

1 FINRA DISPUTE RESOLUTION

2
3 Case No. 08-00661

4 Arbitrators: Kelley, Dombalagian & Upton

5
6 In the Matter of the Arbitration Between:

7
8 KRAEMER L. DIEL,

9 Claimant

10 VERSUS

11 MORGAN KEEGAN AND COMPANY, INC.,

12 Respondent

13 VOLUME III

14
15 * * * * *

16 The Arbitration in the above-entitled
17 cause, taken in the Iberville Conference Room of the Pan
18 American Life Conference Center, 601 Poydras Street,
19 11th Floor, New Orleans, Louisiana, on Thursday, January
20 22nd, 2009, beginning at 9:00 a.m.

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22
23 REPORTED BY:

24 LAINEY B. MARGAVIO, CCR

25 Certified Court Reporter

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A P P E A R A N C E S

WITNESSES:

Michelle Wood
Kraemer L. Diel

Also Present:
Dr. Kraemer L. Diel
Charles G. Myers

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MR. UPTON:

If you want to put this on the record. It doesn't have to do with any of the testimony here or anything. Last night I was going over the notes, and I'm a little -- I'm a lot unclear as far as the structure we are talking about. We had Morgan Keegan down here and we had Morgan Asset Management and then whatever Mr. Kelsoe was. And so I just wondered if possibly we could address the structure before we start so we don't put round pegs in square holes and we don't know who everybody works for.

MR. CARUSO:

Do you want to do that before we do this testimony?

MR. UPTON:

Whatever would be more appropriate. We are all kind of unclear on the structure of Morgan Keegan, who reports to whom and so on and so forth.

MR. HICKS:

I think Peter is drawing it out for you.

MR. CARUSO:

Let me try this. And you guys, of course, can do it. We have Regions Financial is the

1 parent company. There are a number of
2 subsidiaries of Regions, one of which is Morgan
3 Keegan, another of which is Morgan Asset
4 Management and then they have a whole bunch of
5 other subsidiaries.

6 MR. FRUIN:

7 Technically incorrect. There is -- these
8 are not sister corporations. Actually, MAM
9 is a subsidiary of MK Holdings and MK Holdings
10 is a subsidiary of Regions Financial Corp.,
11 which is different than just Regions Bank,
12 which is one of other subsidiaries. But then
13 Morgan Keegan is a direct subsidiary of
14 Regions Financial Corp.

15 MR. CARUSO:

16 Now, for purposes of the securities law
17 filings, these two entities are what are known
18 as affiliates. Does that help?

19 MR. UPTON:

20 I guess the question was, are each one of
21 those separate corporations?

22 MR. FRUIN:

23 Yes. Yes.

24 MR. UPTON:

25 So you have three corporations there?

1 MR. FRUIN:

2 Absolutely. Yes.

3 MR. UPTON:

4 I mean, that is agreed, right?

5 MR. CARUSO:

6 Yes. I mean, clearly there is a certain
7 relationship, at least from my perspective,
8 between the two. For instance, in order for
9 Morgan Keegan to sell the MAM mutual funds
10 at issue in this case, there had to be a
11 selling agreement, there had to be a contract
12 allowing them to sell that fund. There is also
13 the underwriting agreement that we discussed
14 which allowed them to underwrite the closed
15 funds. There is also in our exhibit book the
16 servicing agreement between the two where
17 Morgan Keegan said we are going to do -- if you
18 remember yesterday -- the valuation, the
19 compliance and all of those things on behalf of
20 the funds.

21 MR. FRUIN:

22 Just like any two corporations can enter
23 into contracts.

24 MR. UPTON:

25 Really our question was on the corporation

1 side. Mr. Kelsoe worked for whom?

2 MR. CARUSO:

3 Again, you can put your own spin on this,
4 but here is what I think the documentation
5 shows. He testified he is currently an
6 employee of MAM. The evidence has shown at the
7 same time he was employed by MAM, he was
8 registered -- had his securities licenses with
9 Morgan Keegan. He also testified in his
10 testimony, and we don't have the transcript
11 yet, that he believes he received some
12 compensation from Morgan Keegan for what he was
13 doing.

14 MR. FRUIN:

15 He stated he obtained deferred compensation
16 from Morgan Keegan.

17 MR. CARUSO:

18 I said some compensation. Again, we don't
19 have the transcript.

20 MR. HICKS:

21 And the compensation didn't come from
22 Morgan Keegan.

23 MR. FRUIN:

24 That is right. It didn't come from Morgan
25 Keegan. It came from a plan, a deferred comp

1 plan that was administered by Morgan Keegan.
2 And it is correct that he was employed by MAM
3 and that he had his securities licenses through
4 Morgan Keegan, but -- and that is absolutely
5 -- that is true.

6 MR. CARUSO:

7 And then the woman who is going to testify
8 this morning is a woman named Michelle Wood.
9 She was an employee of Morgan Keegan who also
10 served as chief compliance officer for Morgan
11 Asset Management. It was sort of like loaning
12 somebody, is the way I'm going to put it in
13 plain English. She had both -- my
14 understanding is, responsibilities to both
15 entities.

16 MR. FRUIN:

17 That is not true. That is not true. She
18 will testify.

19 MR. CARUSO:

20 I'm going based on what I read in SEC
21 filings.

22 MR. UPTON:

23 Really, I thank you for the explanation.
24 We wanted to know if those were separate
25 entities in there, and that answered the

1 question.

2 MR. FRUIN:

3 And I think we stipulated to that on the
4 record previously that that is, in fact, the
5 corporate structure and that they are separate
6 entities.

7 MR. MADDOX:

8 We did.

9 MR. KELLEY:

10 And do you have any questions? Okay. We
11 are ready to go.

12 MR. MADDOX:

13 Do you have Ms. Wood's phone number?

14 (Counsel calling Ms. Wood.)

15 MR. FRUIN:

16 This is Pete here. I'm going to turn you
17 over to the Chair of our arbitration,
18 Mr. Kelley.

19 THE WITNESS:

20 Okay.

21 MR. KELLEY:

22 Okay. I understand that you are going to
23 be the witness and you have to be sworn in.

24 And would you swear her in, please.

25 * * * * *

1 MS. MICHELLE WOOD,
2 after having been first duly sworn by an authorized
3 court reporter, was examined and testified as follows:

4 * * * * *

5 MR. KELLEY:
6 I think we are ready.

7 DIRECT EXAMINATION

8 EXAMINATION BY MR. CARUSO:

9 Q. Good morning, Mrs. Wood. My name is Stephen
10 Caruso. Can you hear me okay?

11 A. I can.

12 Q. I am one of the attorneys representing the
13 Claimant in this arbitration proceeding. And I'm going
14 to be the one asking you a series of questions. If at
15 any point you don't understand what I'm saying or if
16 it's unclear, please let me know and I'll try to help
17 you work your way through it. Where are you sitting as
18 we speak?

19 A. In my office.

20 Q. Okay. At Morgan Keegan?

21 A. Yes.

22 Q. And is anybody in the office with you?

23 A. Not at the moment, but there will be another
24 attorney joining shortly.

25 Q. Okay. And who is that attorney?

1 A. His name is Tom Barnett.

2 Q. And is he a Morgan Keegan employee?

3 A. Yes.

4 Q. And can you tell me, what is the reason he is
5 going to be sitting in with you?

6 A. As I understand it, simply to observe.

7 Q. Okay. Do you have any documents, ma'am, in
8 front of you?

9 A. No.

10 Q. Do we need to wait for Mr. Barnett?

11 A. I shot him a message a minute ago telling him
12 to come by my office, so I expect him momentarily.

13 Q. Would you like to wait for him to arrive?

14 A. If you don't mind.

15 Q. Sure, that is fine.

16 MR. FRUIN:

17 And just since we have a down moment, I
18 know obviously we are taking attendance and we
19 have a witness by telephone. Is there any way
20 we should I.D. that?

21 MR. UPTON:

22 Yeah.

23 MR. FRUIN:

24 And I can also put down it's their witness.

25 I guess I should put Michelle Wood down on your

1 side because you are calling her, but I will
2 also identify Mr. Barnett as a representative
3 of Morgan Keegan on the list.

4 MR. UPTON:

5 Thank you very much.

6 THE WITNESS:

7 Okay. Mr. Barnett has just entered the
8 room.

9 MR. CARUSO:

10 Good morning, Mr. Barnett. I'm Stephen
11 Caruso. I'm one of the attorneys in this case.
12 It's my understanding you are going to be
13 listening in on this conversation?

14 MR. BARNETT:

15 Correct.

16 MR. CARUSO:

17 Do you represent Ms. Wood for purposes of
18 her testimony today?

19 MR. BARNETT:

20 I do.

21 MR. CARUSO:

22 You do. As I explained to Ms. Wood at the
23 beginning of our call, I'm going to be asking
24 her a series of questions. And as I'm sure you
25 have explained to her, as well, if at any point

1 she doesn't understand any of my questions,
2 please ask me to rephrase it and I'll be more
3 than happy to do so.

4 EXAMINATION BY MR. CARUSO:

5 Q. Ms. Wood, are you ready to go?

6 A. Yes.

7 Q. Let's begin with a brief description of your
8 educational background, please, since high school.

9 A. Okay. I graduated from the University of
10 Missouri in 1991 with a bachelor of journalism. I
11 graduated from Boston University School of Law in 1997
12 with my J.D.

13 Q. Okay. And what states are you currently
14 licensed to practice in?

15 A. Tennessee and Colorado.

16 Q. Okay. And let's quickly go to your employment
17 background. After law school, could you take us through
18 the chronology, please.

19 A. After law school I went to work for a law firm
20 here in Memphis called Ford and Harrison. I worked
21 there until 2001. After that, I joined the legal
22 department at Federal Express Corporation. I worked
23 there until April 2002, when I joined Morgan Keegan.

24 Q. Okay. And have you been with Morgan Keegan
25 since April of 2002?

1 A. Yes.

2 Q. Do you have any securities licenses?

3 A. I do. I have the Series 7 and the Series 24.

4 Q. Series 7 being the general securities license
5 and 24 being the supervisory license?

6 A. Right. Series 24 being securities -- general
7 securities principal license.

8 Q. And how long have you had those licenses?

9 A. I obtained my Series 7 in 2003 and my Series 24
10 in 2006.

11 Q. All right. Let's begin with Morgan Keegan in
12 April of 2002. What was your initial position with the
13 company?

14 A. I was an attorney assigned to the litigation
15 area of the legal department.

16 Q. And are you still in that same position today?

17 A. No.

18 Q. Okay. When did it change and you were no
19 longer in the litigation department?

20 A. I switched -- I was sort of transitioning in
21 the fall of 2005 to no longer handling the litigation
22 matters, but more to a regulatory role handling the --
23 we had an attorney who left the department who had been
24 primarily dealing with regulatory matters, and I had
25 asked to take his position, so I was -- so around the

1 fall of 2005 was when I transitioned.

2 Q. And are you still in that same regulatory
3 position today?

4 A. No.

5 Q. Okay. What happened then next?

6 A. Then in April of 2006 I became chief compliance
7 officer for the Regions Morgan Keegan Select funds and
8 for Morgan Asset Management.

9 Q. And are you still the chief compliance officer
10 for the Morgan Keegan Select High Income Fund, as well
11 as for Morgan Asset Management?

12 A. There is no Select High Income Fund at this
13 point.

14 Q. Okay. Are you still the chief compliance
15 officer for Morgan Asset Management?

16 A. Yes, and for the RMK Select Fund.

17 Q. And when you say the RMK Select funds, you are
18 also including in that the RMK Select High Income Fund?

19 A. That fund is no longer part of the fund family.

20 Q. Okay. When did that leave the fund family?

21 A. July of 2008.

22 Q. And do you know why it left the fund family in
23 July of 2008?

24 A. Because the shareholders approved a change in
25 investment advisor and approved a new board of

1 directors.

2 Q. Okay. Now, when you said your initial position
3 concerned litigation, are we talking about arbitration,
4 lawsuits, things of that nature?

5 A. Yes, as well as employment matters.

6 Q. Okay. And when you said you moved into the
7 regulatory position, what did that encompass?

8 A. Primarily the investment advisory side serving
9 as a legal liaison for compliance on the advisory --
10 investment advisory side of the business.

11 Q. And as part of that position, were you familiar
12 with the NASD, slash, FINRA rules?

13 A. Yes.

14 Q. And would the answer be the same for the rules
15 of the New York Stock Exchange?

16 A. Yes.

17 Q. How about state securities statutes?

18 A. Only when I needed to research them.

19 Q. Who are you being paid by right now in your
20 position? Is it Morgan Keegan?

21 A. My paycheck comes from Morgan Keegan.

22 Q. Have you received any paychecks over the past
23 couple of years from Morgan Asset Management?

24 A. No.

25 Q. Tell us about how you became involved with the

1 Select funds and serving as the compliance officer for
2 Morgan Asset Management, please.

3 A. The person who had been chief compliance
4 officer resigned in order to take another position at
5 Morgan Keegan, and I was asked to take his position.

6 Q. And as chief compliance officer of Morgan Asset
7 Management, can you tell us generally what your duties
8 and responsibilities are.

9 A. My responsibilities are primarily to oversee
10 the compliance with the funds' code of ethics and
11 policies and procedures, as well as the advisors
12 policies and procedures.

13 Q. Anything else?

14 A. I mean, that is the broad summary of it.

15 Q. Does Morgan Asset Management have its own
16 procedures manual?

17 A. It does.

18 Q. And what is the name of that manual?

19 A. The Morgan Asset Management Policies and
20 Procedures.

21 Q. How many people assist you in your compliance
22 efforts with respect to the Morgan Asset Management
23 funds?

24 A. You will have to define a relevant time period
25 for that.

1 Q. Okay. Let's begin with 2006 when you became
2 chief compliance officer, April of 2006?

3 A. There was one compliance administrator and an
4 administrative assistant.

5 Q. Okay. And in addition to yourself, or were you
6 the administrator?

7 A. By administrative assistant, I mean a
8 secretary.

9 Q. Right. But, in other words, aside from
10 yourself, how many other people were involved in the
11 compliance effort?

12 A. There was myself and two other people.

13 Q. Okay. And at some point, did that change after
14 April of 2006?

15 A. Yes.

16 Q. When did it change?

17 A. In early May of 2006 we hired on another
18 attorney. And then in late May, the compliance
19 administrator left the company.

20 Q. Okay. So we were still at three people?

21 A. Yes.

22 Q. And did that ever change subsequent to that
23 point in time?

24 A. Yes.

25 Q. When did it change?

1 A. In March of 2008 we added an additional
2 compliance officer.

3 Q. So now we are up to four people. And has that
4 changed up through today?

5 A. No, that is the number we currently have.

6 Q. The other people who performed compliance
7 functions for Morgan Asset Management, were all of them
8 Morgan Keegan employees?

9 A. Yes.

10 Q. Tell us what it is you do as chief compliance
11 officer of Morgan Asset Management, generally.

12 A. That is a very broad question.

13 Q. I know it is, and I apologize for it, but I'm
14 not sure how else to get around it. Just give us a
15 general description of what areas fall within your
16 responsibilities.

17 A. Well, as I said before, my responsibilities
18 relate to adhering to the funds' policies and procedures
19 and code of ethics. And so a lot of what goes on
20 involves overseeing the people who we call access
21 persons, who have inside information regarding the funds
22 and we look at their personal trading, for instance, to
23 ensure that they aren't -- they have requirements about
24 pre-clearing personal trades and things of that nature.
25 So, you know, that is a for instance. You asked such a

1 broad question and it's very hard to, you know --

2 Q. Let me see if I can help narrow it down a
3 little bit. Are you involved in the preparation of any
4 SEC filings for the funds?

5 A. I would not say I was involved in the
6 preparation. I am one of the people that is on the -- I
7 have an opportunity to review and comment on those
8 filings.

9 Q. Okay.

10 A. I don't actually do the filing.

11 Q. How about any sales materials relating to those
12 funds?

13 A. Yes, I would have reviewed sales materials for
14 the funds.

15 Q. And staying with the sales materials, can you
16 tell us what period of time you were involved in
17 reviewing them.

18 A. From April of 2006 through the end of 2007.

19 Q. And why did your involvement in that area end
20 in 2007?

21 A. Well, it ended in 2008 because we ceased
22 producing any materials.

23 Q. So you were involved in sales materials from
24 April of '06 through the end of '08?

25 A. The end of '07.

1 Q. The end of '07. And why did you stop producing
2 sales materials at that point in time?

3 A. Because the funds were declining in assets and
4 there was not much benefit to trying to put together
5 materials to generate interest in them.

6 Q. Okay. The sales materials, how often were they
7 produced for these funds in 2007?

8 A. Could you please define what "these funds" are.

9 Q. Okay. The Select High Income Fund, why don't
10 we start with that. If I were to ask you in 2007 how
11 many sales pieces you reviewed or participated in the
12 preparation of, what would your estimate be?

13 A. The materials were produced quarterly.

14 Q. And when I'm referring to sales materials, just
15 to make sure you and I are on the same page, these would
16 include materials that were approved for distribution to
17 clients of Morgan Keegan?

18 A. Yes.

19 Q. And how about any internal-use-only materials
20 that only brokers could see?

21 A. What is the question?

22 Q. Were you involved in the review or preparation
23 of those internal-use-only pieces as well?

24 A. To the best of my knowledge.

25 Q. To the best of your knowledge you were or you

1 were not?

2 A. To the best of my knowledge, I was involved.

3 Q. And do you recall in 2007 how often
4 internal-use-only pieces may have been prepared for
5 Morgan Keegan brokers?

6 A. I do not remember.

7 Q. Can you give us an estimate? Was it more than
8 ten times? Less than ten times?

9 A. It would be less than ten times.

10 Q. Do you think it was more than five times or
11 less than five times?

12 A. I think it was less than five times.

13 Q. Now, when you reviewed the sales materials,
14 what was the purpose in having you review them?

15 A. Well, for one thing, we have a requirement to
16 file any changes with FINRA, so in part I'm looking at
17 them to make sure there haven't been any changes made to
18 the materials that would otherwise require us to
19 resubmit the pieces for FINRA's approval.

20 Q. Let me just stop you there. What you are
21 discussing now is the FINRA rule that requires all
22 advertising materials to be submitted for review?

23 A. Correct.

24 Q. And do you maintain a file of those submissions
25 to FINRA?

1 A. Yes.

2 Q. And how far back, if I were to ask you right
3 now, does your file go with those materials?

4 A. My file goes back to my time at CCO.

5 Q. So going all the way back to April of 2006?

6 A. Yes.

7 Q. And do you still have those materials today?

8 A. Yes.

9 Q. Can you -- I realize this is difficult because
10 we are on the phone. Could you give me a brief
11 description of what these materials would look like.

12 A. When you say "these materials," are you
13 referring to the advertising materials?

14 Q. Yes.

15 A. Yeah, they are a front and back slick -- and
16 when I say slick, I mean coated paper with just
17 different information regarding the fund holdings and
18 performance and then various disclosures.

19 Q. Okay. I'm looking at a document in front of
20 me, and let me describe it to you and see if you can
21 recognize what this is. I'm looking at a document that
22 has a banner at the top that -- the one I'm looking at
23 says RMK Select High Income, High-Yield Bonds. And then
24 beneath that it has performance highlights for the
25 quarter ending 12/31/06, and it gives a return for a

1 one, three, five year period. Is that what you are
2 discussing?

3 MR. BOLUS:

4 Let me just interpose an objection here.
5 Yesterday there were some documents produced in
6 connection with the testimony of Gary Stringer
7 based upon documents that his group at Morgan
8 Keegan created. And I believe that is what
9 Mr. Caruso is referring to, not to a MAM sales
10 material.

11 MR. FRUIN:

12 You are referring to a two-page document;
13 she referred to a one-page document front and
14 back, so with all due respect.

15 MR. CARUSO:

16 This could have been --

17 MR. BOLUS:

18 And I would also say that we had asked if
19 you had documents to use with her, we could
20 have faxed them to her or sent them to her
21 otherwise --

22 MR. CARUSO:

23 Again, when was I given these? This
24 morning.

25 MR. BOLUS:

1 Yesterday we provided the document to you.
2 If you wanted us to provide the document, we
3 would have been glad to provide it to her.

4 MR. KELLEY:

5 What is the objection?

6 MR. BOLUS:

7 My objection is he is asking about a
8 document not provided to MAM, according to the
9 testimony of Mr. Stringer yesterday. And she
10 doesn't have the document in front of her.

11 EXAMINATION BY MR. CARUSO:

12 Q. Let me try asking this. Ms. Wood, could you
13 describe generally what one of these documents would
14 look like at the top.

15 A. When you say "these documents," are you talking
16 about the pieces that the fund's compliance area would
17 review?

18 Q. Yeah, I'm talking about the sales slicks that
19 you were discussing before.

20 A. Yeah, I mean, they would have on the top, if
21 you are talking about the open-end Select High Income
22 Fund, which is the fund you referred to earlier.

23 Q. Yes.

24 A. That fund at the top would say something to the
25 effect -- it would have the fund name, it would have the

1 quarter end, whichever time period we were producing the
2 material for. On the left-hand side it would have sort
3 of a bullet point summary of the fund's objectives. And
4 there would be somewhere on the top half of the page
5 either a bar graph or a pie chart. I think it's a bar
6 graph that showed the credit quality breakdown of the
7 fund. There would then also be a pie chart somewhere,
8 usually in the lower half of the first page, that would
9 have distribution of the different type of assets that
10 the fund had. For instance, corporate bonds, you know,
11 that sort of thing.

12 Q. Okay. I think I now know which one you are
13 discussing. And these were produced on a quarterly
14 basis, and you have them going back to April of '06, at
15 least?

16 A. I have hard copy files going back that far,
17 yes.

18 Q. How about before then; were there sales slicks
19 that were filed with FINRA, or at that point the NASD?

20 A. I believe so, but I don't -- without being able
21 to go to the records and look, I can't definitively
22 answer what happened before my time.

23 Q. Are you familiar with the document retention
24 rules for advertising?

25 A. Yes.

1 Q. Do you know how long you need to retain those
2 documents?

3 A. I believe advertising materials are supposed to
4 be kept for five years for investment advisors.

5 Q. Do you have any reason to believe that Morgan
6 Keegan has not kept these documents for the five year
7 required period?

8 A. No. I mean, our retention obligations for
9 onsite are two years.

10 Q. Right. And then you can keep them in storage
11 for the other three?

12 A. Correct.

13 Q. Yes.

14 MR. FRUIN:

15 And, for the record, I believe five years
16 of such documents have been produced in this
17 case as part of the discovery.

18 EXAMINATION BY MR. CARUSO:

19 Q. Tell me, Ms. Wood, why does Morgan Keegan
20 provide compliance for Morgan Asset Management?

21 A. Well, I wouldn't say Morgan Keegan provides
22 compliance for Morgan Asset Management. More or less,
23 Morgan Keegan compliance department, there would be --
24 it would be a stand alone compliance person who was sort
25 of operating on an island if it wasn't somebody that was

1 housed within the Morgan Keegan compliance department.

2 Does that make sense?

3 Q. I'm not sure I'm following you totally. Maybe
4 my question was a little confusing. Why does Morgan
5 Keegan provide an employee, such as yourself, to also
6 have the responsibilities with respect to the MAM funds?

7 A. That is a question I don't -- I don't know the
8 answer to.

9 Q. Okay. Do you know whether the MAM funds pay
10 Morgan Keegan for your time and services?

11 A. I don't know the answer to that either.

12 Q. How do you allocate your time between what you
13 do at Morgan Keegan versus what you may do at Morgan
14 Asset Management?

15 A. I -- if you would care to define the time
16 period you are talking about, I can answer that more
17 clearly.

18 Q. Okay. Why don't we take a look at 2007.

19 A. Okay.

20 Q. I mean, I realize this is difficult. But if I
21 were to say in a typical week, how much of your time
22 would be spent on Morgan Keegan, that area of your
23 responsibilities, and compare that to Morgan Asset
24 Management.

25 A. In 2007 I had zero percent of my

1 responsibilities for Morgan Keegan. A hundred percent
2 of my responsibilities were for Morgan Asset Management
3 and the funds. And you have to keep in mind that as
4 chief compliance officer for the funds, I'm appointed by
5 the fund's board of directors. I'm not appointed by
6 anybody at Morgan Keegan. And only the fund's board of
7 directors has the power to hire and fire me.

8 Q. Do you know how that Morgan Asset Management
9 board of directors came to hire you?

10 MR. FRUIN:

11 Objection. Mischaracterizes what she just
12 said. She said the fund's board.

13 EXAMINATION BY MR. CARUSO:

14 Q. Do you know how the fund's boards came to hire
15 you?

16 A. I interviewed with certain of the independent
17 directors before I was offered the job.

18 Q. And aside from Morgan Asset Management and any
19 funds in their area, do you provide compliance services
20 for any other mutual funds, you know, like Vanguard or
21 anybody else?

22 A. No.

23 Q. Going back quickly to the sales slicks that we
24 discussed a few minutes ago. Do you know who drafts
25 those sales slicks?

1 A. Well, what do you mean who drafts?

2 Q. Who writes them?

3 A. Well, keep in mind, when I came on board in
4 April of 2006, those materials had been used previously
5 and had been, according to my predecessor, submitted to
6 NASD, now FINRA, for approval. So when you say write,
7 it's not like they are rewritten every quarter. The
8 materials are the same from quarter to quarter with only
9 the performance information and the, you know, some of
10 the other information like the pie charts and the credit
11 distributions, that sort of thing changes, but the
12 wording did not change from quarter to quarter.

13 Q. Okay. So, for instance, the one I have in
14 front of me, which is for the period ending March 31,
15 2007, in the left-hand side it says if your objective is
16 income and growth. What you are saying is that would
17 not have changed?

18 A. When I came on board in April of 2006, the
19 materials already read that.

20 Q. Okay.

21 A. Yes.

22 Q. And at any point in time did that particular
23 section of the sales slick ever change?

24 A. For the RMK Select High Income Fund?

25 Q. Yes.

1 A. I don't believe it did.

2 Q. The bar graph and the pie charts that are on
3 these sales slicks, who was responsible for updating
4 that information on the quarterly basis?

5 A. That information came from Courtney Nash.

6 Q. And is Courtney Nash still employed at Morgan
7 Keegan?

8 A. She was a Morgan Asset Management employee and
9 she is no longer employed.

10 Q. Do you know when she left Morgan Asset
11 Management?

12 A. She left in June of 2008.

13 Q. And do you know where she got the information
14 that is reflected on these sales slicks, as far as the
15 pie chart and the bar graphs?

16 A. I do not.

17 Q. Was there somebody -- and it may have been you;
18 I'm not sure -- at Morgan Keegan who needed to review
19 and approve these materials before they were given to
20 either Morgan Keegan brokers or Morgan Keegan clients?

21 A. Yes.

22 Q. And who was that person?

23 A. I reviewed them before the materials were
24 printed.

25 Q. And when you performed your review, what is it

1 that you were looking for?

