injunctive relief;

(9) Costs; and

(10) Such other relief as the Panel may deem proper.

Award:

(1) Respondent is liable for and shall pay to Claimant the sum of \$298,400.00 in compensatory damages.

(2) Any and all claims for relief not specifically addressed herein, including any requests for treble damages, attorneys' fees, and punitive damages, are denied.

Analysis:

In this arbitration, a *pro se* claimant was awarded almost \$300,000.00 by the panel after a hearing that lasted only two days. While only compensatory damages were awarded, this is a large *pro se* result. The question is whether the Claimant might have received other types of damages (including punitive or interest) if an attorney had been representing him in this case.

28 No. 2 PIABABJ 309