2 A. I was looking for, as I mentioned before, that
3 the substantive wording in the materials had not been
4 changed. I was looking generally to make sure that the
5 numbers appeared to make sense. And when I say that,
6 I'm not saying that I sat there with a calculator and
7 actually computed whether the numbers were correct, but
8 just that from a general standpoint the things -- you
9 know, percentages matched. For instance, if there is a
10 pie chart, that the numbers came to a hundred percent,
11 things of that sort.

12 Q. Okay.

13 A. It was that type of review.

14 Q. Okay. In addition -- let's say for the pie
15 chart. In addition to adding up the numbers to make
16 sure they equalled a hundred percent, did you ever go
17 back to see how these percentage allocations compared to
18 the actual SEC filings?

19 A. What do you mean by that?

20 Q. Well, the one I'm looking at -- and I'm sure
21 these are all the same. For instance, in the pie chart
22 it says cash and cash equivalents, 1.6 percent. Okay.
23 Did you or anybody else ever take a look at the SEC
24 filings for this fund to make sure that 1.6 was the
25 same?

1 A. Are you talking about for like a March 31st
2 quarter end?

3 Q. Yes.

4 A. Well, no, that wouldn't have been possible.

5 Q. Why not?

6 A. Because those materials would have been
7 produced before any filing would have been done.

8 Q. But in the pie chart we have certain
9 percentages, correct?

10 A. Right.

11 Q. Did anybody -- those percentages had to come
12 from some source, correct?

13 A. Right.

14 Q. Do you know what the source was for those
15 percentages?

16 A. No.

17 Q. Did you ever attempt to correlate the pie
18 charts or the bar graphs with any of the SEC filings,
19 even after the fact?

20 A. No.

21 Q. Aside from Courtney Nash, was there anybody
22 else involved in the preparation of these sales slicks,
23 as far as you know?

24 A. Courtney -- excuse me. Corporate
25 communications at Morgan Keegan was the entity through

1 which the materials funneled, because they contracted
2 with an outside agency to actually do the lay-up, do the
3 layout of the document and make it look nice, for lack
4 of a better word. And so when -- after Courtney had
5 submitted all of her information, it would come back to
6 Courtney, myself and another person named Casey King for
7 a review.

8 Q. Okay. And then it would be printed?

9 A. Yes.

10 Q. Okay. So just so we have the chronology,
11 Ms. Nash would prepare the sales slicks initially, it
12 would then come over to you at Morgan Keegan and you
13 would review them; is that correct?

14 A. No. Courtney would give corporate
15 communications the updated information that needed to go
16 into the materials. Corporate communications would work
17 with the outside ad agency that actually had the
18 template of the piece, the advertising piece. And they
19 would typeset it, send a draft back over here, then it
20 would come back to myself, Courtney and Casey King.

21 Q. Okay. Just let me then make sure I have this
22 straight. Courtney would prepare the sales slick; she
23 would then send it to Morgan Keegan corporate
24 communications; they would then send it to the outside
25 agency that would do the layout, who would then send the

1 proposed sales slick back to you at Morgan Keegan,
2 Courtney at Morgan Asset Management and the other
3 individual for final review and approval?

4 A. Yes.

5 Q. Okay. And then once everybody signed off on
6 it, it would be printed and distributed, correct?

7 A. Right.

8 Q. Were there ever any occasions where you refused
9 to approve any of these sales slicks?

10 A. Not that I can think of.

11 Q. Did you ever have any questions about any of
12 these sales slicks or the information on them?

13 A. I cannot think of a specific example, no.

14 Q. As compliance officer, did you have any
15 involvement in any due diligence that was performed on
16 any of these funds?

17 A. I don't know what you mean by due diligence.

18 Q. Okay. Do you have an understanding of what the
19 term "due diligence" means?

20 A. Generally, yes.

21 Q. Okay. What is your general understanding?

22 MR. BOLUS:

23 Before you answer that, I would just
24 object. It looks like you are turning a page
25 to a new subject. We let you go on for a

1 period of time without objecting. But the
2 period of time when Ms. Wood functioned as
3 compliance officer is after the last of the
4 purchases by Dr. Diel. We have been through
5 the process, at least after her role as chief
6 compliance officer with MAM, as far as the
7 sales materials. I don't think there is any
8 purpose to be served for purposes of this
9 arbitration in getting into due diligence
10 type issues with regard to MAM, which is not a
11 party to this proceeding.

12 MR. CARUSO:

13 We now know and found out this morning that
14 the sales slicks went to Morgan Keegan
15 corporate communications. We now know that
16 they came back to Morgan Keegan for final
17 review and approval. And hearing the objection
18 about after the date of purchase, these sales
19 slicks and the information that was
20 communicated to brokers is not only relevant
21 to what may or may not have been or should have
22 been communicated to Dr. Diel. But taking
23 their logic that anything after the date of
24 purchase shouldn't be discussed at this hearing
25 is not only directly contrary to their

1 statement of answer, to their assertion of a
2 mitigation of damages defense, to their
3 comments in this hearing that Dr. Diel didn't
4 sell these funds until months after he filed
5 his statement of claim. And if they want that
6 to be the ground rule, I'm sure when Dr. Diel
7 testifies they aren't going to get into
8 anything other than his purchases of these
9 funds. I think their attempt to shut down this
10 line of questioning is improper and it should
11 be rejected.

12 MR. KELLEY:

13 Okay. Let's go out and --

14 MR. DOMBALAGIAN:

15 Do you want to say anything in response?

16 MR. BOLUS:

17 She is the chief compliance officer of MAM,
18 which is not a respondent in this proceeding.
19 We have cooperated by providing her testimony
20 regarding the sales materials, which are
21 actually for a period of time beyond these
22 sales. It's not only temporal in time, but
23 it's a subject matter objection that we have.
24 The questions, just particularly turning to due
25 diligence, are not relevant to this proceeding.

1 MR. DOMBALAGIAN:

2 May I ask one question of the witness,
3 then, before?

4 MR. KELLEY:

5 Sure.

6 MR. DOMBALAGIAN:

7 Is there anybody else at the broker/dealer
8 who was responsible for FINRA compliance with
9 respect to these materials?

10 THE WITNESS:

11 Not with respect to these materials.

12 MR. DOMBALAGIAN:

13 Okay.

14 MR. CARUSO:

15 We will take a break while the Panel
16 deliberates.

17 (A break in the proceedings was held.)

18 MR. KELLEY:

19 We are going to allow this line of
20 questioning to go on for a few minutes.

21 EXAMINATION BY MR. CARUSO:

22 Q. Ms. Wood, are you still there?

23 A. I am.

24 Q. Okay. I'm not sure if you could hear what the
25 ruling of the Panel was, but they are going to give me a

1 few more minutes on this area. I believe we last left
2 off with I asked you for what your understanding of the
3 term "due diligence"?

4 A. Yeah. And I guess I'm still unclear. In what
5 context are you referring to due diligence?

6 Q. Well, let me try asking it in another way. In
7 addition to reviewing the sales slicks, what else, if
8 anything, did you do with respect to the Select High
9 Income Fund?

10 A. Again, what does that mean? That is a very
11 broad question.

12 Q. Well, we already went through that you looked
13 at the sales slicks, you reviewed them and approved
14 them. We went through and discussed the
15 internal-use-only pieces. We discussed the SEC filings.
16 Was there anything else you would do with respect to
17 this fund?

18 MR. BOLUS:

19 I object to the extent it has been asked
20 and answered. She answered about her duties as
21 compliance officer in general terms when you
22 asked that question, as far as code of ethics
23 and insider trading.

24 EXAMINATION BY MR. CARUSO:

25 Q. Let me try it another way. Did you ever do

1 anything with respect to reviewing the holdings in these
2 funds?

3 A. That is also a very broad question.

4 Q. Did you ever look at any of the securities in
5 the portfolio of this fund?

6 A. Yes.

7 Q. What would you be doing -- what would you be
8 looking for and what was the purpose of your review?

9 A. Well, keep in mind that one of my
10 responsibilities or one of my -- one of the things I did
11 was sat on the funds' valuation committee. And a number
12 of these securities -- well, a number of the securities
13 in the Select High Income Fund were valued under the
14 fund's valuation -- they were valued -- the whole fund
15 was valued according to the funds' valuation procedure;
16 but within the fund's valuation procedures there are
17 procedures for valuing what is called "fair valued
18 securities."

19 Q. And am I correct that fair valued securities
20 are securities to which no established market trading
21 price may exist?

22 A. Correct.

23 Q. Okay. So you sat on the valuation committee?

24 A. Uh-huh.

25 Q. Is that a yes?

1 A. Yes.

2 Q. And with respect to the Select High Income
3 Fund, were there any other committees that you sat on in
4 addition to valuation?

5 A. No, there were no other committees that I sat
6 on.

7 Q. In addition to everything we have discussed so
8 far this morning, were there any other areas of
9 responsibility that you had with respect to these funds?

10 A. Yeah. I mean, again, without you giving me
11 very specific questions, you are asking -- you know,
12 it's the whole -- you know, what is your whole job, and
13 that is a very hard thing for me to just sit down and
14 detail for you. You know, as I mentioned earlier, my
15 job -- I'm charged with overseeing the funds from the
16 standpoint of adhering to their policies and procedures
17 and to the code of ethics that the board has
18 implemented.

19 Q. Let me try asking -- let me try helping you.
20 Did you have any role in ensuring that these funds
21 complied with the securities laws?

22 A. Yes.

23 Q. Okay. Can you give us a general description of
24 that.

25 MR. BOLUS:

1 Let me just object again. This is getting
2 into the interworkings of the funds themselves,
3 not to communications to customers of Morgan
4 Keegan, and I think it's -- basically what we
5 are getting at, at this point, is a deposition
6 of Ms. Wood regarding MAM internal workings.
7 And, again, that is not the purpose of this
8 arbitration. So I would object to this scope
9 as irrelevant.

10 MR. KELLEY:

11 And your --

12 MR. CARUSO:

13 She is a Morgan Keegan employee paid by
14 Morgan Keegan. All we have heard since we
15 first walked in this room on Tuesday is we have
16 two separate entities. They don't have any
17 relationship. They don't have any involvement.
18 One is not responsible for the other. This
19 area is showing that it's similar to saying a
20 brother and a sister aren't related because
21 they were born on separate days. We have these
22 two groups; employees are being mixed and
23 matched back and forth. We have registration,
24 we have job responsibilities. It's going to
25 exactly what their defense is, which I must

1 also note, if you look at their statement of
2 answer, you don't find that in their statement
3 of answer. It's not there. But we will deal
4 with that later. So I think it is relevant to
5 the extent that Morgan Keegan is performing
6 at these functions. I think it's important to
7 the Panel's ultimate award as far as whether
8 -- and who is going to be held responsible for
9 what happened here.

10 MR. BOLUS:

11 Mr. Chairman, if I may respond. Number
12 one, there are no claims in this arbitration
13 relating to management of the funds. And they
14 wouldn't be properly asserted in any -- those
15 are not part of Dr. Diel's claims. In addition
16 to that, Ms. Wood has testified that she is
17 appointed, she is hired or fired by the board
18 of the funds themselves, or MAM, not by Morgan
19 Keegan, with respect to her role as chief
20 compliance officer. And she has testified in
21 response to Mr. Caruso's questions that she
22 spent a hundred percent of her time during the
23 period he asked about, a hundred percent of her
24 time as chief compliance officer with no dual
25 function whatsoever. So she was hired or fired

1 by the boards of those funds and MAM and spent
2 a hundred percent of her time in that function.
3 She has testified about issues that conceivably
4 could be relevant. We think she has gone far
5 beyond.

6 MR. KELLEY:

7 Okay. Your line of questioning is going to
8 bring about what, you hope?

9 MR. CARUSO:

10 I'm sorry?

11 MR. KELLEY:

12 Your line of questioning.

13 MR. CARUSO:

14 Further establishing the connections
15 between Morgan Keegan and Morgan Asset
16 Management. That is what this line of
17 questioning --

18 MR. KELLEY:

19 Okay. Let's go on for a couple more
20 minutes.

21 MR. CARUSO:

22 I'm sorry?

23 MR. KELLEY:

24 Let's go on for a couple more minutes.

25 MR. FRUIN:

1 Mr. Chair, asking -- and I apologize. I
2 don't mean to double team. If you want me to
3 stop, I won't say anything. I respect the
4 Chair's ruling. But with all due respect, it's
5 one thing to establish a relationship between
6 the two companies; it's another thing to ask
7 about the role of what MAM was doing, and that
8 is what his question was. His question --
9 while he represents that what he is doing is
10 this, his question had nothing to do with the
11 relationship, and that is what we are objecting
12 to. His question had nothing to do with what
13 he just represented his intent was.

14 MR. CARUSO:

15 Maybe we should get the last question read
16 back so we are clear.

17 (The requested testimony was read back.)

18 MR. BOLUS:

19 And, again, Mr. Chairman, there are a
20 number of lawsuits out there not related to
21 this arbitration and this should not be a
22 discovery vehicle for those.

23 MR. DOMBALAGIAN:

24 I would -- could you rephrase the question.
25 Could you just re-read the question for me. I

1 wanted to insert two words into the
2 question and see if that would work. The
3 question was compliance with securities.
4 Morgan Keegan, the broker/dealer's compliance
5 with securities laws, as opposed to the fund's
6 compliance with securities laws. The concern
7 I'm wrestling with is, is there anybody else at
8 Morgan Keegan, the broker/dealer, who is
9 providing any due diligence function with
10 respect to the sales materials or the
11 underwriting. If there is nobody else, it
12 would seem she is the only person able to
13 testify, regardless of how she allocates her
14 time. If there is somebody else who is
15 responsible for the brokers/dealer's compliance
16 with securities laws, with respect to
17 the marketing of these materials, then that
18 person would be someone whose testimony I would
19 like to listen to. But if no such person
20 exists, we would have to keep asking Ms. Wood.

21 MR. BOLUS:

22 Well, I would just state, I didn't
23 understand your earlier -- and I may have
24 just misunderstood.

25 MR. DOMBALAGIAN:

1 And I could be completely off.

2 MR. BOLUS:

3 I did not understand your earlier question
4 to Mrs. Wood to be directed at Morgan Keegan
5 and Company, the broker/dealer, as far as their
6 compliance functions.

7 MR. DOMBALAGIAN:

8 I thought my question was, is there anyone
9 else who does FINRA compliance for Morgan
10 Keegan, the broker/dealer, with respect to
11 materials. That is what I intended to ask.
12 And it seems from her testimony she is the one
13 who was maintaining the required log of
14 advertising, which suggests that if she is
15 complying with the FINRA rules, then she is
16 effectively performing a compliance function

17 for the broker/dealer, regardless of how she
18 characterizes the allocation of her time.
19 If that is not the case, if there is somebody
20 else in charge of the broker/dealer's
21 compliance with the securities laws, then I
22 understand your point; that we have to respect,
23 you know, the separate existence of the
24 entities.

25 MR. BOLUS:

1 I'm not sure whether Ms. Wood understood
2 that, but I'll let her respond for herself.

3 EXAMINATION BY MR. CARUSO:

4 Q. Ms. Wood, let me try rephrasing the Panel's
5 suggestion on the question. Is there anybody else at
6 Morgan Keegan who from a compliance perspective reviewed
7 and approved these materials, other than you?

8 A. When you say "these materials," are you talking
9 about the quarterly marketing pieces?

10 Q. Yeah, the sales slicks.

11 MR. BOLUS:

12 Let me interpose an objection there because
13 he asked is there anyone else at Morgan Keegan
14 other than you. But I think the question
15 is whether there is anyone at the
16 broker/dealer, Morgan Keegan and Company, who
17 performed a compliance function.

18 MR. DOMBALAGIAN:

19 I don't think you want to know the answer
20 to that question, but you can ask it if you
21 would like.

22 MR. CARUSO:

23 When I said Morgan Keegan --

24 MR. BOLUS:

25 You said other than Mrs. Wood.

1 EXAMINATION BY MR. CARUSO:

2 Q. Ms. Wood, let's try it a third time. At Morgan
3 Keegan and Co., comma, Inc., the broker/dealer, was
4 anybody else responsible for reviewing and approving the
5 sales slicks?

6 A. For the mutual funds?

7 Q. Yes.

8 A. Nobody else.

9 Q. Thank you.

10 MR. KELLEY:

11 Okay.

12 MR. DOMBALAGIAN:

13 If there is nobody else doing it for the
14 broker/dealer, we have to talk to the person.

15 MR. FRUIN:

16 And, Mr. Chair, I understand that, with
17 regard to sales slicks. But his question, I
18 think, was broader. If it's limited to the
19 sales slicks, I understand your ruling.

20 MR. CARUSO:

21 Let me try asking this question. And I'm
22 sure -- let me try asking it.

23 EXAMINATION BY MR. CARUSO:

24 Q. Ms. Wood, aside from the sales slicks, was
25 there anybody else at Morgan Keegan who was involved in

1 compliance of mutual funds, the funds we are talking
2 about in this case? Did anybody else have a compliance
3 role with respect to these funds?

4 A. With respect to these mutual funds?

5 Q. Yes.

6 A. No.

7 MR. KELLEY:

8 Okay.

9 MR. FRUIN:

10 But, again, nor should there be.

11 MR. CARUSO:

12 I'm going to object to that. We got a
13 question and we got an answer. The commentary,
14 nor should there be, is inappropriate. I
15 should be allowed to continue my questioning.
16 There was no question pending. His opinion,
17 nor should there be, differs from my opinion.
18 I don't think it's appropriate for us to engage
19 in this discussion at this point in time. We
20 would rather finish with her and get her off of
21 the phone.

22 MR. KELLEY:

23 Your point.

24 MR. DOMBALAGIAN:

25 Mr. Fruin and Mr. Bolus I think would like

1 to respond to that.

2 MR. BOLUS:

3 My problem with the question is, you could
4 similarly ask Merrill Lynch, is there a person
5 at Merrill Lynch who has a compliance role in
6 reviewing Morgan Keegan Select funds'
7 advertising materials.

8 MR. DOMBALAGIAN:

9 My -- again, just speaking for myself. My
10 understanding is that one of the arguments --
11 there are various theories one can raise.
12 Whether those theories have any merit is
13 something one can address when one gets to the
14 closing arguments. The various theories I have
15 heard from Claimant involve Morgan Keegan, the
16 broker/dealer's capacity as underwriter of the
17 open-ended funds, I suppose; Morgan Keegan's
18 capacity as the broker/dealer, you know, where
19 the dividends are being reinvested; Morgan
20 Keegan's general duty to handle the customer
21 accounts, if such a duty exists. Those are
22 legal theories. You may feel as a matter of
23 law that those legal theories have no merit,
24 and I think there is an appropriate point in
25 the proceedings at which those can be

1 determined if we need to. But, you know, to
2 the extent that those theories are out there
3 and they are educating testimony with respect to
4 those theories, I think this falls in the
5 realm of relevance. But that is just me. I
6 don't know if the Panel agrees.

7 MR. FRUIN:

8 I understand what the Panel is saying, or
9 at least what you are saying.

10 MR. DOMBALAGIAN:

11 What I'm saying in my personal capacity.

12 MR. FRUIN:

13 But from that standpoint, I guess my
14 concern was -- and I understand that concept as
15 it relates to the marketing materials and
16 whether or not she would -- you know, if there
17 was anyone else at Morgan Keegan who was
18 reviewing the marketing materials. But as far
19 as the other functions of compliance with
20 SEC rules outside of marketing, that is a MAM
21 only issue. And that is where if he gets
22 beyond the marketing materials, I think it's
23 objectionable because -- I understand the
24 Panel's ruling with regard to the marketing
25 materials. But when we get beyond marketing

1 materials, I believe we are done with this
2 witness.

3 MR. DOMBALAGIAN:

4 The next question was -- I mean, I haven't
5 heard anything dealing with the internal
6 workings of the mutual fund other than -- I
7 guess there is the question of due diligence
8 with respect to the prospectus and whether or
9 not the broker/dealer has any obligations
10 there, but I think we talked about that. We
11 talked about sales materials. Anything
12 relating to the internal operations of the
13 fund, in my view, would seem not to be
14 relevant, unless somehow it gave her special
15 knowledge as a Morgan Keegan employee that she
16 had a duty to pass on. I have not heard
17 anything to that effect.

18 MR. CARUSO:

19 Well, we heard about she served on the
20 valuation committee.

21 MR. DOMBALAGIAN:

22 That is true. And we can fight over the
23 FASBE rules on valuation, but I don't want to.

24 MR. UPTON:

25 Mr. Caruso, maybe you can help us on this.

1 Dr. Diel got out of these funds when?

2 MR. CARUSO:

3 In the summer of '08.

4 MR. UPTON:

5 '08. So anything after that would not have
6 affected him in any way, then?

7 MR. CARUSO:

8 That is correct.

9 MR. UPTON:

10 So, in other words, you are going up to
11 that '08 period.

12 MR. CARUSO:

13 We were pretty much confined to 2007, which
14 is the critical time frame when, as you know,
15 a lot of these events and the price changes
16 occurred.

17 MR. UPTON:

18 Okay. So you are saying he owned the funds
19 during this period that we are discussing?

20 MR. CARUSO:

21 Yes. Let me move on to my next area so we
22 can finish with Ms. Wood and let her get back
23 to work.

24 MR. KELLEY:

25 Okay. Let's go.

1 EXAMINATION BY MR. CARUSO:

2 Q. Ms. Wood, are you aware of the fact that Morgan
3 Keegan removed the Select High Income Fund from its
4 recommended list in August of '07? Ms. Wood? Hello?

5 MR. KELLEY:

6 Have we lost her?

7 MR. MADDOX:

8 Ms. Wood? Hello?

9 MR. FRUIN:

10 She may hear us and we don't hear her.

11 MR. MADDOX:

12 Ms. Wood, if you can hear us, we will hang
13 up and try to call you right back.

14 MR. KELLEY:

15 Do we want to take ten minutes.

16 (A break in the proceedings was held.)

17 THE WITNESS:

18 This is Michelle.

19 MR. FRUIN:

20 Hello, Michelle. This is Peter Fruin. We
21 apologize for dropping you for some reason, or
22 whatever happened with the phones. But we are
23 glad to know that we are back on board.

24 THE WITNESS:

25 All right.

1 EXAMINATION BY MR. CARUSO:

2 Q. Ms. Wood, it's Stephen Caruso again. Do you
3 still have Mr. Barnett with you?

4 A. He stepped out, but he will be back.

5 Q. Do we need to wait for him?

6 A. Maybe that is a good idea.

7 Q. Okay.

8 A. Mr. Barnett is back.

9 Q. Okay. Where I think we lost you, I was asking
10 you a question about, are you aware of the fact that in
11 August of 2007 Morgan Keegan dropped the Select High
12 Income Fund from its list of recommended funds?

13 A. No.

14 Q. You are not aware of that?

15 A. No.

16 Q. Okay. We have spent all of our time this
17 morning so far talking about the Select High Income
18 fund. Let me ask you now about the other funds. And
19 the other funds involved in this case are the Advantage
20 Income funds, the regular high income funds, the
21 Multi-Sector fund. Are you familiar with those funds?

22 A. Yes.

23 Q. And do you also serve as chief -- as compliance
24 officer with respect to those funds?

25 A. Yes, or I did at the time that they were here.

1 Q. Up until the time the new portfolio managers
2 were hired?

3 A. Yes.

4 Q. Okay. Everything we have gone through this
5 morning, I don't want to go through it again with
6 respect to these other funds. But was there any
7 material difference in your duties and responsibilities
8 with respect to these other funds, than what we have
9 already discussed?

10 A. No.

11 Q. I'm sorry?

12 A. No.

13 Q. Okay. Did you ever participate in or listen to
14 conference calls that Jim Kelsoe held with the Morgan
15 Keegan brokers concerning these funds?

16 A. Yes.

17 Q. How often would those conference calls take
18 place?

19 A. They were approximately weekly starting in, I
20 believe, August of 2007 up through the end of the year.
21 And I can't remember how far into the new year, into
22 2008, they continued.

23 Q. How about prior to August of 2007, can you give
24 us an estimate as to the frequency of those calls?

25 A. Prior to 2007 -- or, excuse me, prior to August

1 of 2007, I think -- this is off the top of my head. My
2 best recollection, I believe that he had a call in July.
3 And then prior to that, I don't remember.

4 Q. Okay. And tell me, what was the reason why you
5 listened in on those calls.

6 A. Just to hear what he was saying.

7 Q. Okay. And was there any tape-recording made of
8 those calls?

9 A. There was.

10 Q. There was?

11 A. Yes.

12 Q. And do you still have those tapes?

13 A. Yes, they are electronic filed.

14 Q. Are you aware of the fact that at some point in
15 2007 Regions invested its own money in the Select High
16 Income Fund?

17 MR. BOLUS:

18 I would object to relevance. He is talking
19 about an investment of Regions Bank. It
20 doesn't go to the issues in this
21 arbitration.

22 MR. CARUSO:

23 I can re -- let me try this.

24 EXAMINATION BY MR. CARUSO:

25 Q. Ms. Wood, are you aware in any of the sales

1 slicks that were issued through Morgan Keegan of there
2 being any discussion of Regions having injected its own
3 money into the Select High Income Fund to keep it from
4 going out of business?

5 A. I'm sorry, I don't understand your question.
6 Are you saying -- are you saying did that disclosure
7 appear in the sales materials?

8 Q. Yes.

9 A. It did not appear in the sales materials.

10 Q. Ms. Wood, a final question for you. In your
11 compliance function, did you have any role in the
12 preparation or review or approval of any of the
13 shareholder commentaries written by Jim Kelsoe?

14 A. Well, those were part of the, you know, annual
15 report or semi-annual report documents as a whole. And
16 I received copies of the whole -- of drafts of that
17 whole document. So, yes, that would have been part of
18 that.

19 MR. CARUSO:

20 Okay. Thank you. I have nothing further
21 at this time for you.

22 MR. BOLUS:

23 Could we just take a couple minutes break
24 to confer about whether we have any questions
25 for this witness?

1 MR. KELLEY:

2 Sure, I have no problem with that.

3 MR. FRUIN:

4 And, Ms. Wood, we will call you back
5 probably in about five minutes.

6 THE WITNESS:

7 That is fine.

8 MR. FRUIN:

9 Thank you.

10 (A break in the proceedings was held.)

11 MR. CARUSO:

12 Members of the Panel, as we just heard --
13 and I think maybe we should first get that you
14 have no further questioning for Ms. Wood so
15 that is completed.

16 MR. BOLUS:

17 There is no further -- there is no
18 questioning from Morgan Keegan of Ms. Wood.

19 MR. CARUSO:

20 As we just heard a few minutes ago,
21 Ms. Wood testified they have all of Jim
22 Kelsoe's recordings to the Morgan Keegan
23 brokers. All of these calls, the information
24 that was given, clearly material that comes
25 under both Lists 7 and 9 of NASD Notices to

1 Members 9990 be discovery materials. We would
2 request the immediate production of all of
3 those transcripts or recordings that we think
4 should have been turned over during the course
5 of discovery in this case.

6 MR. FRUIN:

7 Do you want me to respond?

8 MR. KELLEY:

9 Yes.

10 MR. FRUIN:

11 I'm not so sure they are covered by Lists 7
12 and 9. I would have to look at the actual
13 request. I don't have them in front of me.
14 But, more importantly, whether or not MAM has
15 copies of those recordings or not is, quite
16 frankly, irrelevant. She testified that they
17 have copies of the recordings. That is okay.

18 MR. KELLEY:

19 How involved is this?

20 MR. CARUSO:

21 Well, she testified Morgan Keegan has these
22 recordings.

23 MR. FRUIN:

24 No, sir. She testified -- she was asked
25 the question, Do you have recordings? The

1 answer is yes. She is the compliance officer
2 for Morgan Asset Management. She was not asked
3 does Morgan Keegan have the documents. She was
4 asked, Do you have the documents? And she said
5 yes. So, again, I don't know necessarily --
6 I'm not saying who has the documents. But at
7 this point, I would assume that Morgan Asset
8 Management has the documents. But that being
9 said, you know, I don't think it's something
10 that has to be produced. But, again, I'm not
11 -- I don't even know if it would have to be
12 produced if it was in Morgan Keegan's
13 possession. I would like to --

14 MR. KELLEY:

15 I'll answer that. We will just let that go
16 then. We won't get it. So we will have to
17 start with the next witness.

18 MR. CARUSO:

19 Note my objection for the record to being
20 denied documents under the 9990 sales
21 materials.

22 MR. BOLUS:

23 Her testimony certainly was not that they
24 were sales materials.

25 MR. FRUIN:

1 Right.

2 MR. CARUSO:

3 Okay.

4 MR. FRUIN:

5 So Dr. Diel is --

6 (A break in the proceedings was held.)

7 * * * * *

8 DR. KRAEMER L. DIEL,

9 after having been first duly sworn by an authorized
10 court reporter, was examined and testified as follows:

11 * * * * *

12 DIRECT EXAMINATION

13 EXAMINATION BY MR. GRIFFIN:

14 Q. Good morning, Dr. Diel.

15 A. Good morning.

16 Q. Can you give us a little bit of a background on
17 your education.

18 A. I graduated from Catholic High School in Baton
19 Rouge, then I went to LSU. And after three years at
20 LSU, I went to dental school.

21 Q. What year did you graduate from dental school?

22 A. '68.

23 Q. '68. Did you receive a D.D.S.?

24 A. Yes.

25 Q. Dr. Diel, do you have any military experience?

1 A. Yeah, when I graduated from dental school I
2 went into the Navy for two years.

3 Q. Were you enlisted or drafted?

4 A. I enlisted.

5 Q. What year did you open your dental practice?

6 A. 1970.

7 Q. Are you working today?

8 A. No.

9 Q. When did you retire?

10 A. 1989.

11 Q. Dr. Diel, are you married?

12 A. Yes.

13 Q. What is your wife's name?

14 A. Judy.

15 Q. How long have you been married?

16 A. Fourteen years.

17 Q. Is this your first marriage?

18 A. Yes. I guess you would call me kind of a late
19 bloomer. I didn't get married until I was 49 years old.

20 Q. How old are you today?

21 A. 65.

22 Q. Okay. Do you and Judy have any children?

23 A. Yes, we do.

24 Q. How old are your children?

25 A. They are 12 and 14.

1 Q. Boys? Girls?

2 A. They are boys.

3 Q. Two boys?

4 A. Right.

5 Q. Do they keep you busy?

6 A. Yeah, they really keep you busy. I mean, you
7 know, bringing them back and forth to school, to
8 activities that they do. You know, I always -- when I
9 got married, I wanted to have a couple of boys, and that
10 is what I got. They both play sports. You know, the
11 oldest one, he runs cross country and that is it. The
12 younger one, I think he wants them to invent another
13 sport so he can play that too. Football, basketball,
14 baseball.

15 Q. I can appreciate that. Mark talked a little
16 bit about some health issues that you had in his
17 opening. Do you recall hearing that?

18 A. Yes.

19 Q. Okay. Can you tell us a little bit about your
20 back and neck problems.

21 A. I was rear-ended and it snapped my neck back
22 and I ruptured some discs. And I had to have surgery
23 for that in -- I believe it was 1985. The surgery was
24 not successful and so here I am.

25 Q. I would just like to clarify that a little bit.

1 What year was the wreck, the accident?

2 A. 1980.

3 Q. Okay. And you had surgery when?

4 A. '85.

5 Q. And, again, just so we are clear, what year did
6 you retire?

7 A. In '89.

8 Q. Did the back and neck problems associated from
9 the wreck affect your retirement?

10 A. Oh, yes, that is what happened. I mean, I
11 think from '87 to -- no, '85 to '87, I -- anyway, in a
12 period there I started practicing half days because I
13 just couldn't -- I couldn't go. Like when I would be
14 working on patients, my hands would get like stiff and
15 whatnot and my neck and muscles would tighten, so I
16 would have to quit working on patients to go out in the
17 hallway and walk up and down until I got all of that
18 smoothed out. So eventually I had to quit practicing.

19 Q. Dr. Diel, I would ask you to speak loud enough
20 for the court reporter to hear you. Since you have been
21 retired, what have your primary sources of income been?

22 A. I have one disability policy, you know, and I
23 get social security and investments that I have.

24 Q. What does your wife do?

25 A. She is a court reporter.

1 Q. Still working?

2 A. Yes.

3 Q. Dr. Diel, who was your first broker?

4 A. Wade Randolph.

5 Q. The same Wade Randolph that we have been
6 talking about?

7 A. Yes.

8 Q. Approximately when did you begin working with
9 Wade Randolph?

10 A. I think like 1980.

11 Q. Dr. Diel, did there come a time when you left
12 or stopped working with Wade?

13 A. Yes, I did. I'm not sure exactly when. I
14 don't remember, but I did quit.

15 Q. Can you tell us a little bit about the reasons
16 why?

17 A. Well, it was mainly I just didn't understand
18 the stock market. I didn't feel comfortable with it. I
19 really, you know, just didn't feel like -- I just didn't
20 feel confident in the investments. I just didn't
21 understand it.

22 Q. What did you do right after you left Wade?

23 A. I didn't do anything right away. And then I
24 went with a broker at Merrill Lynch, a guy named Gary
25 Grzybowski.

1 Q. Did you have any investments in between that
2 time, in between the time you left Wade and started with
3 Gary?

4 A. I'm not sure. I did at one point in time. I
5 got with my accountant and he -- you know, I wanted -- I
6 was trying to get familiar with something that would be
7 safe. I didn't want to lose, you know, my money, my
8 principal. And he showed me a pamphlet on a Vanguard
9 500 Index and explained it all to me and it was, you
10 know, relatively safe and over the long-haul, you know,
11 you would get some income from it.

12 Q. I just want to be clear of the time frame here,
13 Dr. Diel. My question was, in between the time that you
14 left Wade Randolph and started working with Merrill
15 Lynch, did you have any investments? Did you work with
16 any banks?

17 A. Well, that -- initially I bought some CDs.

18 Q. So other than Wade and the Merrill Lynch broker
19 you have just talked about, has anybody else advised you
20 on investments?

21 A. Brian Bennett did. He was -- like I say, I got
22 with him when I bought that Vanguard.

23 Q. Explain to us who Brian Bennett is again.

24 A. He is my accountant.

25 Q. How often did Brian Bennett make investment

1 recommendations to you?

2 A. Not often.

3 Q. For purposes of quantifying that, can you give
4 us an idea? Maybe before the year 2000. Not often, are
5 we talking ten or more?

6 A. Advising me ten different times in a period up
7 to when?

8 Q. Say the year 2000.

9 A. Yeah, that is fair.

10 Q. Doctor, who did you rely on to assist and guide
11 you with investments?

12 A. My broker.

13 Q. Dr. Diel, do you read business or investing
14 newspapers?

15 A. No.

16 Q. What about magazines?

17 A. No.

18 Q. Do you subscribe to any investment newsletters?

19 A. No.

20 Q. What do you read?

21 A. Well, I get an outdoor magazine, Louisiana
22 Sportsman. I love to hunt and fish. I read the Baton
23 Rouge newspaper. I mean, in my church I get a weekly
24 bulletin on Sunday. I also get a newspaper they put out
25 called the Catholic Commentator. And I read the bible a

1 lot.

2 Q. So where do you get your investment
3 recommendations?

4 A. What are my investment recommendations of what
5 I want to buy?

6 Q. Where do you get them? Where do you get your
7 investment recommendations?

8 A. From my broker. And, I mean, not really from
9 my broker -- I mean, I know what I want, you know, in my
10 investments.

11 Q. Have you made recommendations to your brokers
12 for particular investments?

13 A. Are you talking about buying stock?

14 Q. That is right.

15 A. I thought you were talking about what type of
16 stocks I wanted. I have, but not often. I mean, I just
17 really don't do it. My broker usually calls me, you
18 know, when he has something that is good to buy and he
19 tells me about it.

20 Q. All right. Dr. Diel, did there come a time
21 where you started working with Wade again?

22 A. Yes.

23 Q. When was that?

24 A. In 1999.

25 Q. Where was Wade working at this time?

1 A. For Morgan Keegan.

2 Q. At this time, 1999, did you and Wade discuss
3 your investment objectives?

4 A. Yes.

5 Q. What did you tell him?

6 A. I told him that I wanted things that were low
7 risk, had an income, diversified, conservative things
8 where I wouldn't lose my investment.

9 Q. Did you have those conversations on more than
10 one occasion?

11 A. Yes. Oh, yes.

12 Q. Did you ever tell Wade you wanted speculative
13 investments?

14 A. No, I didn't.

15 Q. Did you have an expectation of what Wade was
16 going to recommend to you?

17 A. Yes, because it was -- and that is why I went
18 with him again. A friend of mine was using him and he
19 said that he was, you know, buying bond funds. And he
20 said -- he had the same criteria I did for investing;
21 you know, low risk, income and so forth. And I decided
22 to call Wade to, you know, talk to him about it and
23 hopefully be able to invest with him in something that
24 was safe.

25 Q. Did you tell him you wanted to buy stocks?

1 A. No.

2 Q. Why not?

3 A. I just thought there was too much risk. I
4 wanted low risk and that was my main objective.

5 Q. All right. Dr. Diel, do you have in front of
6 you the big white binder, Respondent's notebook No. 1?
7 Excuse me. That is one that is not marked.

8 MR. FRUIN:

9 I think you took the witness's copy, one of
10 you has the witness's copy.

11 MR. KELLEY:

12 Okay. Is that notebook No. 1?

13 MR. BOLUS:

14 Yes.

15 EXAMINATION BY MR. GRIFFIN:

16 Q. Dr. Diel, I would like you to take a look at
17 Exhibit 1, Page 6 in that binder. Exhibit 1, Page 6.
18 Thank you. Are we there?

19 A. Yes.

20 Q. Okay. Dr. Diel, do you recognize this
21 document?

22 A. Not really.

23 Q. Do you have any idea who prepared this
24 document? Do you have any idea who prepared this
25 document?

1 A. I don't know, but Wade Randolph signed it.

2 Q. Okay. That is Wade Randolph's signature on the
3 front page?

4 A. Yes.

5 Q. Can you turn to the next page. Actually,
6 actually --

7 MR. BOLUS:

8 It's numbered Page 7. Is that what you are
9 looking for?

10 MR. GRIFFIN:

11 That is okay. There is no second page
12 here. We will just go with that page. Okay.

13 EXAMINATION BY MR. GRIFFIN:

14 Q. Dr. Diel, is your signature anywhere on Page 6?

15 A. No.

16 Q. All right. Dr. Diel, do you remember the first
17 time that Wade mentioned the RMK funds for you -- to
18 you?

19 A. Yes.

20 Q. Do you remember an approximate time frame of
21 when that was?

22 A. In 2002, I think. Well, 2002.

23 Q. What did Wade tell you about the RMK funds in
24 early 2002?

25 A. Well, he told me they were consistent with my

1 investing, you know, what I wanted in my investments;
2 and low risk and, you know, income. He said that these
3 funds, you know, fit what I wanted and that they were
4 really good funds. That they were better than any funds
5 he had ever recommended to me before. And he was real
6 high on Mr. Kelsoe, who was the fund manager. He just
7 talked about him like he was -- you know, he was the
8 best in the business, is what he said. And that is how
9 he sold them to me. That is how he told me about them.

10 Q. Okay. Did Wade send you a prospectus before he
11 told you about the fund?

12 A. No.

13 Q. What about before he made the recommendation?

14 A. No.

15 Q. How about before you bought the fund?

16 A. No.

17 Q. Dr. Diel, did Wade mail you any sales materials
18 regarding the fund?

19 A. Yeah, he sent me something, you know. You are
20 talking about before or after I bought them?

21 Q. Around the time that you purchased the fund?

22 A. Yes.

23 Q. I would like you to look at the green exhibit
24 book, the small thin book. Is it in the stack to your
25 right, Dr. Diel, with all of the black binders right

1 there next to you. All right. Dr. Diel, in this
2 exhibit, the green exhibit book, I would like you to
3 look at Tab No. 1. Are you there?

4 A. Yes.

5 Q. Is this the marketing material that you
6 received?

7 A. Yes.

8 Q. I would like you to look through this document
9 a little bit, Dr. Diel. And let me know, was this
10 consistent with your expectations and what Wade told you
11 about the fund?

12 A. Yes, it says --

13 MR. FRUIN:

14 Dr. Diel, I'm going to switch with you.

15 This is their version. And I know you didn't
16 mean it intentionally.

17 EXAMINATION BY MR. GRIFFIN:

18 Q. Again, it's the same document you are
19 looking at. We wanted you to have the cleanest
20 version.

21 A. You know, it says that it has a goal of
22 high yields without excessive credit, which I wanted.

23 Q. And where are you reading there?

24 A. This is right directly under where it says
25 "Select advantages." And it's No. 1, "opportunity for a

1 high return of income." And it has a bunch of values.
2 But the main thing that it says about -- or tells what I
3 wanted, you know, is it doesn't have excessive risks.
4 "The goal of high yields without excessive credit
5 risks."

6 Q. Okay.

7 A. And it says, "Your objective is income and
8 growth," over on the left side there; which is, you
9 know, what I would like also. Down here it says,
10 "Diversification and it's a conservative
11 below-investment-grade profile."

12 Q. Did Wade ever tell you this fund that you
13 purchased or were recommended to purchase at this time
14 was speculative?

15 A. No.

16 Q. Was there anything in the sales material that
17 you received talking about speculation?

18 A. No.

19 Q. Dr. Diel, did Wade ever tell you this fund was
20 high risk?

21 A. No.

22 Q. Did he call it a junk bond fund?

23 A. No.

24 Q. Did he tell you you could lose significant
25 principal if you invested in this fund?

1 A. No.

2 Q. All right. Dr. Diel, do you recall any other
3 conversations that you had with Wade regarding other RMK
4 funds?

5 A. Yes.

6 Q. Could you describe those a little bit to us.

7 A. Well, as we went along, another fund would come
8 out and he would call me and recommend it to me also,
9 just like he did the first one. He kept stressing it
10 had the things that I wanted; you know, low risk and
11 income, you know, conservative, diversified. And he was
12 always -- he always mentioned Mr. Kelsoe saying he was,
13 you know, just a guru doing those types of funds.

14 Q. Did he ever tell you -- did Wade ever tell you
15 the differences between the funds that you were
16 purchasing?

17 A. He said that they were a little bit different
18 in some of the things that they contained, but the main
19 thing he stressed was they had the same objectives.

20 Q. Did you think you were getting anything
21 different by investing in these different funds?

22 A. No, I just thought they would be more
23 diversified if they were different funds. They had a
24 little bit different things, like he said.

25 Q. Dr. Diel, do you know the difference between an

1 open-end fund and a closed-end fund?

2 A. No.

3 Q. Did Wade ever talk about those terms to you?

4 A. No.

5 Q. How many RMK funds did you purchase?

6 A. Five.

7 Q. Who recommended them to you?

8 A. Wade.

9 Q. All five?

10 A. Yes.

11 Q. Did you ever buy any on your own?

12 A. No.

13 Q. At Morgan Keegan or elsewhere?

14 A. No.

15 Q. Did Wade ever talk to you about just adding

16 more money to one of the investments that you held?

17 A. No.

18 Q. He always recommended buying another fund?

19 A. Yes.

20 Q. Okay. Was there ever a discussion about the

21 holdings of the funds?

22 A. No. I mean, I always made sure that each one

23 had the objectives that I wanted, and depending on

24 Wayne -- depending on Wade, you know, to look at it and

25 read them and make sure that what was in the funds was

1 what I needed.

2 Q. How would you describe a bond fund?

3 A. A fund that contains bonds.

4 Q. Any particular kind of bonds?

5 A. Well, municipal bonds and corporate bonds were
6 things I had bought in the past and. You know, I
7 figured, you know, it had bonds of that type in it, good
8 bonds.

9 Q. Dr. Diel, do you know what a CDO is?

10 A. No.

11 Q. What about CLO?

12 A. No.

13 Q. Dr. Diel, I would like you to look back at that
14 white exhibit binder that you have in front of you,
15 Dr. Diel, Respondent's Exhibit 1, Tab 1, Page 7. Keep
16 going. Page 7. Are you there?

17 A. I have 6.

18 Q. Go past the purple page, I think. There you
19 go. Are you looking at Page 7?

20 A. Yes.

21 Q. Okay. Do you recognize this document?

22 A. No, not really.

23 Q. Just to be clear, it is your signature on that
24 document, though?

25 A. Yes, it is.

1 Q. And the date of this is what, of your
2 signature?

3 A. 3/18/05.

4 Q. Okay. Dr. Diel, in 2005, did you tell Wade you
5 wanted to change your investment objectives?

6 A. No, I didn't.

7 Q. Did you tell anyone at Morgan Keegan you wanted
8 to change your investment objectives?

9 A. No, I didn't.

10 Q. Dr. Diel, did you receive prospectuses for all
11 of the RMK funds that you purchased?

12 A. I received prospectuses from them, but I'm not
13 sure if I received all of them, but I did get some RMK
14 prospectuses.

15 Q. The ones that you did receive, did you read
16 them?

17 A. No.

18 Q. Why not?

19 A. Well, I didn't understand them. I couldn't
20 read them and they confused me; and Wade had already
21 told me, you know, what they had in it. They had my
22 objectives, investment objectives: low risk and income.

23 Q. Did Wade ever tell you to read the prospectus?

24 A. No.

25 Q. Did Wade ever tell you that he had read the

1 prospectus?

2 A. No.

3 Q. Dr. Diel, do you recall if you ever received
4 any annual or semi-annual reports from the funds?

5 A. No.

6 Q. Don't remember?

7 A. Well, I don't remember getting any.

8 MR. FRUIN:

9 I think those are for us.

10 (A break in the proceedings was held.)

11 EXAMINATION BY MR. GRIFFIN:

12 Q. I'm changing the topic a little bit, Dr. Diel.
13 How long has Mr. Preis, Richard Preis, been your broker?

14 A. For three years.

15 Q. When did he take over?

16 A. That was when Wade died. When did he take
17 over? Yeah, when Wade died. I think it was in March of
18 '06, I believe.

19 Q. Okay. Dr. Diel, with the exception of this
20 week, this past Tuesday out in the hall outside of this
21 room, have you ever spoken with Mr. Preis?

22 A. No.

23 Q. Tell us a little bit about how your
24 relationship with Wade Randolph differed from your
25 relationship with Richard Preis?

1 A. Well, I knew Wade. He was a friend. Like I
2 say, Richard Preis I didn't know at all.

3 Q. Did Wade call you when he had recommendations
4 for you?

5 A. Yes, he did.

6 Q. Did you get a call from Mr. Preis or anyone at
7 Morgan Keegan when your funds began dropping in 2007?

8 A. No, I didn't.

9 Q. You were here on Tuesday when Mr. Preis
10 testified in this arbitration; is that correct?

11 A. Correct.

12 Q. Do you recall him saying -- testifying to this
13 Panel that he had never made any recommendations for
14 these RMK funds?

15 A. Yes.

16 Q. While you were his customer back in 2006, '7,
17 '8, would you have liked to have known that information?

18 A. Yes.

19 Q. Would that have been information that would
20 have helped you to decide whether to hold the funds or
21 not?

22 MR. BOLUS:

23 Well, I object to the leading. I have let
24 some of this go on. And I understand at
25 times it's necessary, but I think it's gotten

1 excessive at this point.

2 MR. GRIFFIN:

3 That is fair.

4 EXAMINATION BY MR. GRIFFIN:

5 Q. Dr. Diel, did anyone tell you in 2007 that the
6 funds were off of Morgan Keegan's recommended list?

7 A. No.

8 Q. Dr. Diel, do you have an agreement with my law
9 firm to represent you on a contingency fee basis?

10 A. To do what now?

11 Q. For my law firm to represent you on a
12 contingency fee basis?

13 A. Yes.

14 Q. What is that contingency fee?

15 A. 33 1/3 percent.

16 Q. In addition to that agreement, do we have
17 another agreement or part of the same agreement where
18 you are responsible for expenses?

19 A. Yes.

20 Q. Okay. Have your lawyers estimated those
21 expenses for you?

22 A. I was told like 30,000.

23 Q. Dr. Diel, did you have any discussions -- or
24 who at Morgan Keegan have you spoken with during the
25 point of time after Wade Randolph passed away?

1 A. Rosa Stelly.

2 Q. Ms. Stelly who was here on Tuesday?

3 A. That's correct.

4 Q. Did you and Rosa ever have any discussions
5 about what had happened with your RMK funds?

6 A. Well, just the fact that they were really,
7 really down. And she told me that, you know, she was
8 glad Wade wouldn't be here -- wasn't here because he
9 would really be upset with what happened to the RMK
10 funds, since he recommended them so highly.

11 MR. GRIFFIN:

12 That is all, Dr. Diel. Thank you.

13 MR. MADDOX:

14 Mr. Chairman, what time is it now?

15 MR. KELLEY:

16 It's 11:15. Do you want to go to lunch
17 now?

18 MR. MADDOX:

19 That is a possibility. We would be okay
20 with that.

21 MR. FRUIN:

22 That is fine. As long as we obviously
23 don't take an hour and a half. If we break
24 early, obviously, and come back within a
25 reasonable time frame because, obviously, we

1 don't want to have too long of a delay. 12:30
2 coming back.

3 MR. KELLEY:

4 12:30 sounds good to me.

5 (A lunch break in the proceedings was held.)

6 MR. KELLEY:

7 Any housekeeping to talk about between now
8 and five?

9 MR. CARUSO:

10 No.

11 CROSS EXAMINATION

12 EXAMINATION BY MR. BOLUS:

13 Q. Dr. Diel, my name is John Bolus. We have been
14 in the room together the past few days, but we haven't
15 been able to talk of any substance. If at any time I
16 ask you a question that you don't understand, please
17 tell me and I'll be glad to rephrase the question.

18 A. Okay.

19 Q. And we both need to probably keep our voices
20 up. We ended up next to one another the way this room
21 is configured, but the court reporter is going to have
22 to take down what we say. Remind us, how long have you
23 known or did you know Wade Randolph prior to his death?

24 A. I think like in 1980. I'm not sure, but I
25 think that is when I met Wade.

1 Q. Okay. Let's go back. You got your dental
2 degree from -- was that from LSU?

3 A. No, it was Loyola here in New Orleans. I was
4 the last class to go all the way through Loyola, then
5 they switched over to the new school LSU had.

6 Q. Did you have to sit for boards at that time to
7 become a dentist?

8 A. You had to take a state board exam for the
9 clinical part. And then you had to take national boards
10 for the academic part, and that would allow you to not
11 have to take the written state board. If you passed the
12 national boards, then you passed the state boards.

13 Q. Okay. You took the national boards; is that
14 right?

15 A. Yes.

16 Q. Did you have to keep up with continuing
17 education requirements from year to year?

18 A. Yes.

19 Q. And you did that during the course of your
20 dental practice?

21 A. Yes.

22 Q. Is that right? During the course of your
23 dental practice, and that was from about 1970 to 1989;
24 is that right?

25 A. Right.

1 Q. Did you take any medical journals?

2 A. What do you mean? I don't know what you mean
3 by medical journals.

4 Q. Did you receive periodicals from the American
5 Dental Association or other medical organizations to
6 keep you abreast of developments in the practice?

7 A. Yeah, I would -- I think with what you pay for
8 with your state license, I think that I got, you know,
9 I'm going to say a national publication. I forget what
10 the name of it is, but I did receive one of those.

11 Q. And you would receive that periodically and
12 keep up with it, I assume, to keep abreast of
13 developments?

14 A. Well, you would thumb through it. I wouldn't
15 read it like I would read my hunting and fishing
16 magazine.

17 Q. But you would look for important information
18 that you thought was relevant to you and you would keep
19 abreast of that; is that right?

20 A. Right.

21 Q. And you didn't have any trouble reading those
22 journals, at least for the information that you thought
23 was important to you, correct?

24 A. Yes.

25 Q. Did you practice with anyone during your 19

1 years of practice?

2 A. No.

3 Q. So you had a solo practice?

4 A. That's correct.

5 Q. Was that incorporated?

6 A. Yes.

7 Q. Who did the books for that practice?

8 A. Brian Bennett.

9 Q. Did you do any kind of administrative functions
10 with regard to your practice?

11 A. No.

12 Q. Did you review any accounts receivable to help
13 Brian in sorting through that for your practice?

14 A. No.

15 Q. When you retired, did you sell your practice?

16 A. Yes.

17 Q. Who did you sell it to?

18 A. Another general dentist that was in town that
19 had another office and he bought mine from me.

20 Q. Did you receive some stream of income from him
21 in exchange for selling your practice?

22 A. No, it was just a lump sum.

23 Q. In terms of managing a solo practice, did you
24 ever take any -- or read any management articles on
25 managing a dental practice over the course of time that

1 you had your practice?

2 A. No.

3 Q. Have you had any accountants other than Brian
4 Bennett over the time?

5 A. No.

6 Q. Now, Brian Bennett is located in Baton Rouge;
7 is that right?

8 A. Yes, he is. I had his brother I think for a
9 year or maybe two, and then I switched over to Brian.

10 Q. Did you have a lawyer handle the sale of your
11 dental practice?

12 A. I don't remember.

13 Q. What did you sell your dental practice for?

14 A. Like 60,000, I believe.

15 Q. Now, how did you come to know Wade Randolph?

16 A. A friend of mine was trading with him and told
17 me about him.

18 Q. Who was that friend?

19 A. A guy named Jeff Bennett.

20 Q. Is Jeff Bennett related to Brian Bennett?

21 A. No.

22 Q. So Brian Bennett told you about Wade Randolph?

23 A. That's correct -- no. No, Jeff Bennett told me
24 about Mr. Randolph, not Brian Bennett.

25 Q. I'm sorry, Jeff Bennett. What did Jeff Bennett

1 tell you about Wade Randolph initially, if you recall?

2 A. He told me that he was buying bonds from him
3 and they were low risk and were paying well.

4 Q. This was back in the 1980 time frame, early
5 1980s?

6 A. No. Well -- no, because I didn't -- I wasn't
7 with Wade back then. I was -- in the '80s you said?

8 Q. Yes, sir.

9 A. No, I did -- at that time -- at that time I
10 was -- wait a minute. We are at 1980?

11 Q. We are at 1980. And I'm asking you, Dr. Diel,
12 how you first came to know Wade Randolph. And I think
13 you testified Jeff Bennett mentioned him to you. And
14 I'm asking, if you can recall, what he told you about
15 Wade Randolph at that time.

16 A. Okay. And he just told -- Jeff would do
17 stocks. And he said that Wade was a good, honest
18 broker. And if I wanted a broker, that I could go with
19 him. And at that time he advised me to do that.

20 Q. So Jeff told you that he had been investing in
21 stocks with Mr. Randolph?

22 A. Correct.

23 Q. Had you, prior to Mr. Bennett's introduction of
24 Wade Randolph, had you been investing in any type of
25 securities?

1 A. No.

2 Q. What were you doing with any savings that you
3 had prior to knowing Mr. Randolph?

4 A. CDs.

5 Q. And you had no other investments other than CDs
6 prior to becoming acquainted with Mr. Randolph?

7 A. Not that I remember.

8 Q. You don't think you had stocks earlier than
9 your relationship with --

10 A. I don't think so, but it's hard to remember
11 back that far.

12 Q. That is fair. You are not sure sitting here
13 today?

14 A. I can't give you a yes or no.

15 Q. But it's your testimony that Wade Randolph was
16 the first broker you ever used?

17 A. I think so.

18 Q. You think so, but you are not sure?

19 A. Exactly.

20 Q. How far back was Brian Bennett your accountant?
21 We are back to Brian Bennett. I don't want you to get
22 confused with Jeff.

23 A. Right. I think I used him -- I can't be sure.
24 I mean, most of the time of my practice I used him.

25 Q. So you think as early as 1970 you were using

1 Brian Bennett?

2 A. No, because I had just gotten out of the Navy
3 in 1970. And I went with his brother for, like I say, I
4 think two, maybe three years. And then I switched over
5 to him. So, you know, it would be more like '74 or '75,
6 I guess.

7 Q. All right. Sir, do you know when Brian Bennett
8 became a broker, a securities broker?

9 A. In '03, I believe. Yeah, 8 -- in '03.

10 Q. You think he became a broker in '03?

11 A. I think so.

12 Q. 2003?

13 A. Right.

14 Q. Did Brian Bennett also do your personal tax
15 returns?

16 A. Yes, he did.

17 Q. And as early as the 1980s when you began
18 investing with Wade Randolph, was Brian Bennett handling
19 your personal income tax?

20 A. Yes.

21 Q. And so you would give him -- what would you do
22 in terms of providing him information about your
23 investments?

24 A. You are talking about in the stock market you
25 are talking about?

1 Q. Yes. Or any investments?

2 A. Well, I don't remember. I mean, whatever I
3 needed to give him for my tax return is what I gave him,
4 and he never had a problem.

5 Q. You would provide him annually information
6 about your securities transactions, correct?

7 A. Yes.

8 Q. That would include your account statements and
9 1099s that you received; you would have given those to
10 Brian Bennett over the years, right?

11 A. Right.

12 Q. Once Mr. Bennett became a broker, you used his
13 services as a broker in addition to his services as a
14 CPA, correct?

15 A. That is correct. I used his services as well
16 as who?

17 Q. You used Brian Bennett's services as a
18 securities broker as well as a CPA, correct?

19 A. Right.

20 Q. And so in addition to Wade Randolph, you have
21 invested with Brian Bennett as a broker, correct?

22 A. That's correct.

23 Q. And also you mentioned Gary Grzybowski?

24 A. That's right.

25 Q. And Gary was with Merrill Lynch?

1 A. Correct.

2 Q. Do you remember any other brokers that you have
3 used over the years?

4 A. No.

5 Q. Who else have you looked to for investment
6 advice over the years?

7 A. That is it. Those brokers, I mean. I didn't
8 feel like I was competent enough and they were in the
9 field and they know as well as anybody. They had better
10 information, so that is what I relied on.

11 Q. Please keep your voice up. Did you ever ask
12 Jeff Bennett for advice about trading in securities?

13 A. We would talk about stock every once in a
14 while. You know, he would mention something to me.
15 And, you know, I might call Brian and run it by him and
16 see what he thought. Bust mostly, day in and day out, I
17 would have my brokers; they would call me and, you know,
18 ask me -- tell me about a stock or a bond or bond fund
19 and we would act according to the conversation.

20 Q. How long have you been comparing notes with
21 Jeff Bennett about investments?

22 A. Oh, well, I don't know if you would call it
23 comparing notes. It's like kind of you have a
24 conversation over coffee in the morning. You go in and
25 you meet somebody for a cup of coffee and he has the

1 newspaper and you start talking about what is going on
2 in the world and, you know, he might say something. I
3 mean, there was no regularity. I might not talk to him
4 -- I might go a year or more and not have a conversation
5 with him about stocks.

6 Q. Well, at least since about 1980 you have been
7 talking to Jeff about securities trading in general
8 because he introduced you to Wade Randolph, right?

9 A. Right. But, I mean, we didn't have anything
10 set up, we didn't meet and talk about stocks on a
11 regular basis, is what I'm trying to say.

12 Q. And over the years, what types of investments
13 have you held?

14 A. Stocks and bonds and bond funds.

15 Q. You have invested in mutual funds, correct?

16 A. Yes.

17 Q. Including some index funds; is that right?

18 A. Yes.

19 Q. You invested in real estate investment trusts?

20 A. Yes.

21 Q. Have you invested in below-investment-grade
22 corporate bonds in the past?

23 A. No, not to my knowledge. I don't remember. If
24 I did, it was not what I intended.

25 Q. You have also had an account with Vanguard; is

1 that right?

2 A. Yes.

3 Q. Tell me about that account. How did you come
4 to open a Vanguard account?

5 A. That was a real long time ago. And I had --
6 like I said, I wasn't competent -- I didn't feel I was
7 competent to buy things on my own, so I talked to Brian
8 Bennett about it, and he advised me that the Vanguard
9 Index 500 was a good fund and it did well over time;
10 and, you know, it's low risk, and he advised me to buy
11 into it. So he had a pamphlet there, he filled it out
12 for me and I wrote a check, and that was my, you know,
13 first experience, you know, really dealing with -- I
14 think dealing with a bond fund like that.

15 Q. And Brian Bennett was the one who advised you
16 with regard to the Vanguard fund?

17 A. Yes.

18 Q. And Brian was also with AXA at one point?

19 A. Yes.

20 Q. So you had an account with AXA?

21 A. Yes.

22 Q. You had an account with Vanguard?

23 A. Yes.

24 Q. You had an account with Merrill Lynch?

25 A. Now, the account with Vanguard, like I said, I

1 just did that -- bought that one bond fund, and I still
2 have it today, so I didn't trade with them.

3 Q. You had an account with Centaurus; is that
4 right?

5 A. Yes.

6 Q. And you have had an account with Bank of New
7 York, correct?

8 A. I'm trying to think of the name of the -- of
9 the stock I had with Bank of New York. I didn't deal
10 back and forth with them. I think that was the same
11 type of thing that I did with Brian on the Vanguard, if
12 I remember.

13 Q. Was that a unit investment trust with Bank of
14 New York?

15 A. I'm trying to think of the name of it. I know
16 what you are talking about. I just can't come up with
17 the name.

18 Q. Was it Brian Bennett who advised you with
19 regard to that investment?

20 A. I think it was -- I think it was Wade.

21 Q. What about MFS closed-end funds; who advised
22 you with regard to that?

23 A. I don't remember.

24 Q. Now, does Brian Bennett continue to be your
25 broker today?

1 A. Yes, he does.

2 Q. And how long have you had that relationship
3 with Brian Bennett as a broker, as opposed to as a CPA?

4 A. I mean, I went with Brian when he got his
5 securities license. That was '03.

6 Q. So continuously since 2003, to the best of your
7 knowledge, you have used Brian Bennett as a broker?

8 A. Correct.

9 Q. And since the mid-1980s he has been your CPA?

10 A. Yes.

11 Q. Now, I want to get clear on this period of time
12 during which you had a break with Wade Randolph as your
13 broker. What year do you think that was that you
14 stopped using Wade Randolph?

15 A. I'm thinking, you know, like '83 or '84,
16 something like that.

17 Q. Okay. And did you then go directly to Gary
18 Grzybowski?

19 A. No. I quit Wade just because I didn't feel
20 confident dealing with stocks, you know, like he was
21 doing. I didn't know enough about them. And, you know,
22 just getting in the business and things go down, you
23 think it's the end of the world; and that is kind of,
24 you know, how I felt. Just not confident at all. And I
25 wasn't in control. So I quit Wade for no other reason,

1 you know, that I can remember other than that.

2 Q. And what did you -- how did you invest your
3 money after leaving the services of Wade Randolph?

4 A. Well, I had CDs mainly.

5 Q. Well, did you liquidate your assets that had
6 been invested with Wade Randolph?

7 A. I think I did.

8 Q. When did you then move to another broker?

9 A. I guess I went to Gary Grzybowski and Merrill
10 Lynch probably in about '85. You are asking me all of
11 these dates. You know, I can't -- I can't swear it was
12 '85, but right near there.

13 Q. And I'm just asking for your best recollection.

14 A. Yeah, okay. Good.

15 Q. So you had about a year, then, it sounds like
16 where you quit using Wade and you went to Gary

17 Grzybowski; is that correct?

18 A. Yes.

19 Q. And then what --

20 A. But I'm not sure either. I'm just kind of --

21 Q. We understand it's your best recollection.

22 A. Okay.

23 Q. And what kind of investments did Gary recommend
24 that you get into beginning around 1985?

25 A. Well, that was before Brian Bennett had gotten

1 his securities license, and he had recommended -- he is
2 the one that recommended that I go to Brian Bennett
3 because Brian, he said, sold individual bonds. He was
4 very conservative. He had a lot of old people. He took
5 care of their money. He was honest. And he thought I
6 should go talk to Gary.

7 Q. So to be clear, you are saying that Brian
8 Bennett recommended you to go to Gary Grzybowski?

9 A. Yes.

10 Q. And what is it you were looking for? You had
11 your money, I think you indicated, in CDs by this point
12 in time. Why did you want to do something different?

13 A. I thought I could get a better return.

14 Q. So you were looking for a better return and
15 Brian Bennett recommended Gary Grzybowski at Merrill
16 Lynch? Is that where he was?

17 A. Yes.

18 Q. And how long did you invest with Gary
19 Grzybowski as your broker?

20 A. I don't know. Eight, ten years, something like
21 that. I'm just guessing.

22 Q. Let me put it this way, when you signed a new
23 account agreement with Morgan Keegan in 1999, did you
24 make a break with Gary Grzybowski at Merrill Lynch?

25 A. I think I had already made a break with him.

1 Yeah, I think I already did.

2 Q. And I know you are going just from your best
3 memory, Dr. Diel, so that is not meant as a trick. But
4 we will get there together on this. If you turn to Tab
5 13 in Notebook No. 1, the white notebook. And we are
6 under Tab A of No. 13. This first page looks to be a
7 statement of December 31, 1998. The financial
8 consultant is Gary Grzybowski, correct?

9 A. Yeah.

10 Q. And so at this point in time, 1998, Gary
11 Grzybowski was at least one of your financial
12 consultants or brokers, correct?

13 A. Right.

14 Q. Do you see this pie chart? I know this is in
15 black and white, but I think you can see the divisions
16 here of how you were invested with Gary Grzybowski at
17 this point?

18 A. Yes.

19 Q. You see that you had 57 percent of your money
20 in equities at that time?

21 A. Yes.

22 Q. It looks as though, looking at Page 5, that you
23 had several municipal bonds within your portfolio?

24 A. Right.

25 Q. And that is also shown on Page 6 and Page 7.

1 And then on Page 8, it shows stocks. You had stock in
2 the America Express Company, Coca-Cola, Freddie Mac,
3 Gillette Company, Nike, Sunbeam Corporation. So you
4 understand looking at this, this refreshes your
5 recollection, I take it, that you had stocks?

6 A. Yeah, those stocks right there I owned.

7 Q. And that was as of 1998. A few more pages in
8 on Page 15 there is another account statement with Gary
9 Grzybowski as your financial consultant. It lists asset
10 allocation summary on Page 15. It shows 17 percent
11 fixed income, 39 percent cash, 44 percent in equities.
12 Do you see that?

13 A. Yeah.

14 Q. And that fits with your understanding of what
15 you were in at that time?

16 A. Yes.

17 Q. Looking at Page 21, this again shows some of
18 your stock holdings: American Express, Coca-Cola,
19 Freddie Mac, Gillette, Nike, Sunbeam Corporation;
20 correct?

21 A. Yes.

22 Q. Looking at Page 27, as of December 29, 2000 you
23 still had about \$346,000 in your account at Merrill
24 Lynch with Gary Grzybowski, correct?

25 A. Yes.

1 Q. And you had 37 percent of your money in
2 equities, correct?

3 A. Yes.

4 Q. And by this point in time you had already
5 started investing with Wade Randolph at Morgan Keegan,
6 correct?

7 A. Right.

8 Q. This is 2000. You had begun investing again
9 with Wade Randolph back in 1999?

10 A. Yes.

11 Q. So there was certainly an overlap between your
12 investing with Wade Randolph and investing with Gary
13 Grzybowski?

14 A. That is why when I say I'm not sure, I say that
15 because that is happening. I don't dispute the records.

16 Q. And even if we turn over to Page 39 in 2001 you
17 still have investments with Merrill Lynch with Gary
18 Grzybowski, correct?

19 A. Correct.

20 Q. You had 41 percent in equities at that point in
21 time, correct?

22 A. Yeah.

23 Q. And, for the record, you agree with that?

24 A. Yes.

25 Q. Looking at Page 47, as of 2002 you are still

1 investing with Gary Grzybowski, correct?

2 A. Correct.

3 Q. And at that point in time you have 33 percent
4 of your money in equities with Merrill Lynch, right?

5 A. Yeah.

6 Q. If we turn to Page 55, as of 2003 you are still
7 invested with Gary Grzybowski, correct?

8 A. Yes.

9 Q. And you have 38 percent of your monies in
10 equities, right?

11 A. Yes.

12 Q. And you understand when we talk about equities,
13 we are talking about, in particular in this account, you
14 had stocks, right?

15 A. Correct.

16 Q. And I may have misunderstood your previous
17 testimony, but I thought you had said you didn't want to
18 invest in stocks. But these records indicate you were
19 invested in stocks throughout this period, throughout
20 2003, right?

21 A. Right. But that -- I mean, my philosophy, you
22 know, changed. This was a period here where I'm still
23 trying to get used to fooling with the stock market and
24 various things that are available in it. So I never
25 denied -- I never said that I didn't buy equities. I'm

1 just saying at the point in time that I bought the RMK
2 funds, I was not buying any equities from Wade. I
3 wanted that particular account to, you know, reflect
4 mainly bond funds with low risk.

5 Q. You certainly understood that stocks carried
6 with them risks, right?

7 A. Correct.

8 Q. Let's look over at Tab C under this Tab 13,
9 over on Tab 13. And looking at Page 1 under Tab C, this
10 is another statement with Merrill Lynch with your
11 financial consultant Gary Grzybowski, correct?

12 A. Right.

13 Q. And this is for -- it looks like 1998 is the
14 period, correct?

15 A. I see that.

16 Q. If you turn over to Page 3. On Page 3, one of
17 the securities descriptions is under corporate bonds.
18 You have the K-Mart Corporation debenture. That has a
19 Moody's rating. Do you see that? BA-3, S&P, B-plus?

20 A. Yes.

21 Q. Do you understand that to be a
22 below-grade-investment bond?

23 A. No.

24 Q. Did Mr. Grzybowski recommend to you that you
25 invest in that K-Mart Corporation bond?

1 A. I don't remember.

2 Q. Well, certainly in 1998 Mr. Grzybowski was your
3 broker, right?

4 A. Yes.

5 Q. And Mr. Randolph was not your broker at that
6 time?

7 A. Correct.

8 Q. And, according to your recollection,
9 Mr. Bennett had not become a broker yet?

10 A. Correct.

11 Q. So it must have been, wouldn't you think,
12 Mr. Grzybowski that made the recommendation?

13 A. Yes. Yes.

14 Q. And had you communicated to Mr. Grzybowski your
15 investment objectives during that period of time?

16 A. Yes, I did.

17 Q. Did you have frequent conversations with
18 Mr. Grzybowski about your investment objectives?

19 A. Not really. He did the same thing that the
20 other broker did. You know, if he needed to talk to me
21 about a bond or a stock that he wanted me to buy, he
22 would call me.

23 Q. And he would make a recommendation to you?

24 A. Yes.

25 Q. Did you ever give Mr. Grzybowski authority to

1 trade without your approval?

2 A. No.

3 Q. So you retained the ability to approve -- you
4 would listen to recommendations, but you would have to
5 make the final call on it?

6 A. That's correct.

7 Q. Is that the same with Mr. Bennett today?

8 A. Yes.

9 Q. And that was the same with Mr. Randolph, too,
10 right?

11 A. Yes.

12 Q. Now, I want to turn to Tab 5 in this same book.
13 And looking at Page 10 and 11 of Tab 5, 10 is similar to
14 a document your -- or it's the same, another copy and a
15 better one of a document that your counsel showed to you
16 under Tab 1. This is a new account approval form from
17 April of 1999 that has Wade Randolph's signature on it.
18 Do you see that?

19 A. Yes.

20 Q. On the next page, Page 11, there is an April 8,
21 1999 signature by you, correct?

22 A. Yes.

23 Q. Okay. And do you recognize your signature on
24 this Page 11?

25 A. Yes.

1 Q. And above your signature in capitalized letters
2 it says, "The undersigned acknowledges that the
3 undersigned has received a duplicate of this agreement."
4 And it goes on to talk about a binding and forceful
5 arbitration provision. But that was right above your
6 signature, correct?

7 A. I don't remember.

8 Q. Well, you see it now, right?

9 A. Yes.

10 Q. And to look at a full copy, because this one
11 was cut off, we will go back to Tab 1. And I apologize
12 for jumping around.

13 A. Before you leave -- okay. What does this mean
14 here about the arbitration agreement?

15 Q. My question was really not about the
16 arbitration agreement, although we are here arbitrating.
17 My question was about this first part, "The undersigned
18 acknowledges that the undersigned has received a
19 duplicate of this agreement." And that is in capital
20 letters above your signature, right?

21 A. Yes.

22 MR. GRIFFIN:

23 Just for the record, John, can you document
24 to us or represent to us that this is -- that
25 these two pages are one in the same document.

1 MR. BOLUS:

2 Yes, they are part of the same document,
3 which I'm now going to at Tab 1.

4 MR. GRIFFIN:

5 Front and back or two separate pages?

6 MR. BOLUS:

7 These are -- the full document is at Tab 1.
8 And just the way that these were produced, you
9 have Dr. Diel's signature page as the first
10 page of Tab 1, and that is what we were looking
11 at at Tab 5, Page 11. That is the full copy of
12 that page.

13 MR. GRIFFIN:

14 But I'm still not seeing them -- any kind
15 of representation if it was one page.

16 MR. FRUIN:

17 They are separate documents. They are
18 separate.

19 MR. BOLUS:

20 If you look, staying in Tab 1, if you look
21 at Page 2, you have instructions about the
22 entire client agreement. If you look beyond
23 that at 3 and 4, those are the other pages of
24 that agreement. So we have -- and that
25 actually goes through Page 5. For

1 clarification, Pages 2 through 5 are the full
2 client agreement. Page 1 is the signed version
3 of Page 5 at Tab 1.

4 MR. CARUSO:

5 The point he was getting to is we have a
6 new account form and then we go to a page that
7 he signed. What Keith was asking is, is the
8 new account form part of the same document?

9 MR. HICKS:

10 The new account form is -- I would have to
11 see it.

12 MR. FRUIN:

13 Yeah, they are two different.

14 MR. CARUSO:

15 Two different documents. So the fact that
16 he signed the one, you are not implying
17 that --

18 MR. FRUIN:

19 That is right. That is right.

20 MR. CARUSO:

21 -- he had the new account information on
22 it?

23 MR. FRUIN:

24 Correct. Correct. Correct.

25 EXAMINATION BY MR. BOLUS:

1 Q. Well, just focusing on the document that you
2 signed, this is Pages 2 through 5, Tab 1. Looking at
3 Page 5, this is Page 5. Other than not having a
4 signature on it, it's identical to Page 1 that has your
5 signature. See that it starts with Paragraph 15. It's
6 actually cut off on this version. I apologize. We will
7 go back to Page 1 for clarity because it has all of the
8 numbers knocked off. The third paragraph on Page 1 has
9 a section entitled "Morgan Keegan recommendations as
10 opinions." Do you see that?

11 A. Yes.

12 Q. I'm going to read this for you. And if you
13 will read along. "Morgan Keegan's recommendations are
14 recognized by the undersigned as opinions. Since such
15 suggestions may deal with future developments, they
16 cannot be predicted with certainty; and Morgan Keegan is
17 under no obligation to keep the undersigned abreast of
18 developments in the market concerning securities,
19 options or contracts related thereto; and the
20 undersigned shall be responsible for remaining informed
21 of those developments." Do you see that?

22 A. Yes.

23 Q. That is in Paragraph 17 above your signature,
24 right?

25 A. Is that 7? Yeah. Okay. It was 17, but I said

1 is that a 7.

2 Q. You agree that that 17 was on the page that you
3 signed?

4 A. Yes.

5 Q. And that is part of the agreement that you
6 signed with Morgan Keegan, correct?

7 A. Yes.

8 Q. You understand the meaning of entering into an
9 agreement with another party, right?

10 A. Yes.

11 Q. In fact, you talked about the contingent fee
12 contract that you had with your attorneys, right?

13 A. Yes.

14 Q. And you expect them to live by the terms of
15 that agreement, just like they expect the same of you,
16 right?

17 A. I would assume so.

18 Q. And you know that when you sign a document you
19 are bound by the terms of that agreement, correct?

20 A. Correct.

21 Q. So in signing the customer agreement with
22 Morgan Keegan, you understood that Morgan Keegan here is
23 telling you that its recommendations are simply opinions
24 and its not under an obligation to keep you abreast of
25 developments in the market concerning securities that

1 may change, correct?

2 A. Well, yeah, but, I mean, I don't remember
3 reading it or signing it. But if it's there, it's
4 there.

5 Q. You understand by signing it, you are bound by
6 that agreement, right?

7 A. I would assume so.

8 Q. On the Page 4, within the same tab, Section 3
9 deals with discretionary trades; customer required to
10 notify of unauthorized trades. And it says, "No -- and
11 this is in capital letters. "No employee of Morgan
12 Keegan is authorized to effect trades for the
13 undersigned without the undersigned's express approval,
14 unless expressly agreed to in a separate written grant
15 of discretionary authority signed by the undersigned and
16 the manager of Morgan Keegan's customer service
17 department or his or her designee. The undersigned
18 agrees to bring any unauthorized activity immediately to
19 the attention of the manager of Morgan Keegan's customer
20 service department." The fact is, you didn't grant
21 authority and you are not complaining about unauthorized
22 trades in your account, correct?

23 A. Correct.

24 Q. The next section is "Duty to examine statements
25 and advise of errors." And it says, "The undersigned

1 will examine all statements, confirmations and other
2 reports or notices upon receipt thereof from Morgan
3 Keegan. Morgan Keegan may deem such statements,
4 confirmations, reports or notices to have been accepted
5 by the undersigned as correct and conclusive if the
6 undersigned does not notify the Morgan Keegan customer
7 service department otherwise in writing within 10 days."
8 And it goes on. You understood you had an obligation to
9 look at your statements and bring any discrepancies to
10 the attention of Morgan Keegan, correct?

11 A. Well, no, I didn't understand that.

12 Q. Well, you did, in fact, review your statements
13 when you received them, didn't you?

14 A. My Morgan Keegan monthly statement, yeah, I did
15 review those.

16 Q. Did you ever see any inaccuracies on those
17 statements and bring those to the attention of Morgan
18 Keegan?

19 A. No.

20 Q. And if you look at Paragraph 22 back at Page 1.
21 I apologize for skipping around. There is also an
22 attorneys fees section. And I'm going to read the
23 second sentence of that. It says -- this is Paragraph
24 22. "Any expense, including attorneys fees, whether for
25 outside or inside counsel, incurred by Morgan Keegan in

1 defense of an action brought by the undersigned against
2 Morgan Keegan or its agents or employees in connection
3 with any account of the undersigned shall be born solely
4 by the undersigned, should Morgan Keegan prevail." Do
5 you understand that provision was within this same
6 agreement that you signed?

7 A. Yes.

8 Q. Now, we are going to turn to Tab 7 in this
9 white binder. Page 1 of Tab 7 is a letter to you from
10 Stephen B. Smart at branch administration at Merrill
11 Lynch. And this is Tab 7 of Volume 1. It's addressed
12 to Kraemer L. Diel, 1041 Oakley Drive, Baton Rouge,
13 Louisiana 70806. Is that your correct address?

14 A. Yes.

15 Q. And this encloses a new account form in May of
16 2005, correct?

17 A. Correct.

18 Q. And if you look on the next page, Page 2, there
19 is an actual new account form that we have previously
20 identified. And this has your signature as of May 18th,
21 2005, correct?

22 A. Correct.

23 Q. And I think you testified earlier that when
24 your counsel asked you about investment objectives, you
25 said that your objectives had not changed from 1999

1 forward; is that right?

2 A. Forward from '99?

3 Q. Yes, sir.

4 A. Well, there is a difference. In other words,
5 my account with Wade at RMK, like I say, had the
6 objectives I've been stating. And overall, I'm
7 conservative, although I understand that equities, you
8 know, are -- you know, have more risks than bonds. And
9 I was still buying equities, you know, with just a few
10 of them with other companies. But what I talked to Wade
11 about was just bond funds.

12 Q. All right. And looking at the investment
13 objectives on this form that was sent to you for your
14 approval, the No. 1 category was growth. Seeks capital
15 appreciation primarily with equity-oriented investments
16 that have a potential for significant growth. Do you
17 see that?

18 A. Yes.

19 Q. It has as a 2, income. Seeks income via fixed
20 income or equity investments that offer higher yields.
21 Do you see that?

22 A. Yes.

23 Q. The No. 3 is next to speculation. Seeks to
24 maximize return via a broad range of investment
25 strategies that involve a high degree of risk,

1 volatility and/or trading activity. Do you see that?

2 A. Yes.

3 Q. Then No. 4 in priority is tax advantage.

4 Preference for investments which offer tax-free income
5 or tax-deferred advantages, right?

6 A. Yes.

7 Q. And all of those categories listed in the order
8 I just gave to you are on this form that you signed in
9 March of 2005, right?

10 A. Right.

11 Q. And, in fact, turning back to Mr. Smart's
12 letter to you, at Page 1 it talks about this updated
13 information. And in the second paragraph it says, "In
14 the event any of the information on the new account form
15 is incorrect, please write the correct information on
16 the form and initial all changes you have made. You
17 should promptly return the form with changes noted to
18 your financial advisor." And you never made changes to
19 this form, correct?

20 A. No. And the reason for that, I talked directly
21 to Wade and he and I discussed, you know, what my
22 objectives were. And, like I say, I don't even really
23 remember seeing that. I realize that I signed it. I
24 don't even remember looking at those objectives on
25 there. Because I knew when I was dealing with Wade, you

1 know, he didn't go back and look at that either. He
2 always, you know, knew my objectives.

3 Q. Turning to Tab 8 -- do you recall when
4 Mr. Preis was here he testified to a call log that he
5 identified that Morgan Keegan had produced? Do you
6 recall that?

7 A. Yes.

8 Q. Turning to Page 2, there is a telephone call
9 listed for March 15th, 2005. Do you see this? At 8:51
10 a.m., and it's a six minute call. And it's to 928-0578.
11 Do you see that?

12 A. Yes.

13 Q. That is your telephone number, right?

14 A. Correct.

15 Q. And it's from 3351, which Mr. Preis identified
16 was Mr. Randolph's extension in the Baton Rouge office.
17 Do you understand that?

18 A. I don't know that, but if you say that is true.

19 Q. Okay. And March 15th was just before that new
20 account form was sent to you, right? It was actually a
21 date of March 18th, 2005 where your signature was placed
22 on that form, right?

23 A. Yes.

24 Q. So does that refresh your recollection that, in
25 fact, Wade Randolph called you about your investment

1 objectives before sending this form to you?

2 A. I don't know that he called me and told me that
3 before sending that form to me.

4 Q. But you recognize that the call log for Morgan
5 Keegan at least indicates that you had a telephone call
6 very shortly before that form was signed by you?

7 A. Well, I don't have any idea what the phone call
8 was about, is all I'm saying.

9 Q. I understand your testimony that you and Wade
10 had conversations about his recommendations and about
11 your objectives. Do I understand that correctly?

12 A. Yes.

13 Q. You also understand and recall, don't you, that
14 you received a number of writings from Wade's office, or
15 from Morgan Keegan, including prospectuses, including
16 marketing pieces and reports and account statements,
17 correct?

18 A. Yes.

19 Q. What did you do with the prospectuses you
20 received over the years?

21 A. I just threw them away.

22 Q. Would you look at the prospectuses initially --

23 A. No.

24 Q. -- when you received them?

25 A. No.

1 Q. Why did you think you were receiving
2 prospectuses?

3 A. Well, I understand they sent them so you can
4 read them and learn about the investment, you know, but
5 I just didn't understand them. So Wade would call me
6 and explain it to me, what they were and if they met my
7 objectives, and that is how I got my information rather
8 than trying to translate what they had in the
9 prospectus.

10 Q. Well, you knew among the writings you received
11 over time from Morgan Keegan were prospectuses, correct?

12 A. Correct.

13 Q. And those prospectuses provided a number of
14 disclosures about the investments you were making
15 through Morgan Keegan, right?

16 A. I guess.

17 Q. Well, you understand that, right?

18 A. Yeah.

19 Q. There were multiple disclosures within those
20 prospectuses?

21 A. Correct.

22 Q. And you had the opportunity to review the
23 prospectus to find out detailed information about
24 investments you were making, right?

25 A. If I understood it, but I didn't.

1 Q. Well, did you try to understand it?

2 A. At one time I read a couple of prospectuses,
3 and I couldn't -- I didn't understand it, so, you know,
4 I quit reading them.

5 Q. You understand that on the first page of the
6 prospectus there are a number of summary disclosures,
7 just to give you a summary of what the investment
8 entails? Do you understand that? Do you understand
9 that?

10 A. Yes. But that is where I depended on Randy,
11 you know, to tell me about it before they ever sent the
12 prospectus.

13 Q. When you say Randy, are you talking --

14 A. I'm talking about Wade Randolph.

15 Q. I hear what you are saying. You are saying
16 that you may have chosen not to read some of the
17 materials. But that was your choice?

18 A. Correct. Correct.

19 MR. MADDOX:

20 Mr. Chairman, can we take a short break?

21 MR. KELLEY:

22 Sure. 1:25. Due back 20 minutes to.

23 (A break in the proceedings was held.)

24 MR. KELLEY:

25 Okay. I guess we will pick up where we

1 left off.

2 EXAMINATION BY MR. BOLUS:

3 Q. Dr. Diel, we had talked about a number of
4 written documents you had received over time from Morgan
5 Keegan. In response to your attorney's questioning, I
6 think you said you didn't recall receiving annual
7 reports on the investments that you had made?

8 A. Annual reports I don't -- are you talking about
9 the end of the year statement that I -- like the monthly
10 statements that I get, the end of the year statements,
11 for that?

12 Q. Well, I understand you received those, the end
13 of the year statements and the monthly statements,
14 correct?

15 A. Yes.

16 Q. But talking about annual reports for a certain
17 number of the funds that you invested in?

18 A. I don't recall receiving those.

19 Q. If you received those, would you expect that
20 you might have thrown those away, as you did with many
21 of the prospectuses?

22 A. Correct.

23 Q. So you may have received those, but you also
24 may have just thrown them away?

25 A. Correct.

1 Q. Now, going back to 1999, you were investing
2 them with Mr. Grzybowski with Merrill Lynch. We have
3 seen you had a mix of investments there with some bonds
4 and a good bit in the stocks. But you made a decision
5 to reestablish a relationship with Wade Randolph,
6 correct?

7 A. Correct.

8 Q. Had you kept up a relationship, whether it's a
9 friendship or a professional relationship, with Wade
10 Randolph over the years?

11 A. Not while he wasn't my broker. I mean, that is
12 when I talked to him.

13 Q. What led you to reestablish a relationship with
14 Wade Randolph?

15 A. Um, I wanted to start investing in low risk
16 bond funds. So I went to Wade and asked him if he would
17 open me up a new account, and that is what I wanted.

18 Q. And why couldn't you do that with
19 Mr. Grzybowski?

20 A. Grzybowski was -- he was -- he liked to do just
21 individual bonds and a few stocks here and there. He
22 wasn't into just dealing with a fund, at least back then
23 that is what I understood.

24 Q. Well, did you --

25 A. Go ahead.

1 Q. Did you tell Mr. Grzybowski at some point in
2 time that you had changed your objectives and you wanted
3 him to do something different in that account?

4 A. No.

5 Q. Did you believe that you had the ability to get
6 better returns with Mr. Randolph?

7 A. Yes.

8 Q. And Jeff Bennett told you -- did he tell you
9 that he expected that himself?

10 A. Well, he didn't, you know, commit himself to
11 saying, you know, he would do better or worse than him.
12 He just said that Wade was a really good guy and he was
13 honest and, you know, he would get me the investments
14 that I wanted.

15 Q. Including better returns?

16 A. Well, you are always hoping for better returns,
17 but Jeff Bennett didn't guarantee me I would get better
18 returns. I told you that. He just recommended Wade.

19 Q. Did you believe Wade to be an honest person?

20 A. Yes.

21 Q. Did you respect him?

22 A. I sure did.

23 Q. Did you think he was knowledgeable about
24 investments?

25 A. I did.

1 Q. And did you believe that throughout the time
2 that you invested with Wade?

3 A. Yes.

4 Q. Do you have any knowledge today that would lead
5 you to believe that he wasn't honest and knowledgeable
6 about the investments?

7 A. No. Well, I mean, what is going on here does.
8 He sold me these, you know. And so I'm not going to
9 call him dishonest. He probably didn't understand
10 neither. I don't know. I can't say.

11 Q. Well, you didn't expect him to predict the
12 future, right?

13 A. No, I didn't.

14 Q. But you expected him to be honest and
15 knowledgeable about what he was talking with you about?

16 A. Correct.

17 Q. And you don't have any information to lead you
18 to believe that he wasn't honest and knowledgeable about
19 the investments that he recommended to you, do you?

20 A. No.

21 Q. Okay. Now, let's take a look at Tab 3 of the
22 white hearing notebook. Volume 1, Tab 3. And this is a
23 compilation of your account statements, Dr. Diel. And
24 we are going to go through these a little bit at a time.
25 Just to show you the very first one, Page 1, this is

1 April 1, 1999 through April 30th, 1999. And it shows a
2 total portfolio value of what? Can you read that?

3 A. \$558,130.62.

4 Q. Okay. And it shows in the asset allocation,
5 3.52 percent in cash, 7.9 percent in stocks and 52.65
6 percent in mutual funds, 7.72 percent in municipal
7 bonds, 20.8 percent in non-taxable unit trusts, 3.44
8 percent in limited partnerships and 3.97 percent in
9 other, correct?

10 A. Correct.

11 Q. And you don't disagree you would have received
12 this statement back in April of 1999, correct?

13 A. Correct.

14 Q. Now, from April 1999 through March 2002, you
15 invested in a variety of different investments before
16 making a decision to invest in any of the RMK funds,
17 correct?

18 A. Correct.

19 Q. Let's move to Page 149 in this Tab 3.

20 MR. GRIFFIN:

21 149, John?

22 MR. BOLUS:

23 149.

24 EXAMINATION BY MR. BOLUS:

25 Q. And the statement period here is March 1, 2002

1 to March 31, 2002, correct?

2 A. Correct.

3 Q. All right. And your March 31, 2002 portfolio
4 value is \$689,175.49, correct?

5 A. Correct.

6 Q. It looks like you have 75.96 percent of your
7 asset allocation in mutual funds, right?

8 A. Right.

9 Q. Okay. And a variety of other investments.

10 Now, if you look over at Page 151, the bottom half of
11 the page there is activity during this period. And on
12 March 14, that is, 03, slash, 14, it has transaction.
13 You bought -- and it has a quantity, 4592.315 of Morgan
14 Select High Income Class A; price, \$10.67; for a total
15 of \$49,000. This reflects your initial investment in
16 one of the RMK funds, correct?

17 A. Correct.

18 Q. And that was as of March 14th, 2002, right?

19 A. Yes.

20 Q. Your counsel showed to you in this green folder
21 at Tab 1 a high income fund marketing piece, and he
22 asked you if this is what you had received in advance of
23 making this -- making this investment?

24 MR. GRIFFIN:

25 I object. That wasn't my question.

1 MR. BOLUS:

2 Well, that is what I understood.

3 MR. MADDOX:

4 It mischaracterizes the testimony.

5 MR. GRIFFIN:

6 It does.

7 EXAMINATION BY MR. BOLUS:

8 Q. Let me ask you this. Do you recall what you
9 received, in terms of what writing you reviewed before
10 making an investment in Morgan Select High Income Class
11 A Fund?

12 A. No.

13 Q. Do you recall if Wade Randolph sent you a
14 document before you made that investment?

15 A. No.

16 Q. You don't know one way or the other whether you
17 received a document beforehand, do you?

18 A. I don't know.

19 Q. Do you know sitting here today whether he, in
20 fact, sent you a prospectus prior to that investment?

21 A. Did he send me one prior?

22 Q. Yes.

23 A. No.

24 Q. You are sure sitting here today that he did not
25 send you a prospectus?

1 A. As a rule, it didn't make any difference
2 whether he had sent me the prospectus or not because I
3 didn't read them. So, you know, most of the time I
4 bought them after we discussed it on the phone. So
5 sometimes, I don't know for what reason, he would send a
6 prospectus, you know, ahead of time. But mostly he
7 didn't.

8 Q. I understand because we have talked about this
9 before, you made a decision at some point in time that
10 you were not necessarily going to read the prospectus.
11 But I'm asking you whether you know, sitting here today,
12 under oath before this Panel, whether Mr. Randolph sent
13 you a prospectus before you made this investment on
14 March 14th, 2002?

15 A. No.

16 Q. You don't know?

17 A. I don't know.

18 Q. And, in fact, to the extent that I was confused
19 about this, I just want to clear this up. You couldn't
20 have seen this document that was Tab 1 in the green
21 folder on March 14, 2002 because it's actually dated
22 after March 14, 2002, right?

23 A. Right.

24 Q. Okay.

25 A. Let me see.

1 Q. It has a date of March 31, 2002, right?

2 A. Right.

3 Q. We do know from -- and I'm sorry again for
4 jumping around. But just for reference to look at Tab
5 8, we do know that on 3/13 of 2002 there was a 26 1/2
6 minute conversation from Wade's extension to your
7 number, 928-0578, right?

8 A. Correct.

9 Q. Now, going back to the statements under Tab 3,
10 we are going to turn to Page 219. Before I go to Page
11 219, let's look back at Page 168. This is a July 2002
12 statement. There is some handwriting on Page 168 that
13 says "money mkt." Is that your handwriting, Dr. Diel?

14 A. That is similar to how I print.

15 Q. And, in fact, I'll represent to you that these
16 numbers at the bottom of the page that have Diel 00337
17 indicate that these were produced from your documents.

18 A. Well, okay.

19 Q. And on Page 169 there is actually more
20 handwriting. Is that also your handwriting on Page 169?

21 A. No.

22 Q. Do you know who made these notations on Page
23 169?

24 A. I don't.

25 Q. Did you take these account statements to your

1 accountant at some point in time?

2 A. I don't remember if I did, but that is not his
3 handwriting either.

4 Q. And you don't know sitting here today whose
5 handwriting that is?

6 A. I don't.

7 Q. Looking back at Page 62, is this your
8 handwriting on Page 62?

9 A. No, it's not.

10 Q. Do you know whose handwriting that is?

11 A. No.

12 Q. Do you know who would -- who you would have
13 provided these account statements to that you maintain
14 in your files, who would have made notations on them?

15 A. I didn't provide them to anybody. I don't
16 understand it. I don't know who wrote either one of
17 those things.

18 Q. All right. Turning back to Page 219, this is
19 your account statement for June 1, 2003 to June 30,
20 2003, correct?

21 A. Correct.

22 Q. And your June 30, 2003 value, your account was
23 \$899,220.71, correct?

24 A. Correct.

25 Q. Now, if you turn over to Page 222, on June 27th

1 under transactions there is -- you bought 3,000 RMK High
2 Income Fund, Inc., as priced, \$15, for a total of
3 \$45,000. Do you see that?

4 A. Yes.

5 Q. Do you recall having conversations with Wade
6 Randolph about the fund before making that investment?

7 A. I always did.

8 Q. And do you recall whether or not you looked at
9 a prospectus before you made this investment?

10 A. I didn't.

11 Q. But you may have received one; you just chose
12 not to look at it, correct?

13 A. Correct.

14 Q. Turning to Page 249, this is the account
15 statement for December 1, 2003 to December 31, 2003. At
16 this point your account value is \$929,194.82, correct?

17 A. Right.

18 Q. And the breakdown under the portfolio summary
19 indicates stock mutual funds, 35.99 percent; bond mutual
20 funds, 24.04 percent; mutual -- I'm sorry, municipal
21 bonds, 11.38 percent; corporate bonds, 4.67 percent; and
22 non-taxable unit trusts, 24.5 percent. Do you see that?

23 A. Yes.

24 Q. That was set out on the very first page of your
25 statement, obviously. Looking over at Page 253, there

1 is a notation on 12/30 that you sold 3,098 shares of RMK
2 High Income Fund, Inc. at a price of 16.3, \$16.30 a
3 share, \$49,880.69, right?

4 A. Right.

5 Q. You understand you made money on that sale?

6 A. Yes.

7 Q. Okay. You had actually bought that at 15,
8 right?

9 A. Correct.

10 Q. And, again, that would have been the product of
11 information provided to you by Wade Randolph through a
12 conversation, whether or not you had written materials?
13 You might have received them, but you chose not to
14 review those written materials, right?

15 A. Right.

16 Q. It certainly was a transaction you approved,
17 correct?

18 A. Yes.

19 Q. And, in fact, you were happy with it because
20 you made money on that transaction, right?

21 A. Yes.

22 Q. All right. Now turning to Page 262, this is
23 your statement for the period March 1, 2004 to March 31,
24 2004. Your portfolio value at this point in time at the
25 end of March 30, or at the end of March, 2004 is

1 \$970,425.52, right?

2 A. Right.

3 Q. Spread across a variety of investments,
4 including stock mutual funds, bond mutual funds,
5 investment bonds, corporate bonds and non-taxable unit
6 trusts, correct? I'm sorry, there were no corporate
7 bonds this month. All right. And on Page 265, the
8 transaction history at the top of the page, March 23rd,
9 you bought 4,000 shares of the RMK Strategic Income Fund
10 at \$15 per share. That is \$60,000. And you bought 800
11 of the Strategic Income Fund at \$15 a share for another
12 12 -- \$12,000, correct?

13 A. Correct.

14 Q. Looking over at Page 274, this is a statement
15 for June 1, 2004 to June 30, 2004. At the end of this
16 month your account value is \$900,731.79. On June 18th
17 you bought -- and this is Page 276. In the activity
18 section at the bottom of the page, June 18th you bought
19 1,500 shares of the RMK High Income Fund at 16.1 at
20 \$24,540.19, correct?

21 A. Yes.

22 Q. In fact, looking back at Tab 8 of June 15th of
23 2004, June 15th of 2004 you have a 22 1/2 minute
24 conversation with Wade Randolph, correct?

25 A. Correct.

1 Q. Okay. So just before making that purchase.
2 Turning to Page 294, November 1, 2004, the statement
3 November 1, 2004 to November 30, 2004 your account value
4 at the end of that month is \$980,599.42, correct?

5 A. Correct.

6 Q. Again, this portfolio summary shows your asset
7 allocation with 58.58 percent in bond mutual funds,
8 right?

9 A. Right.

10 Q. Looking over at Page 296, it shows in the
11 activity section, the bottom of the page, on November
12 12th you bought 3,000 shares of RMK Advantage Income
13 Fund at \$15 a share for \$45,000, correct?

14 A. Yes.

15 Q. And turning to Page 357, this is your account
16 statement for January 1, 2006 to January 31, 2006. At
17 that point in time you had an account value of
18 \$1,076,811. Again, it shows your asset allocation with
19 49 percent in bond mutual funds, 28.85 percent in stock
20 mutual funds. And on Page 360 -- at Page 360 in the
21 activity section it shows that on January 24th of 2006
22 you bought 500 shares of the RMK Multi-Sector High Fund
23 at \$15 per share for \$7500; is that right?

24 A. Correct.

25 Q. And January of 2006 was your last purchase of

1 the RMK funds, correct?

2 A. If that is what it reflects there.

3 Q. Okay. Now, looking back at Tab 7, Volume 1,
4 Page 3, a couple of months later you receive a letter
5 from Richard Preis at Morgan Keegan regarding the death
6 of Wade Randolph that happened on March 19th. And
7 Richard says, "We want you to know that you can call me
8 or Rosa any time regarding your account here at Morgan
9 Keegan. We will be glad to service your account and
10 answer any questions you may have." And he provides his
11 direct number. Correct?

12 A. Correct.

13 Q. Did you ever after March 23rd, 2006 call the
14 Morgan Keegan office and ask for Richard Preis?

15 A. No.

16 Q. Now, how did you know Rosa? Did you know who
17 Rosa was when you saw this?

18 A. Well, when you would call Morgan Keegan's
19 number, she would answer the phone.

20 Q. Okay. Had she ever been of assistance to you
21 in the past before March of 2006, to your knowledge?

22 A. No.

23 Q. After March of 2006 you did call and speak to
24 Rosa, correct?

25 A. Well, I spoke to her before too, just asking

1 her to put me through to Randy. I didn't call her about
2 stocks or bonds. You know, I didn't talk to her about
3 investments.

4 Q. Okay. And at no time did you talk to her about
5 investments, correct?

6 A. There was a time that we talked about this
7 morning that I called her and I talked to her.

8 Q. Okay. I should have included that. That was
9 about 10 days before this arbitration?

10 A. Right.

11 Q. You were trying to get your December 31st
12 statement; is that right?

13 A. Correct. I had misplaced my November
14 statement. I didn't have it. And the December
15 statement hadn't even come in yet. They hadn't been
16 distributed. So I think Jennifer was the girl --
17 Jennifer, I think she answers for Rosa when Rosa is not
18 there, and Rosa wasn't there. So she mailed me the
19 November statement. And then I called Rosa after the
20 weekend. I called Rosa. I believe it was on a Monday
21 morning. And she said she would send the statement as
22 soon as it comes. It still hadn't come. Well, she must
23 have gotten it right after that because it came in the
24 mail the next day.

25 Q. And that is the only time that you ever spoke

1 to Rosa about your investments, right?

2 A. Yes. That I remember. Okay.

3 Q. And that was about 10 days before this
4 arbitration?

5 A. Right.

6 Q. You never asked anyone after March 23rd of 2006
7 at Morgan Keegan for a recommendation regarding your
8 account there, right?

9 A. No.

10 Q. You were set up on Client Access for Morgan
11 Keegan, correct? The computer or internet-based review
12 of your account?

13 A. Yes.

14 Q. When did you get set up on Client Access? Do
15 you know?

16 A. I don't remember.

17 Q. But you from time to time reviewed your account
18 online, right?

19 A. Not -- I didn't do it very much until the RMK
20 funds started bottoming out, then I was looking at it
21 every day off and on.

22 Q. Turning to Tab 6. Do you remember when
23 Mr. Preis was here he identified that Morgan Keegan had
24 produced this Client Access user activity log. And it
25 actually reads in reverse order, so I'm going to go back

1 to Page 44 under Tab 6. And looking at Page 44, it
2 looks like you accessed your personalized home page --
3 this "Dielkrl" is your log-in, correct?

4 A. Correct.

5 Q. You accessed that on May 16th of 2006, just a
6 couple of months after Wade passed away, correct? He
7 died March 19th of 2006 and this indicates you logged in
8 May 16th of 2006, right?

9 A. Okay.

10 Q. And this is 1:40 p.m. It looks like 1:40 and
11 40 seconds on May 16th is when you accessed the home
12 page and logged in at 1:41:22. And then you were
13 actually online from that point in time until 2:14 p.m.
14 on 5/16/2006, correct?

15 A. Correct.

16 Q. And you looked at a number of different things:
17 your account summary, investment activity, all activity
18 inquiry, earnings info. Am I correct in reading that?

19 A. Yeah, that is what it says.

20 Q. And you knew how to do that? You knew how to
21 get in and look at your account and look at specific
22 activity in your account online, right?

23 A. Yes.

24 Q. And it looks like looking on Page 42 you logged
25 in on August 10, 2006. This is the second entry from

1 the top on Page 42 at 3:21:44 p.m. You logged in and
2 then stayed online looking at account summary and
3 Royder's market summary and investment services
4 information through -- looking on Page 41, the top line,
5 it looks like you were looking at realized gains at
6 4:08:52 p.m., correct?

7 A. Correct.

8 Q. So from 3:21 p.m. to 4:08 p.m. you were looking
9 at your account on that date. Again, a few months after
10 Wade Randolph passed away, correct?

11 A. Yes.

12 Q. And I'm not going to go through the rest of
13 this activity, but the rest of this 45-page report shows
14 various online activity, and you don't dispute that you
15 reviewed your account and various information about your
16 account online from time to time?

17 A. Yes.

18 Q. Did you talk to your accountant about your
19 account activity at Morgan Keegan? And I say your
20 accountant. He was also your broker?

21 A. Right. Right. You know, yeah, I told him. I
22 went by his office and I told him how much, you know,
23 the funds had lost. And, you know, I just didn't know
24 what I was going to do. I mean, I was pretty shook up
25 by then. And that is about it. You know, I ended up

1 selling them and here we are.

2 Q. When did you have that conversation with him?

3 A. I couldn't tell you. Probably just prior to
4 when I sold them, sold the RMK funds.

5 Q. You sold the RMK funds in July of 2008?

6 A. Correct.

7 Q. Did you have earlier conversations with him
8 just about your account activity at Morgan Keegan?

9 A. No.

10 Q. After Wade died?

11 A. No.

12 Q. But you never called Richard Preis to ask for
13 advice about the account?

14 A. No.

15 Q. At some point, did you move funds from Merrill
16 Lynch over to Brian Bennett when he became a broker?

17 A. I would assume that I did, but I can't say for
18 sure.

19 Q. And you began relying on Brian's investment
20 advice at that point, sometime in 2003, right?

21 A. Yes.

22 Q. Now, let's go back to Tab 3. Looking at Page
23 433. And we are jumping ahead to May 1st, 2007 to May
24 31, 2007, that statement. And at this point in time,
25 your May 31, 2007 value is \$1,197,196.85, down from the

1 beginning of the month where it was just over \$1.2
2 million, correct?

3 A. Correct.

4 Q. Now, in fact, Dr. Diel, you had not been
5 withdrawing money from this account for living expenses,
6 right?

7 A. No.

8 Q. You hadn't been making withdrawals from this
9 account at all, right?

10 A. No.

11 Q. So your living expenses were based on other
12 income and other assets that you had, correct?

13 A. Correct.

14 Q. Now, turning to Page 434, this is under your
15 portfolio positions. This shows your positions in
16 various investments, including the RMK High Income Fund,
17 the RMK Advantage Fund. These are all in the middle of
18 the page on Page 434. RMK Multi-Sector High Income Fund
19 and the RMK Select High Income Class A, right?

20 A. Right.

21 Q. These show the prices of those shares, correct?
22 And it shows the total value based on those share
23 prices, correct?

24 A. Yes.

25 Q. And I've just done the math for you. It looks

1 like it's about \$188,494.29 out of your almost \$1.2
2 million in your Morgan Keegan portfolio, correct?

3 A. Correct.

4 Q. Does that sound about right, as far as what
5 your RMK funds were as a portion of your portfolio?

6 A. I don't know. If it's there.

7 Q. You don't dispute --

8 A. I don't remember.

9 Q. Okay. It is what it is, based on that
10 document?

11 A. Yeah, these are the right numbers.

12 Q. Now, if you turn over to Page 438, this is the
13 statement for June 1, 2007 to June 30, 2007. Your
14 account value by June 30, 2007 is down to \$1,166,232.15,
15 correct?

16 A. Correct.

17 Q. And of that it looks like if you add on the
18 next page your RMK funds, they are down to \$177,943.42,
19 right?

20 A. Right.

21 Q. And you can actually see, just looking at the
22 share prices, you could see those were down. They had
23 mostly been in the 15s, other than that Select fund.
24 You had bought that at a little over 10, right? So now
25 they are down to 13.99 for two of them, 14.72 for

1 another, 9.21 for the Select High Income. And, yeah,
2 that is it. But that was easily visible on the
3 statement, right?

4 A. Right.

5 Q. And we have established you didn't call anyone
6 at Morgan Keegan to talk about that decline, right?

7 A. Right.

8 Q. Looking over at Page 442, this is the statement
9 for the period July 1, 2007 to July 31, 2007. And it
10 shows your July 31, 2007 value is down to \$1,120,889.78,
11 correct?

12 A. Correct.

13 Q. And just looking over at these RMK funds, I've
14 added those up. They are down to \$154,717.93. But you
15 can easily tell they are down again just looking at the
16 unit prices which are now down in the 11 range for all
17 but the select, which is down to 8.61, right?

18 A. Right.

19 Q. And that was noticeable on the statements you
20 received, right?

21 A. Right.

22 Q. You certainly knew that you were down from over
23 \$1.2 million to \$1,120,000 at that time?

24 A. Yes, I did.

25 Q. And, again, you didn't call anyone at Morgan

1 Keegan about that, correct?

2 A. No, I didn't.

3 Q. Now, let's talk about one thing. You did --
4 even though the value had gone down at this point, you
5 were still receiving dividends from those funds, right?

6 A. Yes.

7 Q. That is actually shown on the next page, 444.
8 We can see under the activity during this period, it
9 shows dividends received on July 3rd for the RMK High
10 Dividend fund, \$935.32. And you have others there. But
11 certainly you recognize you weren't just looking at the
12 value of the units, but you also were receiving income
13 from those funds, right?

14 A. Right.

15 Q. Looking at Page 446, this is the statement for
16 the period August 1, 2007 to August 31, 2007. And your
17 account value is now overall down to \$1,076,108.85,
18 correct?

19 A. Right.

20 Q. And again on the next page, 447, you can see
21 that your RMK funds are down. They are now -- all but
22 the Select are down in the \$9 range and the Select fund
23 is down in the \$6 range, right?

24 A. Right.

25 Q. So you can easily tell at this point that these

1 funds were subject to the risk of loss in value, right?

2 A. Right.

3 Q. They were not simply safe funds where you
4 couldn't lose value, correct?

5 A. They proved it.

6 Q. And you didn't call anyone at Morgan Keegan
7 about that at that point in time?

8 A. No.

9 Q. But, again, if you look at the next page, 448,
10 you were still receiving some dividends from these
11 funds, right?

12 A. Right.

13 Q. Looking at the statement on Page 450, this is
14 for a period September 1, 2007 to September 30th, 2007.
15 Your account value had actually come up by the end of
16 the month to \$1,091,522.85, correct?

17 A. Correct.

18 Q. But, again, you can tell on the next page, 451,
19 that your funds are down again. They are now in the \$8
20 range per unit, for the most part. And the Select High
21 Income is down to 5.94, correct?

22 A. Correct.

23 Q. And, again, you didn't call anyone at Morgan
24 Keegan?

25 A. Right.

1 Q. Now by October 1, 2007 on Page 454 your overall
2 portfolio stands at the end of the month at
3 \$1,044,820.45, correct?

4 A. Correct.

5 Q. Your RMK funds on the next page, 455, are down
6 to about 90,000, \$7.62. That is my addition. I have
7 added those up. Again, you can tell by looking at the
8 unit price. Six dollars per unit, other than the Select
9 High Income, which is at 4.93, correct?

10 A. Correct.

11 Q. And I don't want to belabor the point, but the
12 fact is you can see from these statements beginning back
13 in May of '07 going forward that these funds had the
14 potential to lose value and were losing value, right?

15 A. Right.

16 Q. But, yet, you never called anyone at Morgan
17 Keegan about that, correct?

18 A. Correct.

19 Q. Did you talk to Jeff Bennett about that by that
20 point in time?

21 A. Yes.

22 Q. By '07?

23 A. Yes.

24 Q. And what did he say to you in '07?

25 A. He was just as confused as I was.

1 Q. But he didn't advise you to get out of those
2 funds?

3 A. Not right away.

4 Q. Did he tell you hold on, the market might come
5 back?

6 A. Well, that is what had happened a couple of
7 times with, you know, some funds in the past that I had
8 with Randy. You know, they had taken a significant drop
9 and Randy advised me to hold on. So that is what we
10 did. And they did come back. This is what we were
11 hoping here, but, you know, just a lot of wishful
12 thinking on our part. You know, it didn't happen.

13 Q. And that was the advice that Brian Bennett gave
14 you once he saw the loss of value in that, correct?

15 A. Yes.

16 Q. Turning to Tab 11, do you recognize any of the
17 handwriting on this page? This has a Bates number at
18 the bottom, Diel 00846.

19 A. On what account?

20 Q. Well, it looks --

21 A. What company?

22 Q. It looks like it has the RMK funds and other
23 funds that were invested at Morgan Keegan. But do you
24 recognize the handwriting on that page; that is my
25 question?

1 A. Not this. These, that is my handwriting.

2 Q. The Bristol-Myers, it looks like?

3 A. Yes.

4 Q. Merck, Royal -- who is that, Royal Dutch?

5 A. Yes.

6 Q. SBC and Nokia?

7 A. Yeah.

8 Q. Do you know what that relates to?

9 A. Stocks, I assume.

10 Q. Okay. Do you have any idea of any context of

11 this document?

12 A. No. What time -- when is this?

13 Q. Well, you know, I'm with you on this. I'm

14 trying to establish it myself, Dr. Diel, and I was

15 hoping you could shed some light on it.

16 A. I can't.

17 Q. But the one thing we do know about the document

18 is you had written these different stocks?

19 A. Yeah, I wrote those down and I put a number by

20 Nokia, but I didn't put anything by the other ones.

21 Q. Is that number a share price?

22 A. I don't know.

23 Q. You mentioned that by 2007 when you saw these

24 accounts or when you saw these funds going down and you

25 talked to Brian Bennett, you were clearly at that point

1 receiving brokerage advice from Mr. Bennett, correct?

2 A. Correct.

3 Q. And there was no need to call Richard Preis
4 because you were -- you didn't have a relationship with
5 him?

6 A. Right.

7 Q. Although, you understand sitting here today he
8 had offered his services to you through that letter in
9 March of 2006, correct?

10 A. Correct.

11 Q. You filed this arbitration claim in March of
12 2008, correct?

13 A. If that is what it says, yeah.

14 Q. And what led you to file a claim?

15 A. You know, the money loss that I had. And I
16 thought when the bonds were presented to me by Wade to
17 be, you know, low risk and good income and diversified,
18 conservative; and this is what happened. So I decided
19 to file the suit.

20 Q. Did you see some advertising about filing a
21 claim?

22 A. No.

23 Q. Despite the fact that you had filed a claim,
24 you made several phone calls to the Morgan Keegan office
25 after that time in March of '08, didn't you?

1 A. To --

2 Q. To Rosa?

3 A. No. I'm trying to think. I was going to say
4 to do something, but I didn't -- I don't recall what
5 they were about.

6 Q. Do you recall -- I'm sorry to interrupt you.
7 Do you recall you talked to Rosa after March of 2008 to
8 make some cash withdrawals from your account?

9 A. Okay. That is what it was, cash withdrawals.

10 Q. And that was the first time you had made
11 withdrawals from this account in 2008, right?

12 A. That's right.

13 Q. What was the purpose for making those
14 withdrawals in 2008?

15 A. Well, it was sitting in there, you know, it was
16 in a money market fund, which wasn't making a lot of
17 money, so I took them out and was going to put them in
18 CDs.

19 Q. Okay. Did you invest in anything other than
20 CDs?

21 A. Yeah, I ended up putting them in a money market
22 account at a new bank I was going to.

23 Q. Did Brian Bennett advise you as to investing
24 any of those monies?

25 A. He said he thought it would be good -- the CDs

1 you are talking about?

2 Q. Any of the monies that you withdrew from Morgan
3 Keegan in 2008. Did he advise you with respect to the
4 withdrawal of those monies?

5 A. Well, we didn't have anywhere to put it right
6 away. So, yeah, I talked to him and he agreed that --
7 we both agreed that CDs would be the place, or, you
8 know, in the money market funds because CDs were
9 fluctuating at that time. And, you know, it was
10 supposed -- the rate was supposed to be going up.

11 Q. Okay. Now, despite the fact that you had filed
12 your arbitration claim in March of 2008, Rosa was still
13 helpful to you after that time in facilitating what you
14 needed done with your account, right?

15 A. Yes.

16 Q. And at no time did she refuse to assist you or
17 refuse a request from you, correct?

18 A. No.

19 MR. BOLUS:

20 This might be a good time for a five minute
21 break if Dr. Diel needs to stretch.

22 MR. GRIFFIN:

23 I think a five minute break will be great.

24 MR. KELLEY:

25 Let's be back at 20 minutes to 3.

1 (A break in the proceedings was held.)

2 MR. KELLEY:

3 Okay. Is everybody back? We can go ahead
4 and start again.

5 EXAMINATION BY MR. BOLUS:

6 Q. Dr. Diel, I have a few more things I want to
7 talk to you about. First, I want to turn to Tab 26 in
8 Volume 2 of the white binders. This binder of exhibits
9 contains several prospectuses. No. 26 is one that you
10 kept, Dr. Diel, because your lawyers produced it with
11 your number on it. And I just wanted to go through some
12 items on this prospectus, which we know is one that not
13 only did you receive, but that you kept over time.
14 Looking at the first page of this prospectus at Tab 26,
15 this is for the RMK High Income Fund, correct?

16 A. Correct.

17 Q. At \$15 per share. And on the very first page
18 there is a general description of the fund. Do you see
19 that?

20 A. Yes.

21 Q. Okay. It has a section that says "the fund,"
22 and it describes it as a newly organized, diversified
23 closed-end management investment company. It has
24 another section, "investment objectives." And that
25 says, "The fund's primary investment objective is to

1 seek a high level of current income," correct?

2 A. Correct.

3 Q. And that is easily understood, right?

4 A. Right.

5 Q. "The fund seeks capital growth as a secondary
6 investment objective when consistent with its primary
7 investment objective." And that is easily understood,
8 right?

9 A. Right.

10 Q. It has a section called "investment strategy"
11 just below that, correct?

12 A. Yes.

13 Q. The first sentence says, "The fund will seek to
14 achieve its investment objectives by investing the
15 majority of its total assets in a diversified portfolio
16 of below-investment-grade debt securities offering
17 attractive yield and capital appreciation potential,"
18 right?

19 A. Right.

20 Q. And you can easily see, if you look at this,
21 that the investment was in below-investment-grade debt
22 securities, right?

23 A. Right.

24 Q. It says beyond that, "These securities are
25 rated BA or lower by Moody's Investor Service, Inc.; BB

1 or lower by Standard and Poor's rating group; comparably
2 rated by another nationally recognized statistical
3 rating organization defines rating agency, or not rated
4 by any rating agency but determined by the advisor to be
5 of comparable quality." It goes on to talk about that
6 investment strategy and that it includes corporate
7 bonds, mortgage and asset-backed securities, municipal
8 and foreign government obligations, as well as
9 securities of companies in bankruptcy reorganization
10 proceedings or otherwise in the process of debt
11 restructuring, correct?

12 A. Correct.

13 Q. And if you chose to read this, you could easily
14 see that those were among the assets that this fund
15 would be investing in, correct?

16 A. Yeah, correct.

17 Q. It goes on -- and skipping a sentence, just to
18 get to the meat of this about risk, it says, "because
19 the fund's investments will be concentrated in
20 below-investment-grade debt securities, the fund will be
21 subject to the risks of such securities.

22 Below-investment-grade debt securities are commonly
23 referred to as junk bonds and are considered speculative
24 with respect to an issuer's capacity to pay interest and
25 repay principal. They involve greater risk of loss; are

1 subject to greater price volatility and are less liquid,
2 especially during periods of economic uncertainty or
3 change, than higher rated debt securities. There could
4 be no assurance that the fund will achieve its
5 investment objectives." And that is all on the front
6 page of this document, right?

7 A. Right.

8 Q. If you chose to read this at the time, you
9 certainly would have seen that below-investment-grade
10 debt securities are commonly known as junk bonds and are
11 considered speculative, correct?

12 A. Correct.

13 Q. Okay. The next section talks about the fact
14 that there is no prior trading history. And then in
15 bold print below that it says, "The fund's investment
16 strategy of investing the majority of its total assets
17 in below-investment-grade debt securities and its
18 expected use of leverage involve a high degree of risk.
19 Stockholders could lose some or all of their
20 investment." And it refers you to the risks section on
21 Page 23 in the prospectus, right?

22 A. Right.

23 Q. Certainly looking at the first page of this
24 prospectus, you knew that there was a high degree of
25 risk involved in these funds, correct?

1 A. Well, like I said, I didn't read it. Why that
2 one was kept, I guess it just got mixed up in the
3 monthly statements that I kept; and that is why, you
4 know, you have it here. But the other -- I mean, I
5 really didn't read the prospectus. Like I said, I put
6 all of my faith in Randy and he didn't tell me any of
7 this. He told me that it was low risk and, you know,
8 income, conservative and diversified, you know, so --

9 Q. But you knew that if you wanted simply a safe
10 investment and a conservative yield, you could have just
11 left your money in CDs or other investments that didn't
12 have the potential for this high rate of return,
13 correct?

14 A. Well, that is true.

15 Q. This -- the date of this prospectus is June 24,
16 2003, right?

17 A. Yeah.

18 Q. And, again, you didn't keep all of the
19 prospectuses. You know you received prospectuses over
20 the course of time that you were investing through
21 Morgan Keegan, right?

22 A. Right.

23 Q. The next page of this, that regular text before
24 we got to the bold explanation of risk referred you to
25 the next page. That next page has a section called

1 "leverage." It says, "The fund may use leverage through
2 bank borrowing, reverse re-purchase agreements and/or
3 other transactions involving indebtedness or through the
4 issuance of preferred shares." It goes on and describes
5 that. At the end of that paragraph it says, "Leverage
6 creates an opportunity for increased income and capital
7 appreciation for stockholders, but at the same time it
8 creates special risks. There can be no assurance that a
9 leveraging strategy will be successful during any period
10 in which it is used." And this refers you then to
11 leverage and risks within the prospectus, correct?

12 A. Correct.

13 Q. In fact, if you turn over a few pages where it
14 pointed you to the section on risks -- and this is at
15 Diel 00668. The risks, you know, not only are they
16 mentioned in a pretty good level of detail on the very
17 first page, but here it elaborates on the various risks
18 involved in the investment, as you can see in this
19 section. It has a general statement of risks. The very
20 second sentence says, "Because the fund invests a
21 majority of its assets in below-investment-grade debt
22 securities, investments in the fund's common shares
23 involves a high degree of risk." Correct?

24 A. Correct.

25 Q. And that is easily understood, if you would

1 have looked at it at the time, right?

2 A. Right.

3 Q. It has a special section on investment risks
4 below that. "An investment in the fund is subject to
5 investment risks, including the risk of loss of the
6 entire principal that a stockholder invests," correct?

7 A. Correct.

8 Q. There is another section on the next page,
9 "leverage risks," as we pointed out before. There is
10 interest rate and related risks at the bottom of that
11 page. There is, on the next page, Diel 00670, there
12 is --

13 MR. GRIFFIN:

14 I object to this line of questioning. The
15 witness has already told us that he has never
16 read these. We have gone through now five
17 minutes or so. I don't see the importance of
18 continuing to review a document with him that
19 he has acknowledged that he hasn't read.

20 MR. KELLEY:

21 After you have established that, do we have
22 to go all the way through?

23 MR. BOLUS:

24 No, sir. No, sir. I'm going through the
25 headings at this point, and I'm just about

1 finished with this document.

2 MR. KELLEY:

3 Okay.

4 EXAMINATION BY MR. BOLUS:

5 Q. On this Page Diel 00670 there is a section
6 dedicated to below-investment-grade securities risks.
7 Do you see that?

8 A. Yes.

9 Q. And you could have turned to that page and seen
10 that, again, there is a description of
11 below-investment-grade debt securities are commonly
12 referred to as junk bonds, right?

13 A. Right.

14 Q. And that those are considered speculative, just
15 like it said on the first page, right?

16 A. Right.

17 Q. There is a special section called
18 "mortgage-backed securities risks," as well, correct?

19 A. Correct.

20 Q. And there is on Page Diel 00672 a section about
21 preferred stock risks, right?

22 A. Right.

23 Q. But you chose -- I'm sorry, on page Diel 00673
24 there is also a section on illiquid and restricted
25 securities risks, right?

1 A. Right.

2 Q. All of these risks were spelled out in this
3 prospectus that you received, correct?

4 A. I guess.

5 Q. On Page 674 there is also a section called
6 "derivative risks," correct?

7 A. Correct.

8 Q. It says, "Even a small investment in
9 derivatives can have a significant impact on the fund's
10 exposure to fluctuations and interest rates or currency
11 exchange rates." If you had chosen to look at this
12 document, you certainly could have seen that all of
13 these risks were elaborated on within the document,
14 right?

15 A. I think so.

16 Q. But you chose to close your eyes to the
17 document; is that right?

18 A. Like I said before, I trusted Wade. I didn't
19 think -- I didn't really understand, you know, the
20 documents, and I just put my faith in him, what I did
21 before. And, you know, did well with him, so I just --
22 I believed what he said.

23 Q. Well, do you think that Wade believed that
24 while there were risks involved in this that the manager
25 hopefully was doing a good job of managing risks?

1 MR. GRIFFIN:

2 Objection. That calls for speculation on
3 his part. He doesn't know.

4 EXAMINATION BY MR. BOLUS:

5 Q. Did Wade ever express to you that he believed
6 the fund manager was a good one who he felt could manage
7 risks?

8 A. I already stated before that he -- you are
9 talking about Kelsoe?

10 Q. Yes, sir.

11 A. Yes, he really spoke well of Kelsoe.

12 Q. And, again, no one could predict the future,
13 but based on your observations, you thought that Wade
14 Randolph had a high level of confidence in Jim Kelsoe,
15 correct?

16 A. Evidently.

17 Q. But you sitting here today don't believe that
18 Wade Randolph willingly misrepresented or failed to
19 provide you with the risks involved in this investment,
20 do you?

21 A. Do I think that he failed to provide me with
22 the risks involved?

23 Q. That he willingly failed to give you
24 information about the risks involved in his oral
25 conversations with you?

1 MR. GRIFFIN:

2 Once again, objection. That calls for
3 speculation.

4 MR. KELLEY:

5 Yeah, I think I will move on that.

6 EXAMINATION BY MR. BOLUS:

7 Q. Let me show you under Tab 21, Dr. Diel. This
8 is another document that you produced in this
9 arbitration. And this is a Morgan investing piece.
10 And, again, you produced this. This is something that
11 you kept. And it's actually dated January of 2001. Do
12 you see that?

13 A. Yes.

14 Q. Do you know why you kept this piece?

15 A. I have no idea.

16 Q. This document has an article on Page 1 called
17 "MK Select Funds perform well in a volatile market,"
18 right?

19 A. Right.

20 Q. If you look down at the second paragraph of
21 that article, it says, "The basic difference between
22 these two funds" -- and it explains a couple of funds
23 here -- "between these two funds is their choice of bond
24 investments. The high income fund takes a more
25 aggressive credit stance investing in bonds that are

1 often labeled below-investment-grade, BB or lower by
2 Standard and Poor's and/or Moody's. These bonds offer
3 higher returns for investors, but they have an
4 associated risk of loss too." Right?

5 A. That is what it says.

6 Q. And you certainly sitting here today, do you
7 know whether you ignored this document as well as the
8 others?

9 A. I did. I didn't see things like that in any
10 document. Like I told you, I depended on Randy.

11 Q. But you received the document and you kept it
12 for eight years, right?

13 A. Like I say, that one and probably that other
14 prospectus I had just got left there. I don't remember
15 seeing either one of them. And there is no reason that
16 I would have kept them and thrown all of the other ones
17 away.

18 Q. But you did keep it?

19 A. Well, it got -- it kind of kept itself, I'm
20 saying.

21 Q. Okay. Let's turn to Tab 31, Sub Tab C. And
22 this is another document that you kept, Dr. Diel, that
23 was produced by your counsel. It has a Bates label of
24 Diel 00782 and 783, the back side. And do you recall
25 keeping this document over the years too?

1 A. No.

2 Q. This is a December 31, 2003 brochure, for lack
3 of a better word, on the RMK High Income Fund, correct?

4 A. Correct.

5 Q. It says it's seeking a high level of current
6 income, right?

7 A. Right.

8 Q. This has a chart that shows credit quality
9 distribution. It shows from AAA down to CCC, CD and not
10 rated, correct?

11 A. Correct.

12 Q. Okay. But the majority of investments in BB,
13 correct?

14 A. Correct.

15 Q. On the back side, Page Diel 00783, this lists
16 all of the same risks we talked about before in the
17 prospectus, correct? Newly organized, fund is newly
18 organized. Is a newly organized closed-end management
19 investment company and has no operating history of
20 public trading. It goes through investment risks --

21 MR. CARUSO:

22 How about giving him a chance to read the
23 document.

24 THE WITNESS:

25 I'm just looking at the black part of it.

1 EXAMINATION BY MR. BOLUS:

2 Q. You would agree with me, wouldn't you,
3 Dr. Diel, that this document lays out risks in the same
4 way that the prospectus does in providing you a
5 discussion of investment risks, equities securities
6 risk, leverage risks, interest rate risks, risks
7 associated with below-investment-grade securities,
8 asset-backed securities risks, mortgage-backed
9 securities risks, illiquidity risks, derivatives risks?
10 All of those are set forth on this brochure that you
11 kept over time within your files, right?

12 A. Right.

13 Q. I apologize to the Panel. We are going to jump
14 back for the last time to Volume 1 now, so I apologize.

15 MR. KELLEY:

16 Will this be the last one on this?

17 MR. BOLUS:

18 It will be the last time we jump to another
19 exhibit, or at least to the other book. I have
20 just a couple more exhibits.

21 EXAMINATION BY MR. BOLUS:

22 Q. Okay. Going to Tab 12(A) and to Page 42 in
23 that tab. Now, this is a client agreement, new account
24 application with Centaurus Financial, Inc., correct?

25 A. Correct.

1 Q. That is who Brian Bennett is with, right?

2 A. Right.

3 Q. And this is consistent with your recollection
4 that he became a broker in 2003, at least this form is
5 dated August 25th of 2003, right?

6 A. Right.

7 Q. This shows your investment objectives as
8 capital appreciation here, correct?

9 A. Right.

10 Q. The signature on the second page is your
11 signature; is that right?

12 A. Yes.

13 MR. GRIFFIN:

14 I would like a little clarification. Is
15 Respondent representing that this is the same
16 document, once again?

17 MR. FRUIN:

18 It's tough for us to say, obviously, since
19 we are not Centaurus. That is fair.

20 MR. BOLUS:

21 I don't think that is a real issue here,
22 and I don't make that representation.

23 EXAMINATION BY MR. BOLUS:

24 Q. Okay. Turning to Page 18 under this tab, this
25 is your May 1, 2007 to May 31, 2007 --

1 MR. FRUIN:

2 You are under Tab B, though, right? You
3 have gone to 30, 12 -- you went to B.

4 MR. BOLUS:

5 Yeah, I'm sorry, it is under B. This is
6 under 12(B), Page 18. This is the May 1, 2007
7 to May 31, 2007 statement from Centaurus
8 Financial.

9 EXAMINATION BY MR. BOLUS:

10 Q. Now, this document shows, as far as your asset
11 allocation, you had 86 percent in equities with
12 Centaurus, correct?

13 A. Correct.

14 Q. Looking at Page 22, it has a listing of
15 equities, about 86 percent of your portfolio. Do you
16 know what Frontline Limited is? Do you know what
17 company that is?

18 A. It's a shipping company.

19 Q. So you had stock in Frontline Limited, Nordic
20 American, Ship Finance International Limited, Diana
21 Shipping, Inc., Stewart W.P. Company -- is that also a
22 shipping company?

23 A. I'm not sure.

24 Q. Were these all recommendations by Brian
25 Bennett?

1 A. Yes, they were.

2 Q. And did he indicate to you that those were
3 consistent with your investment objectives in 2007?

4 A. Yes.

5 Q. Had your investment objectives changed in 2007
6 from what they had been before?

7 A. No, not for him. Like I said, with Wade and
8 Morgan Keegan, I had different objectives than I did
9 with Gary -- with Brian.

10 Q. You also had stock in American Express Company,
11 Ameriprise Financial, Bevel Corporation, H&R Block,
12 correct?

13 A. Uh-huh.

14 Q. Is that a yes?

15 A. Yes.

16 Q. On the next page, 24, you have stock in Kinder
17 Morgan Energy, Nam Tai Electronics; do you know what
18 that is?

19 A. No.

20 Q. Prime West Energy?

21 MR. GRIFFIN:

22 Panel, I think this document speaks for
23 itself. If we are going to try to get out of
24 here at a reasonable time, I don't think we
25 need to read through every individual equity.

1 MR. BOLUS:

2 I just have two other things that I want to
3 ask him about on this document.

4 MR. KELLEY:

5 Just two?

6 MR. BOLUS:

7 Yes, sir.

8 MR. KELLEY:

9 Okay.

10 EXAMINATION BY MR. BOLUS:

11 Q. You have two other investments shown on this
12 statement. One is in New Century Financial Corporation.
13 Do you know what that is?

14 A. No.

15 Q. And the other is Thornburg Mortgage, Inc. Do
16 you know what that is?

17 A. It's a mortgage company.

18 Q. Do you understand New Century Financial to be a
19 company that originated subprime mortgages?

20 A. No.

21 MR. BOLUS:

22 Mark as R-1?

23 MR. FRUIN:

24 No, Respondent's 40.

25 MR. CARUSO:

1 Can we see a copy?

2 MR. FRUIN:

3 Yeah, we will give it to you first.

4 MR. MADDOX:

5 Is this a document that we have seen?

6 MR. FRUIN:

7 You will notice it has a Bates number at
8 the bottom. It was produced in the original
9 production.

10 MR. MADDOX:

11 We are going to object to this document.
12 I mean, the testimony of the witness was he
13 didn't know what this investment was or what
14 the company is. And I don't see any relevance
15 to going through anymore information about this
16 company with this witness.

17 MR. BOLUS:

18 Well, he has testified about his investment
19 objectives and we have asked questions about
20 the identity of two of his investments through
21 Brian Bennett, which are real estate investment
22 trusts. And I'm asking to --

23 MR. MADDOX:

24 And his testimony was he doesn't know what
25 the investments were.

1 MR. BOLUS:

2 And I'm going to ask him regarding Morning
3 Star reports that identify the nature of his
4 investments.

5 MR. KELLEY:

6 I don't think he will even know what they
7 are.

8 MR. BOLUS:

9 Well, I'm going to ask if it refreshes his
10 recollection to see these Morningstar reports
11 that provide a description on these
12 investments.

13 MR. MADDOX:

14 He is not the right witness to put those
15 documents in front of.

16 MR. FRUIN:

17 Whether or not he admits the document
18 through this witness is different than whether
19 or not the document can be used to refresh his
20 recollection, I believe is what was the
21 argument that was made during your case in
22 chief.

23 MR. CARUSO:

24 He has not said he is uncertain. He has
25 said he doesn't know.

1 MR. FRUIN:

2 And this might refresh his recollection.

3 MR. CARUSO:

4 A document he has never seen.

5 MR. MADDOX:

6 That is our objection.

7 MR. KELLEY:

8 I think you have a valid objection there.

9 I think we have given you wide latitude. Now
10 let's jump onto something else or the closing
11 or whatever.

12 EXAMINATION BY MR. BOLUS:

13 Q. You admit, Dr. Diel, as we looked through those
14 statements, you had actually made money off of the
15 Strategic RMK Fund that you sold early on?

16 A. I think that is what it shows. That is what it
17 showed.

18 Q. And you also would admit that you earned income
19 from the RMK funds that you have to take into account
20 when considering any losses on those funds, correct?

21 A. Well --

22 MR. MADDOX:

23 I'm going to object to the question to the
24 extent it calls for a legal conclusion on the
25 part of this witness who is not a lawyer.

1 MR. KELLEY:

2 We can uphold that.

3 MR. BOLUS:

4 I'll modify it slightly.

5 EXAMINATION BY MR. BOLUS:

6 Q. You admit that you received income on those
7 funds, correct?

8 A. Some of them, yes. I mean, you know, at the
9 end of the day I lost \$170,000 of my money. That is
10 what I'm looking at. I'm not looking at how much yield
11 it paid or, you know, what went up or what went down.
12 That is the money that I'm out. And my discussions with
13 Wade were, you know, that I didn't want any kind of fund
14 that was like this. I wanted low risk with income, you
15 know, conservative and diversified. And I ended up,
16 here I am.

17 Q. In fact, you would admit, though, that you
18 overall in your Morgan Keegan portfolio earned money?

19 A. I did. That is why I was with Randy.

20 MR. BOLUS:

21 That is all I have.

22 MR. KELLEY:

23 Are you finished?

24 MR. BOLUS:

25 Yes, sir.

1 MR. GRIFFIN:

2 I have just a couple of brief points,
3 Panel.

4 REDIRECT EXAMINATION

5 EXAMINATION BY MR. GRIFFIN:

6 Q. Dr. Diel, do you still have the white book in
7 front of you, No. 1, I believe. Respondent's notebook
8 No. 1, Tab -- I believe it's 6. These are the internet
9 access. Page 41. Are you there, Dr. Diel?

10 A. Yeah.

11 Q. Will you look at the top of Page 41 -- and,
12 again, Respondent's counsel took you through this page a
13 little earlier in your testimony. Take a look at the
14 top of Page 41. What is the date on that line?

15 A. 8/10/06.

16 Q. Okay. And then let's look at the bottom of the
17 next page, Page 40. What is the date there?

18 A. 12/20/07.

19 Q. Okay. About a year and a half later?

20 A. Yes.

21 Q. Do you recall Respondent's counsel telling you
22 that these are in sequential order?

23 A. Yes.

24 Q. In the same book I would like you to take a
25 look at Tab No. 1, Page 4. Do you remember Respondent's

1 counsel taking you through this document, Dr. Diel?

2 A. Yes.

3 Q. Would you look at Item No. 1 on Page 4. And
4 please read that for the Panel.

5 A. Is this the one he is talking about right here?

6 Q. It's under "custom and usage." Do you see
7 that?

8 A. That?

9 MR. BOLUS:

10 That is what he is talking about, custom
11 and usage.

12 THE WITNESS:

13 Okay. Transactions of the account for the
14 undersigned shall be -- I'm having --

15 MR. GRIFFIN:

16 I'll read it to you, Dr. Diel.

17 THE WITNESS:

18 Okay.

19 EXAMINATION BY MR. GRIFFIN:

20 Q. All transactions for the account of the
21 undersigned shall be subject to all then applicable
22 federal and state laws and rules and regulations
23 promulgated thereunder and the constitution rules,
24 customs and usages of the applicable exchange
25 association, market or clearinghouse. That is part of

1 the same agreement that you signed?

2 A. There is no signature on this page.

3 MR. FRUIN:

4 We will stipulate that that is part of the
5 same group.

6 MR. GRIFFIN:

7 That is all.

8 MR. KELLEY:

9 Okay. Any other questions?

10 MR. DOMBALAGIAN:

11 No re-cross?

12 MR. KELLEY:

13 No re-cross?

14 MR. BOLUS:

15 No.

16 MR. DOMBALAGIAN:

17 Further witnesses?

18 MR. MADDOX:

19 The Claimants have no further witnesses in
20 their case in chief, but we do want to go
21 through the exhibit books for both sides
22 probably at this point. Do you want to take a
23 short break first?

24 MR. FRUIN:

25 I think we can do it now, can't we? If you

1 want to take a quick break right after, we can.

2 MR. MADDOX:

3 Okay. Why don't we go through the
4 exhibits now and then we will take a short
5 break after that.

6 MR. DOMBALAGIAN:

7 Are you going to do it off the record or on
8 the record?

9 EXHIBIT ADMISSIONS

10 MR. FRUIN:

11 No, I think it should be on the record. I
12 think as far as our books go, we have Volume 1 and
13 Volume 2. I think there are no objections until we get
14 to Tab 38. And, actually, there are two. I think we
15 actually -- and you may have a Tab 38 and a Tab 39. Our
16 books, unfortunately, the two documents are under the
17 same tab. We are happy to withdraw -- if you have both
18 Exhibits 38 and 39, we will withdraw them; but if you
19 only have 38 actually in your book. Other than that, I
20 think the agreement is, is that everything is admitted.

21 MR. MADDOX:

22 That is correct.

23 MR. DOMBALAGIAN:

24 Tabs 1 through 37 of Respondent's two
25 notebooks are admitted just as a single exhibit,

1 Respondent's 1? Or do you want to break them up?

2 MR. FRUIN:

3 They are numbered 1 through 37.

4 MR. DOMBALAGIAN:

5 We will do 1 through 37.

6 MR. FRUIN:

7 It's just easier that way, probably.

8 MR. MADDOX:

9 For the Claimants' book, I'll let you write
10 a little bit more there, Professor. We have C-1, which
11 was the Notice to Members 9416. No objection to that.

12 MR. FRUIN:

13 Right.

14 MR. MADDOX:

15 We have C-2, which is the CV of Richard
16 Evans. No objection to that. Let's call C-3, the
17 orange book, the orange book with Tabs 1 through 15-8.

18 MR. DOMBALAGIAN:

19 1 through 15-8

20 MR. FRUIN:

21 And just for the record, I'm not objecting
22 to this book for the purposes of this case, but I
23 reserve any -- I mean, I think under circumstances I
24 might object to it in other cases. But I just don't
25 want it to be my admissions here as to relevancy and

1 things like that to be used against Morgan Keegan in
2 other cases. So I don't object in this case, but solely
3 for this case, as to C-3.

4 MR. MADDOX:

5 Every case stands on its own merits.

6 MR. FRUIN:

7 Some people may -- since there is a record
8 here, I want to make sure it's on the record. And the
9 same is going to be true for the remaining books.

10 MR. MADDOX:

11 Okay. For the next one we have the -- we
12 will call it C-4, which is the yellow book titled
13 "annual reports," with Tabs 1 through 8.

14 MR. FRUIN:

15 And there is no objection at all on that.

16 MR. DOMBALAGIAN:

17 1 through 8. Okay.

18 MR. MADDOX:

19 For C-5, we have the purple book titled
20 "prospectuses," with Tabs 1 through 6.

21 MR. FRUIN:

22 No objection at all as to that document.

23 MR. MADDOX:

24 For C-6, we have the blue book with Tabs 1
25 through 25.

1 MR. KELLEY:
2 This one?
3 MR. FRUIN:
4 Yeah.
5 MR. DOMBALAGIAN:
6 There is also another page of tabs.
7 MR. KELLEY:
8 Through 45.
9 MR. MADDOX:
10 I'm sorry. Yeah, it's 1 through 45.
11 MR. FRUIN:
12 And that is admitted with the same
13 condition that it's only for this case and not to be
14 used against us in any other cases.
15 MR. MADDOX:
16 That was C-6. For C-7, we have the green
17 book with Tabs 1 through 8.
18 MR. FRUIN:
19 No objection.
20 MR. KELLEY:
21 And that is this one.
22 MR. MADDOX:
23 For C-8, we have the mustard book.
24 MR. DOMBALAGIAN:
25 Forensic investment analysis?

1 MR. MADDOX:

2 Forensic investment analysis, with Tabs 1
3 through 12. And we will note that we are not offering
4 Tab 5 of that because that was the tab that was denied
5 by the Panel. So C-8 is Tabs 1 through 12, not
6 including Tab 5.

7 MR. FRUIN:

8 And no objection, with the same exception
9 that it's only for this case.

10 MR. DOMBALAGIAN:

11 And there is only one page of index?

12 MR. KELLEY:

13 Yes.

14 MR. MADDOX:

15 And then I believe last we have C-9, which
16 is the black book.

17 MR. KELLEY:

18 What are you calling that?

19 MR. MADDOX:

20 C-9.

21 MR. DOMBALAGIAN:

22 That is the Kelsoe examination binder.

23 MR. MADDOX:

24 Yes.

25 MR. FRUIN:

1 And, again, there is no objection with the
2 same limitation; that it's only for this case and any
3 agreement on this case does not carry forward.

4 MR. MADDOX:

5 And that has Tabs 1 through 38 in the black
6 book.

7 MR. FRUIN:

8 Technically, more tabs, but there are only
9 documents under Tabs 1 through 38.

10 MR. KELLEY:

11 Yeah, the rest is blank.

12 MR. DOMBALAGIAN:

13 I think that is all that I had on my list.

14 MR. MADDOX:

15 That is everything from the Claimant's
16 side.

17 MR. KELLEY:

18 One minute and we will go into break.

19 MR. MADDOX:

20 Mr. Chairman, do you want to take about a
21 15 minute break?

22 MR. KELLEY:

23 Just a second. He is looking for one thing
24 to make sure.

25 MR. DOMBALAGIAN:

1 The only two loose things I have are the
2 Evans CV and the notice to members, so that is right.
3 And Exhibit 1, Arbitrator's Exhibit 1, is the materials
4 we have received.

5 MR. MADDOX:

6 Yes.

7 MR. KELLEY:

8 Okay. Back by 3:30 if you can. We will
9 start closing up.

10 (A break in the proceedings was held.)

11 MR. KELLEY:

12 Okay. This is everybody. Do the parties
13 have any further evidence or testimony to present?

14 MR. CARUSO:

15 The only thing from the Claimant's side is
16 we would like to have the opportunity to submit a
17 post-hearing brief on the issue, first and foremost, of
18 Morgan Keegan's liability for the acts of Morgan Asset
19 Management. We would like the opportunity to submit a
20 brief on that specific issue, and there may be another
21 couple of issues that will also be incorporated within
22 that brief. We don't anticipate it being an extensive
23 brief, but given the Panel's questions throughout the
24 hearing in this case, we think it's important that we be
25 provided with the opportunity to address that specific

1 issue.

2 MR. KELLEY:

3 Do you have any problem with that?

4 MR. DOMBALAGIAN:

5 What is the briefing schedule? Is this
6 something that you have prepared?

7 MR. CARUSO:

8 No, I don't have it prepared. I get back
9 to my office on Monday. I would propose to have it to
10 FINRA by the end of next week.

11 MR. FRUIN:

12 Mr. Chair, we would object, I think for a
13 lot of different grounds. One, being finality and the
14 other being they had a right with regards to hearing
15 briefs. Not only did they have their initial statement
16 of claim that they could have identified any issues that
17 they needed to; but, likewise, this Panel in the initial
18 pre-hearing conference talked about whether or not there
19 were any unique legal issues that needed to be
20 identified and needed to be briefed. That is part of
21 the original script. It's something that is talked
22 about in the initial pre-hearing conference. There was
23 no reference made to it other than the fact that there
24 was an agreement amongst the parties that at the 20 day
25 exchange, there would be an exchange of pre-hearing

1 briefs if necessary.

2 We filed a pre-hearing brief. The other side
3 did not. They certainly at that point in time had the
4 right, if they were going to try to argue this sort of
5 -- that there was some nefarious issues or some legal
6 issues relating to these issues that needed to be
7 discussed, that was their time to do it. And it's not
8 at post-hearing time for that process to go forward.
9 That is to be -- they had the opportunity to do it in
10 their initial statement of claim. They had the
11 opportunity to tell the Panel during the initial
12 pre-hearing conference that there were unique issues
13 that needed to be discussed. They had the opportunity
14 to file a pre-hearing brief to raise these issues. They
15 did none of those things. And I would object to it at
16 this point after the hearing is over, to add additional,
17 you know, burden to this Panel and additional burden to
18 us. It wasn't in their original statement of claim. It
19 wasn't in their opening statement, these issues. And I
20 would object to it being hoisted upon us in an
21 additional content at this point in time.

22 MR. CARUSO:

23 Can I just respond.

24 MR. KELLEY:

25 We will have one response and then make the

1 charge.

2 MR. CARUSO:

3 Their statement of answer, and I would
4 implore the Panel, take a look at their statement of
5 answer. Show me one place, one place, where it mentions
6 Morgan Asset Management, even one place. I just went
7 through it. It's not in there. On the issue of
8 prospectuses, which as the Panel knows we were not
9 allowed to get into with any of the witnesses. Do you
10 know how many times they discussed prospectuses in here?
11 Eleven different times. On the issue of the sales
12 materials, as you know we were not allowed to get into
13 any of the sales materials because they supposedly came
14 from Morgan Asset Management, even though some of the
15 testimony in the record is different. They mentioned
16 the sales materials on Pages 2, 7 and 15 and they go
17 into extensive discussions of them. I think if this
18 Panel has an interest in being fair to Dr. Diel, he
19 should at least be given that opportunity. There is no
20 downside to this Panel.

21 MR. FRUIN:

22 With all due respect, Mr. Chair, with
23 regards to the prospectuses, they did ask Mr. Kelsoe
24 about the prospectus issue. I think the stopping of the
25 questions about the prospectus with Mr. Kelsoe was after

1 he asked what involvement he had in them. It was a
2 question -- they then tried to get into the issues of
3 MAM's responsibilities for the prospectus. That is
4 where the Panel cut them off. That is a completely
5 different issue. And the Panel urged them time and time
6 again to focus their questioning on issues of sales
7 materials and disclosures. And I think with all due
8 respect, for opposing counsel to state that they were
9 not allowed to go into sales materials is beyond untrue.
10 That is what we dealt with with regards to Ms. Wood this
11 morning; that is what we dealt with in regards to
12 Mr. Kelsoe yesterday. We have talked about those
13 materials with all of the witnesses.

14 So, frankly, at this point the fact is, yes, we
15 didn't mention MAM in our answer because MAM is not our
16 client, MAM is not the Respondent. Morgan Keegan is the
17 Respondent. The fact is, if they wanted to say that we
18 are responsible for Morgan Keegan, look at the statement
19 of claim. Is it in there? No. Was it in their opening
20 statement? No. They are hoisting new issues -- you
21 know, frankly, they are trying to add things now that,
22 frankly, were not pled, were not in their opening
23 statement. And they are now saying that you are
24 responsible for MAM. With all due respect, I think the
25 Panel has been more than gracious in allowing them to go

1 into the issues that were necessary to go into with
2 regard to this case. And, you know, frankly, to add
3 additional burdens of additional briefing, additional,
4 you know -- is unnecessary, especially in light of the
5 fact that they never raised -- they had the opportunity
6 to raise it all of these times before in their written
7 papers and they failed to do so.

8 MR. KELLEY:

9 Okay. Yeah, I think the request is denied.
10 Let's move on. Anything else? Okay. Who wants to
11 start?

12 MR. MADDOX:

13 Hold on. We have a couple of things we
14 need to do, and then I'm going to ask that we break for
15 10 or 15 minutes before we start closing.

16 MR. FRUIN:

17 As far as us putting on a case in chief,
18 the other side has agreed to stipulate to the entry of
19 the damages numbers. And I apologize, the other box of
20 these are up in my room. I can get you -- you have been
21 provided a copy.

22 MR. MADDOX:

23 Do you want to give them just two and give
24 us one?

25 MR. FRUIN:

1 That is fine, if that is okay. And,
2 actually, I think I can give you one. In fact, I can.
3 Sorry, here, let me give you this one, Mark. One was in
4 a black binder, so I was a little bit -- I do have
5 three. We have stipulated to the entry of that
6 additional exhibit, which it is essentially the same
7 damage analysis that the other side has provided with
8 the exception that we stopped our analysis effectively
9 at the filing of the statement of claim, whereas their
10 analysis went through --

11 MR. MADDOX:

12 Date of sale.

13 MR. FRUIN:

14 Date of sale. The other, I think,
15 agreement that we have reached amongst ourselves is that
16 in lieu of putting on any evidence of our fees and
17 expenses to date with regards to the contractual
18 provision that was brought out in the contract, that in
19 light of the fact that ours are likely in excess of
20 \$25,000, we have generally just stipulated that that is
21 what we will ask for. And there is an agreement that we
22 have spent certainly in excess of that, but the 25 is
23 the number that we would put in as far as our attorneys
24 fees and costs to date. And with that, I think we are
25 going to not call any witnesses.

1 MR. DOMBALAGIAN:

2 So we will mark this R-38?

3 MR. FRUIN:

4 That would be great.

5 MR. KELLEY:

6 Go ahead.

7 MR. UPTON:

8 I just wanted to ask Mr. Caruso, you made
9 the statement "in fairness to Dr. Diel," and I really
10 would like you to elaborate on that where we work fair
11 to him.

12 MR. CARUSO:

13 Honestly, Mr. Upton, I think I have
14 established on the record the Panel closing me down in
15 my questioning of Mr. Kelsoe I think was improper, in my
16 opinion. And I don't say this in a demeaning way, but
17 for purposes, I must preserve this record for a number
18 of reasons. I think cutting my questioning was
19 improper, preventing me from getting into any of the
20 prospectus disclosures, misrepresentations and
21 omissions, I think that was improper. Not allowing me
22 to go into any of the shareholder materials, even though
23 they are specified in the statement of answer, I think
24 that was improper. So, in my opinion -- and, again, the
25 record will speak for itself. And I know this is no

1 longer a part of the hearing script, but if it were and
2 if I were to be asked was Dr. Diel given a full and fair
3 opportunity to present his case, with all due respect, I
4 would have to say no.

5 MR. UPTON:

6 Thank you.

7 MR. FRUIN:

8 The other thing I think that Mr. Maddox was
9 going to propose is at this point we are going to, I
10 guess, give closings. One thing I am going to ask to
11 use in the closing as a demonstrative is the chart that
12 just contains information that effectively is in the
13 record. But I think there was going to be a request for
14 just a short break, in light of the fact that we will be
15 giving closings, if we can just gather our thoughts.

16 MR. DOMBALAGIAN:

17 May I ask one question, and not to belabor
18 the point. I guess one of the things that I need to
19 include in the award summary is anything unusual that
20 occurred. I think if you would like to state your
21 objections in some written form, that would make it
22 easier for me to decide how to include them in this
23 document, if you feel that is appropriate.

24 MR. CARUSO:

25 And you expect me to do that in the next 15

1 minutes?

2 MR. DOMBALAGIAN:

3 I wasn't expecting a brief.

4 MR. CARUSO:

5 Well, not even from a brief. I mean, I
6 would need to go through the transcript, obviously.

7 MR. DOMBALAGIAN:

8 My understanding is that the objections are
9 to the termination of Mr. Kelsoe's testimony and the
10 second objection was to the limitation of the inquiry
11 into certain documents during the examination of
12 Ms. Wood. Is that a summary? This is just a summary
13 description for purposes of notifying FINRA of any --
14 something unusual that happened. This does not in any
15 way reflect your position. It is merely a way for the
16 arbitrators to summarize what happened at the
17 proceeding.

18 MR. CARUSO:

19 And I agree with you that this is unusual.
20 And, understand, I have never made this statement on the
21 record, and I've done hundreds of these before. I
22 believe limiting my ability to question our own
23 witnesses was improper. I believe that denying us
24 discovery during the -- prior to this hearing, documents
25 that would have established the connection between MAM

1 and Morgan Keegan, I think that was improper. If you
2 would like me to go back when I get the full transcript
3 to provide chapter and verse.

4 MR. DOMBALAGIAN:

5 This is only for purposes of the
6 ministerial task of advising FINRA of what proceeded
7 here, and you obviously can take whatever further action
8 you deem necessary in this case.

9 MR. CARUSO:

10 Thank you.

11 MR. FRUIN:

12 And to the extent that if that is done and
13 that is included in the order -- I'm hesitant to say
14 this, and I know we already have sort of a record of
15 what transpired with regard to certain things. But to
16 the extent that there is going to be a listing of,
17 quote/unquote, the improper activities, I think there
18 also needs to potentially be an explanation as to why
19 those things were ruled on in the way they were. You
20 know, obviously the record -- we already have a lot of
21 that perhaps in the transcript. And I'm saying all of
22 this because I'm fearing -- and I don't know how the
23 Panel is going to rule in this case for one side or the
24 other, but I'm hearing, anyway, that if a ruling goes a
25 certain way that there may be an appeal of that, a

1 motion to vacate. And with that said, I guess if there
2 is an identification of these are things that were
3 unusual, then -- and if there is no explanation as to
4 why they weren't unusual or the reasons they were
5 done --

6 MR. DOMBALAGIAN:

7 Let me rephrase the question. Well, I
8 don't want to create issues where none exist. My
9 understanding of the FINRA rules is that the Panel has
10 broad latitude to decide what evidence is admitted and
11 what isn't, so I don't necessarily think that anything
12 we did was improper; otherwise, we wouldn't have done
13 it. The question is merely, I think, you know, is this
14 to the extent that either after the case you seek the --
15 I assume there is an opportunity to seek some sort of
16 written opinion. I can't remember what the rule is, but
17 there are rules that permit the parties to request some
18 sort of explanation from the Panel.

19 MR. FRUIN:

20 There was a suggested rule that has not
21 passed.

22 MR. DOMBALAGIAN:

23 That has not passed, so that rule does not
24 exist.

25 MR. FRUIN:

1 A panel certainly has the right to do it,
2 but there is no procedure in place for the parties
3 necessarily to ask for it at this time. The Panel can
4 do it.

5 MR. DOMBALAGIAN:

6 If the rule does not exist -- if the rule
7 does not exist, then the Panel is under no obligation to
8 do that.

9 MR. FRUIN:

10 Correct.

11 MR. DOMBALAGIAN:

12 So I think if the Panel is under no
13 obligation to do that, we can -- I guess we can decide
14 among ourselves if we want to include something like
15 this in the award, but I thought that perhaps a brief
16 summary from you would assist us in that. If you feel
17 the way I have summarized the issue now is adequate, we
18 can discuss in executive session whether to put it into
19 the award document. That is all I was looking for, a
20 concise summary of the two issues you have identified to
21 the extent that you think these are -- you know, the
22 Panel acted in excess of its authority under the code of
23 arbitration procedure.

24 MR. CARUSO:

25 Let me just address what you just said. I

1 think the record in this case will speak for itself. I
2 am not requesting that anything go into the award
3 specifically about being unusual or anything else. That
4 was not what I was requesting.

5 MR. DOMBALAGIAN:

6 Okay.

7 MR. CARUSO:

8 To the extent you want me to give chapter
9 and verse, I am unable to do that without having today's
10 transcript, for instance, and having a chance to go
11 through all of the transcripts. But I don't think it's
12 necessary for your award information sheet, and that is
13 not what I'm asking.

14 MR. DOMBALAGIAN:

15 Okay. So, in that case, we won't put
16 anything in the award information sheet since the
17 parties do not deem this unusual. And, you know, you
18 can take it from there.

19 MR. KELLEY:

20 So I think we are ready then to start the
21 closing arguments.

22 MR. MADDOX:

23 Yeah, after about a 15 minute break, sir.

24 MR. KELLEY:

25 Okay. So it's 10 minutes to 4. Let's come

1 back at 4:00 and we will be ready to go.

2 (A break in the proceedings was held.)

3 CLOSING ARGUMENTS

4 MR. KELLEY:

5 I guess the Claimants are going to start
6 here.

7 MR. MADDOX:

8 Panel, what we propose is the Claimants
9 will start, we will go first, we will reserve some of
10 our time for rebuttal, as permitted under the rule in
11 the script. Respondents will go second. And I'll do
12 the initial and Mr. Caruso will do the rebuttal.

13 On behalf of the Claimants, even with
14 Mr. Caruso's comments, we would like to thank the Panel
15 for their service. We would also like to thank the
16 court reporters for their service over the last three
17 days. We think this case is first and foremost about
18 the duties that Morgan Keegan had to its customer here,
19 Dr. Diel. They are very high duties when you entrust
20 people to manage your -- to make investment
21 recommendations for you. They are even higher duties
22 when the subject matter of this case is a product, a
23 proprietary product, you know, that is done by Morgan
24 Keegan in conjunction with one of its related entities.
25 And this hearing is really Dr. Diel's only chance to try

1 to achieve some justice for the situation he has found
2 himself in.

3 The Panel should consider as you deliberate the
4 relationship that Dr. Diel had with his broker. He had
5 known him for a lot of years. He had a high degree of
6 trust in him. At the time that his Morgan Keegan
7 account was opened, he had a discussion with his broker
8 about what he wanted. You heard the testimony many
9 times. He says he wanted low risk, he wanted income, he
10 wanted some diversification, he wanted conservative
11 investments. And that never changed from the time he
12 got to Morgan Keegan in 1999 until the day he sits here
13 today. It never changed.

14 The Panel probably noted the interesting issue
15 relating to the two new account documents that you saw
16 in the record in this case. And Ms. Rosa Stelly, I
17 think, spread a lot of light onto why there were three
18 investment objectives selected in the initial form and
19 four investment objectives selected about five years
20 later. You will recall that Ms. Stelly said, Oh, there
21 was a change that was made where we had to pick four
22 investment objectives or else the new account document
23 got kicked back out. And she thought before that the
24 policy was there had to be three, so that is why you see
25 three investment objectives picked at the beginning, one

1 of which is speculation, which you heard Dr. Diel say, I
2 never told my broker that I wanted speculation.

3 You then had testimony from Dr. Diel about how
4 these RMK funds were sold to him. And the first one was
5 sold, and we see evidence that there was a little bit of
6 a longer phone conversation when the first one was sold.
7 And Dr. Diel was told that these funds met his
8 objectives very nicely. They were high-yield, low risk,
9 diversified, conservative. And where else do we see a
10 lot of that same information. We see it on the one
11 piece of marketing material that we saw for the Select
12 High Income Fund. Now, think about Mr. Kelsoe's
13 testimony. Mr. Kelsoe told the Panel that there was a
14 broker packet that they put together that included a
15 prospectus and a piece of marketing material. What do
16 you think the typical broker does when they get the
17 broker packet? Do they read the prospectus cover to
18 cover, or do they pick up the marketing material and
19 learn what they need to learn about the investment. I
20 think Mr. Preis testified that he will look at the front
21 page of the prospectus maybe, but he didn't even follow
22 these funds. A typical broker is going to look at the
23 marketing material and base his or her recommendations
24 off of that marketing material. And that is what we
25 would submit to the Panel happened in this case.

1 And we would also submit that to represent
2 these RMK funds in the way they were represented to Dr.
3 Diel was actually a misrepresentation and omission of
4 the risks associated with those funds. These funds
5 weren't low risk investments. They were just the
6 opposite. They were high risk, speculative investments.
7 You saw the internal e-mail that was circulated to RMK
8 brokers and sales assistants, branch managers talked
9 about these being -- these funds having speculative
10 investments in them. You need to watch the investment
11 objectives and make sure they are appropriate for
12 investors. Do you believe that Dr. Diel, who came
13 before you and I believe testified very honestly. When
14 he remembered something, he told you. When he didn't
15 remember something, he told you. Do you believe Dr.
16 Diel was looking for speculative investments at Morgan
17 Keegan? Take a look at the rest of his portfolio, if
18 you didn't do that. Very conservative portfolio. He
19 was basically a fixed-income investor. He is not a
20 person who wants speculation. He told you that his
21 investment objective all along at Morgan Keegan was
22 income. Never changed and never waived.

23 And while Wade Randolph was alive, these funds
24 performed as represented. The principal is relatively
25 stable and the yields are good. But then Wade Randolph

1 dies in March of '06 and Dr. Diel is essentially kind of
2 lost at Morgan Keegan. He gets a broker who sends him a
3 letter that says, Call me. And that is it. That
4 broker, unbeknownst to Dr. Diel, doesn't even follow,
5 doesn't really know anything about the Morgan Keegan
6 bond funds in his portfolio. And he is obviously off
7 doing other things with institutional accounts. And
8 this particular investor just didn't even matter to him.
9 He didn't even pick up the phone. He didn't even follow
10 Morgan Keegan's own compliance procedures that require
11 him -- that strongly recommend, you know, that he have
12 contact with his investor and update suitability type
13 information every year. He didn't do it. He didn't
14 know his customer. The first step to knowing your
15 customer is communicating with your customer. He never
16 communicated with this investor at all, and fell far
17 short of the duties that he has under New York Stock
18 Exchange Rule 405.

19 Then what else do we see that happens in this
20 chronology. So he is kind of an orphan at Morgan Keegan
21 after March of '06. And in August of '07 we see that
22 Morgan Keegan stops recommending the Select High Income
23 Fund. It falls off of its recommended list. You know,
24 we thought it was a conflict to continue to recommend
25 our proprietary funds was the testimony. Do they tell

1 Dr. Diel that? No, they don't. In August of '06 his
2 bond fund -- August of '07 his bond fund portfolio is
3 still positive. It's not actually even under water yet.
4 So they stop covering it, or they stop recommending it.
5 And we know that by testimony that the Select High
6 Income Fund had in it, essentially, the same investments
7 as the closed-end funds. You know, Mr. Kelsoe told us
8 that; that there is basically about -- you know, that
9 roughly the same 300 funds in all of these accounts.
10 But they stopped recommending it, and they don't even
11 have the courtesy to let him know that. Far short of
12 the duties that Morgan Keegan owes him under the
13 circumstances.

14 This conduct that Dr. Diel suffered at Morgan
15 Keegan we think constitutes violations of the Louisiana
16 Securities Act. We think it breached fiduciary duties
17 that they owed him. And this law is in our statement of
18 claim, if you want to refer back to that. We think it
19 breached the contract that Dr. Diel had with Morgan
20 Keegan. And you will recall just recently we took a
21 look at the first paragraph of that customer agreement
22 that talks about their duties under the contract to
23 handle his account in conjunction with NASD rules, New
24 York Stock Exchange rules, all the industry rules, the
25 Louisiana Securities Act and the regulations thereunder.

1 We think it constituted violations of NASD, NYSE rules.
2 And clearly there were material misrepresentations and
3 omissions that occurred.

4 What Dr. Diel is asking the Panel to consider
5 awarding him are his principal loss on these funds of
6 \$170,000. He is asking for interest as provided under
7 the Louisiana Securities Act. He is asking for his
8 reasonable attorneys fees, as provided under the Indiana
9 Securities -- or, excuse me, the Louisiana Securities
10 Act. I say Indiana a lot where I'm from. And let me
11 talk about that point for a minute. Dr. Diel has
12 testified to you that he has a one-third contingency fee
13 agreement with his lawyers. And if you would like to
14 see Dr. Diel net a certain amount of money after paying
15 his lawyers, what you do is you take that net number to
16 Dr. Diel and multiply it by 1.5. He is asking for the
17 out-of-pocket costs that he is going to be responsible
18 for associated with this hearing, which we have
19 estimated for him to be \$30,000. And those costs
20 include expert witness fees of Rick Evans; they include
21 expert witness fees of Dr. Craig McCann, who you saw in
22 the room on the second day; they include travel expenses
23 for counsel; they will include thousands of dollars of
24 court reporter charges. And our best guesstimate for
25 him and this Panel is that those are going to add up to

1 about \$30,000. We also are going to ask that the Panel
2 assess all of the NASD -- or the FINRA form fees and
3 arbitrator fees against the Respondent. And at this
4 point I'm going to stop and, again, just request some
5 time for Mr. Caruso to do rebuttal after Mr. Fruin has
6 his say. Thank you.

7 MR. FRUIN:

8 Thank you, Mr. Chair, and thank you Panel.
9 I share Mr. Maddox's gratitude for your service, as well
10 as the court reporters. I actually am going to give
11 more credit to the court reporter. I don't know if I
12 could do that for eight hours a day. Not to say that I
13 could do what you did, but I know I can't do what she is
14 doing. With that said, the fact of the matter is, is
15 that with all due respect to Dr. Diel, I'm glad that he
16 actually got to testify today because for the first
17 three days I didn't even know what this case was about.
18 Claimant's counsel for a long period of time spent a lot
19 of time talking about issues that, frankly, had no
20 relationship to Dr. Diel or anything else. And, you
21 know, part of that is explained by perhaps Mr. McCann
22 being here and not testifying, but asking for his
23 expenses and also the court reporter, which, you know, I
24 guess, for another purpose as well.

25 But what we are dealing with here are the

1 claims of Dr. Diel. And I would encourage the Panel to
2 go back to the statement of claim and see what the
3 claims of Dr. Diel actually are. Dr. Diel is basically
4 saying in his statement of claim, and it was said in the
5 opening statement, that one issue is the issue of
6 whether or not this was a suitable investment. And the
7 other issue is whether this was misrepresented or
8 suppressed from him, information was misrepresented or
9 suppressed from him. With regard to -- I'm going to do
10 the easiest one first, and that is the suppression
11 issue. The fascinating thing about suppression
12 claims -- and there is a lot of criticism of
13 prospectuses and the fact that prospectuses have a lot
14 of information in them, and they say a lot of things
15 that people don't always understand. There may be a
16 reason for all of that. There may be a reason that
17 prospectuses are so long. It's because there is an
18 obligation for us to say what is out there and to
19 disclose the types of risks or disclose everything about
20 a fund. That is the reason we have prospectuses, and
21 that is the reason they are as long as they are. That
22 is the reason we have statements of additional
23 information. It's so that all of that information that
24 allegedly, quote/unquote, wasn't disclosed, in fact, is
25 out there. And that is what these prospectuses

1 identified.

2 And we went through the first page, Mr. Bolus
3 with Dr. Diel did go through some of the other
4 disclosures, but what is very clear is upfront this fund
5 discloses on each of the prospectuses -- and they all
6 differ. I encourage you to look at it. But generally
7 the language I'm going to show you is the same in each.
8 And that is that the fund will seek to achieve its
9 investment objectives by investing a majority of its
10 total assets in below-investment-grade debt securities,
11 offering attractive yield and capital appreciation
12 potential. The fund will invest in a wide range of
13 investment grade securities, including corporate bonds,
14 mortgage and asset-backed securities. All of this is
15 disclosed. It's disclosed, the strategy of investing
16 the majority of the total assets in
17 below-investment-grade securities and its expected use
18 of leverage involves a high degree of risk.
19 Shareholders can lose some or all of their investments.
20 Below-investment-grade securities are commonly referred
21 to as junk bonds and are considered speculative with
22 respect to an issuer's capacity to pay interest and
23 repay principal. They involve greater risks of loss,
24 are subject to greater price volatility and are less
25 liquid, especially during periods of economic

1 uncertainty or change, than higher rated debt
2 securities.

3 These prospectuses are very long, but you don't
4 have to go very far to see that there was nothing
5 suppressed from Dr. Diel with regards to these
6 purchases. That information was in his possession. He
7 said, I didn't read it. I would encourage you to go
8 back and look at the pre-hearing brief. Not only does
9 that take care of the suppression claim, but clearly it
10 also -- there is an obligation, as set forth in our
11 pre-hearing brief. It sets forth the obligations that a
12 customer has of being bound by the written word that
13 they are provided. What we are supposed to suggest here
14 is that Dr. Diel was provided all of this written
15 literature. He got annual and semi-annual statements.
16 He claims he doesn't recall receiving them. They are in
17 the record. You can look at the disclosures in there as
18 well. But they have further disclosures that he
19 received on a -- really four times a year; because as we
20 look at those annual and semi-annual statements, the
21 four closed-end funds were March/October time frame and
22 the open-ended funds were June and December time frames.
23 So effectively four times a year he received either an
24 annual or semi-annual statement that provided additional
25 disclosures setting forth what these funds were about;

1 the fact that they were investing in high-yield funds,
2 the fact that it identified the specific investments
3 that were included in these funds. So to say somehow
4 that information about these funds were suppressed,
5 frankly, goes beyond belief with all of the written
6 documentation that Dr. Diel had in his possession and
7 was provided to him.

8 That gets us to the issue of misrepresentation.
9 I will admit that Dr. Diel today said probably about 50
10 times -- he had the same mantra. He said, I wanted low
11 risk, income, diversified, conservative. I don't think
12 he ever said it when he didn't say all four together.
13 You know, with all due respect, if you look at Dr. Diel
14 and you look at Dr. Diel's history and everything on the
15 timeline we have here -- again, this is simply a
16 demonstrative exhibit, but it includes information that
17 is already in the record, all of the information on it.
18 So there is nothing new on the timeline. But what the
19 timeline shows is it sets forth the history of who
20 Dr. Diel is, at least with regards to his investing
21 history; not completely, but it gives us some of the
22 highlights. And it shows that as early as 1985 he
23 opened accounts at Merrill Lynch. He also independently
24 invested in the Vanguard 500 fund. I know he said he
25 got that recommendation from his accountant, but the

1 paperwork, which has been admitted, doesn't show that it
2 was anything other than an individual account without a
3 financial advisor. The same for his MFS government
4 securities market income trust account.

5 He has opened up -- he has had significant
6 investments before he ever gets to Morgan Keegan. Here
7 is a gentleman who actually says -- I think, actually,
8 that he first opened a Merrill Lynch account in 1980.
9 We don't have that documentation on here. We weren't --
10 we didn't know. We don't have records going back that
11 far. But he represented that certainly as early as
12 1980, which isn't even on this chart, he was investing
13 with Merrill Lynch. So here is a gentleman that at the
14 time he opens his Morgan Keegan account has 19 years of
15 experience of investing. And what is interesting is, is
16 he says, I left -- my first broker was Wade Randolph,
17 and I left Mr. Randolph. Here is an individual who
18 understands that if he is not getting the service, if he
19 is not getting what he wants from his broker, certainly
20 he has the right and the opportunity to go elsewhere,
21 and he has demonstrated that he has done that. He left
22 Wade Randolph when he was at Merrill Lynch, closed his
23 accounts and subsequently opened additional accounts at
24 Merrill Lynch with a different broker approximately a
25 year later. So here is a gentleman who has full

1 understanding that if he is not happy with the service
2 he is getting, he can go elsewhere, and he has.

3 He, likewise, when he opens the Morgan Keegan
4 account, he says, and everyone has said, that Wade
5 Randolph is a gentleman that was an honest and honorable
6 gentleman. Unfortunately, Mr. Randolph isn't here to
7 testify. I think the both of us, he and I, would
8 probably wish he was. But, unfortunately, he died of
9 cancer and is not here. But the fact of the matter is
10 that on 4/7/1999, Dr. Diel opens an account at Morgan
11 Keegan and Wade Randolph on the opening account forms
12 identifies his investment objectives as income, growth
13 and speculation. Now, I understand the testimony of
14 Ms. Stelly, but she was -- she even said, I don't really
15 remember what was going on with this three and four
16 thing. She did talk about the four. But the fact of
17 the matter is, is at that point in time the documents
18 themselves say, "Mark all that apply." Likewise, the
19 later documents say, "Mark all that apply." You can
20 mark one, you can mark two, three, four. That is what
21 the forms say. The fact is three were marked: income,
22 growth and speculation. And that is consistent with the
23 type of investor this gentleman was. He was not taking
24 income from this account, but he wanted the account to
25 grow.

1 He talked about the fact that he moved
2 sometimes from broker to broker because he wanted more
3 income, he wanted more return on his investment. And I
4 think we all understand that with more return comes more
5 risk. That was certainly in line with if you look at
6 the investments that he had both of Morgan Keegan and at
7 Centaurus and all of the other statements that are now
8 admitted into evidence. This is a gentleman that was
9 willing to take risks. He had significant investments
10 in equities. He had investments in REEFs. He even
11 admits that one of those REEFs invested in mortgages.
12 And so here is -- and that was what their investment
13 was. So the fact of the matter is, this gentleman
14 understood what it was. He was willing to take risks
15 because he wanted the return.

16 Then let's look at some of the other documents
17 that he received. As early as '01 -- he says, by the
18 way, and it's interesting; he says the reason I moved to
19 Wade Randolph was because Wade promised me that he could
20 invest in bond funds, and the gentleman that I had at
21 Merrill Lynch couldn't invest in funds. Take a look at
22 the statements, take a look at the investments that he
23 had at Merrill Lynch prior to coming to Morgan Keegan,
24 look at the types of investments he had. I will
25 represent he had funds. It wasn't just equities that he

1 owned, individual equities. He owned mutual funds.
2 Moreover, if the reason that he was coming to Morgan
3 Keegan was to invest in income or bond funds, why was it
4 that he waited so long to do it. Why was it that he
5 waited until 2002 to invest in the Morgan Keegan funds
6 at issue if the quote was "the reason I came was because
7 he was representing that he had all of these funds."

8 The fact of the matter is, he opens his Morgan
9 Keegan account in 1999 and he doesn't buy one of these
10 funds until 2002. You can look at the statements. He
11 did, in fact, in late 2000, well more than a year after
12 opening his account, he bought some other closed-end
13 funds that may have had some bond components to it; but,
14 still, he waited more than a year to even buy those. So
15 the question is, his whole reasoning for why he says he
16 is doing what he does isn't supported by the
17 documentation. Unfortunately, we don't have Wade
18 Randolph here to support our case, but we do have the
19 documents, which, with all due respect, are inconsistent
20 with the representations that Dr. Diel made, not only
21 about his investment objectives, but about why he opened
22 the various accounts and what he was doing with his
23 investments. Because he had equities. He says, oh, I
24 didn't want equities when I went to Morgan Keegan. Take
25 a look. He bought equities. The first five purchases

1 that he bought at Morgan Keegan were all individual
2 equities. So for him to say the reason he opened his
3 Morgan Keegan account was to invest in fixed-income
4 funds and not equities is inconsistent with the actual
5 documents that we have in front of us. He bought -- the
6 first five purchases were all individual securities. He
7 didn't buy the funds at issue until three years later.

8 And what is also interesting is, as we see
9 throughout his time at Morgan Keegan, he has -- in 2001,
10 he receives the first MOR piece that identifies and sets
11 forth -- again, we are talking about suppression. He is
12 provided documents, he has the MOR piece. It comes to
13 him in the mail, that he has kept all this time. He had
14 it. He produced it to us in discovery. And it sets
15 forth that this is a high-yield fund, this invests in
16 junk bonds. And to do that, you are taking more risk.
17 All of that is clearly disclosed in the documentation
18 that he had in his possession a year and a half before
19 he even buys the funds. That is supported again by a
20 second piece in 4 of '01 that he receives. It
21 identifies the fact that -- as well.

22 Then, what do we have. We have the first
23 purchase on 3/13 of '02. We have a 26.5 minute phone
24 call and there is a purchase of one fund. There is a
25 comment that all I was told I ever wanted was -- and,

1 again, the mantra: low risk, income, diversified,
2 conservative. The fact of the matter is, is at that
3 point in time there is a 26 minute phone call.
4 Unfortunately, Mr. Randolph can't be here to explain
5 what happened during that 26 minutes. But the fact of
6 the matter is, you couldn't have a conversation about
7 one investment where all you are saying is, oh, it's got
8 low risk, it has income, it's diversified and
9 conservative, if you are going to be talking for 26
10 minutes.

11 We have talked about a man -- and Ms. Stelly
12 and everyone else testified that this is a man who did
13 his homework. He charted things, he followed things.
14 He was a broker among brokers that people went to for
15 stuff. Here is a man who explained things. And I
16 suspect during that 26 minutes he explained to Dr. Diel
17 exactly what this investment was. But Dr. Diel also
18 received documentation. He received a prospectus. He
19 also received the one brochure in 2002 that talks about
20 this being -- it does use the word conservative, but,
21 again, we have all taken 4th grade English and we
22 understand how to diagram a sentence. And when
23 something says "a conservative high-yield fund," what
24 does conservative modify? It modifies high-yield. And
25 you heard Mr. Kelsoe explain that, in essence, from a

1 high-yield perspective, this was a fund that had both
2 investment grade and non-investment grade investments.
3 And the non-investment grade, historically, were truly
4 at the top end. So we are dealing with a conservative
5 high income investment. There is nothing untoward,
6 there is nothing wrong about that piece. It accurately
7 describes exactly what this fund was at the time.

8 And it's interesting, we talk about the fact
9 that, oh, this was talked about being high-yield and the
10 fact that it had -- and its risk components. What we do
11 have in evidence and what, in fact, Claimants' own
12 expert explained was at the time of this purchase, here
13 is a fund that was yielding about 12 percent as a
14 high-yield junk bond fund; but at the same time, it had
15 a standard deviation of approximately three, which means
16 that on average within one standard deviation per year
17 this fund was going to have a return, if it had a 12
18 percent average return, was going to return between 9
19 and 15 percent. Everyone acknowledges that a .03
20 standard deviation is significantly low in the industry.

21 And, in fact, one of the documents that you
22 have in our books is the Ibbotson data, and I would
23 encourage you to look at that. It shows average
24 standard deviations of various investments. During the
25 time frame of 2000 to 2004, that Ibbotson data shows us

1 that the standard corporate bond fund is going to have a
2 standard deviation of 8.4. So for someone to say, look,
3 this has a really low standard deviation compared to its
4 peers over the life of the fund, that is accurate. This
5 fund at the time truly demonstrated that it had
6 high-yield with what was, you know, the industry uses.
7 And even their expert identifies the way we show risks
8 is by looking at standard deviation. And the standard
9 deviation on these funds at the point of purchase and,
10 frankly, in the documents it shows even through '06,
11 were incredibly low. These funds were, in fact,
12 operating at a very, very low standard deviation, which
13 would indicate to folks -- again, that is a measure of
14 risk in the industry; it's something that we look at;
15 things that have low standard deviations are deemed to
16 be low risk. Compared to its peers and compared,
17 frankly, to almost even U.S. treasuries, if you look at
18 the Ibbotson data, this thing was incredibly low risk,
19 based on its history.

20 Did it have risks involved? Absolutely. Every
21 investment in the market has it. I don't think that
22 anyone here would dispute that if you invest in any type
23 of investment there is a potential for risk. But the
24 issues are, at the time that this man invested, the
25 history of these funds clearly indicated that they had

1 not demonstrated a significant amount of risk.

2 He then continued to buy aspects of these
3 funds, as we can see over time. And there were phone
4 calls. He made buys, he made sells. What is
5 interesting to note when we are talking about a
6 suitability claim is, as this Panel knows with regard to
7 suitability, we have to look at the investment
8 objectives of the fund versus the investment objectives
9 of the customer and do these two things meet. We have
10 to take into account their overall holdings and
11 everything else. Here is a gentleman, Dr. Diel, who had
12 all told about a million-five, a million-six in
13 investments in the market, when you take his Centaurus
14 funds, when you take -- actually, probably closer to
15 one-eight, when you take his MFS, when you take his
16 Vanguard. He is looking at about almost \$1.8 million
17 invested. Okay. Less than 10 percent of his investment
18 was invested in these funds, even if you look at the
19 Morgan Keegan holdings. At its top, no more than 15
20 percent was invested. So as a part of an overall
21 portfolio, even if you take out the fact that he wanted
22 something that was safe, he wanted something that was
23 income conservative, you have to look at an overall
24 portfolio. An investment of this as part of an overall
25 portfolio, he is okay. Even a conservative investor is

1 going to have a certain portion of his investment in
2 something that may have a little bit of a higher risk.

3 So the fact is, is when you look at the overall
4 investment, even if you discount everything that is in
5 these documents, that this man was willing to take risks
6 and all of that and you accept as true his mantra that
7 he said over and over again -- which I admit, every time
8 it was exactly the same. He sometimes said low risk,
9 income, diversified, conservative and then would say
10 diversified, low risk, income and conservative. But he
11 always said all four at the same time, every time. Even
12 if you accept all of that, this was a suitable
13 investment. This was a suitable investment in light of
14 his overall portfolio. So with regards to suitability,
15 I don't think if you look at what he has identified as
16 his investment objectives -- and, by the way, it's
17 curious to say he acknowledges the '99 statement was not
18 signed by him. He does not dispute that he did sign the
19 statement in '05, which set forth specifically that his
20 investment objectives were these four things, and he
21 signed off on it. So the fact of the matter is, it is
22 in the documentation. He didn't say, oh, I didn't want
23 these. I mean, you can say all you want that Stelly
24 said all four had to be marked. But with all due
25 respect, if he didn't agree with it, he could have

1 marked it and said no. He didn't send it back. He
2 signed it. We then sent it back to him with a letter
3 and said, Hey, look, if these aren't your objectives,
4 tell us. We need to have accurate information. But
5 here is what we have and here is what you have signed as
6 your investment objectives in 2005. Did he send it back
7 to us and say, no, that wasn't my objective? He did
8 not. The fact of the matter is, he was well aware of
9 that.

10 Likewise, in the account statements every month
11 starting in '04 -- we didn't go into this, but starting
12 I think in '03 or '04, Morgan Keegan started to add the
13 investment objectives at the bottom of every monthly
14 page. These are in evidence. And it says, "Our records
15 -- this example is October 1 of 2004 to October 31 of
16 2004. "Our records currently reflect your investment
17 objectives as, one, income; two, growth; three,
18 speculation. Should any changes need to be made, please
19 contact your financial advisor so that we can update our
20 records." Was there ever any indication that a call was
21 ever made to do that? No.

22 So, effectively, what we have here is someone
23 who had an investment that clearly was suitable. It's
24 interesting, their own expert never even talked to
25 Dr. Diel. Their own expert never even said, this was an

1 unsuitable investment. He never identified this as
2 being unsuitable. And as the Panel is aware, he
3 couldn't without talking to Dr. Diel. Part of
4 determining whether or not an investment is suitable for
5 an investor is to get what that investor's objectives
6 are, to get an understanding of who they are. So at the
7 time these recommendations were made by Wade Randolph,
8 it is clear that these investments were suitable.

9 And, likewise, with regards to -- it's funny
10 with regard to the misrepresentation claim, and I'm
11 going to bounce it around a little bit. But one of the
12 things that opposing counsel has commented on and has
13 been critical of the Panel is being cut off with regards
14 to various issues with regards to sales literature in
15 '06 and '07 that was produced. Well, guess what, one of
16 the things that we talked about, and the Panel probably
17 rightly so when I objected on reliance grounds at that
18 point in time said, well, we haven't heard from Dr. Diel
19 yet. We don't know what he actually looked at. Well,
20 guess what, now we know. There has not been a claim
21 that Dr. Diel looked at any of this literature which
22 came out in '06, '07 or '08. You know, we talked about
23 the ones that said growth and income on the sales
24 literature. Well, guess what, he never saw it. The one
25 that he saw was a different piece. Even if it was on

1 there, so what. I think that the fact is, is that that
2 would meet his objectives. But the fact is that
3 literature from '06 and '07 was never reviewed by him,
4 so there is no reliance.

5 Likewise, the criticism of not getting certain
6 documents with regards to, you know, oral statements
7 made by Mr. Kelsoe on phone calls. The fact is, he
8 acknowledges he never spoke to a Morgan Keegan broker,
9 so there can be no reliance on those statements. So the
10 fact that there is going to be criticism at some point
11 of any failure for these documents to be included or not
12 being allowed to go into this, it's all a red herring
13 because none of it is relevant based on the claims that
14 are made in this case and based on the fact that Dr.
15 Diel said he never even considered any of that, or he
16 certainly didn't testify that he did consider any of
17 that.

18 And I would also encourage you to look at the
19 Centaurus statements. It's funny that Dr. Diel says,
20 oh, well, at Morgan Keegan I told those guys I wanted to
21 be -- I'm sorry -- low risk, income, diversified,
22 conservative. Mantra. Did I tell that to anybody else?
23 Well, no, I didn't tell it to Centaurus, I didn't tell
24 it to Merrill Lynch, I didn't -- you know, when I
25 invested in the Vanguard 500 fund -- which, by the way,

1 standard deviation on a 500 fund is going to be about
2 17, 18 compared to 3 on the Morgan Keegan funds. You
3 know, six times the risk. Did I tell these folks that I
4 wanted safety or, excuse me, low risk, income,
5 diversified, conservative? No. It is inconceivable,
6 frankly, for this Panel to accept that it was only to
7 Wade Randolph that he would have made these
8 recommendations and he made them only when he was at
9 Morgan Keegan.

10 And, frankly, it's also inconsistent with what
11 he was using this account for. He wanted this account
12 to grow. If you look at what -- he never took any type
13 of income off of this. He never took -- it's not a
14 situation where you have -- and I understand there is
15 conversation about him being a disabled dentist and not
16 working anymore. But the fact is, is he was living off
17 of his disability, his social security, his wife's
18 salary and everything else. He never took income from
19 this account. It's not a situation where you have
20 someone who was critical of that. He wanted these
21 investments to grow because he never took anything out
22 of them.

23 Then we get to the unfortunate death of Wade
24 Randolph, and it is truly a tragedy. But the fact of
25 the matter is, at that point in time Richard Preis sent

1 him a letter and said, Hey, if you need any advice, give
2 me a call. Richard said I didn't really feel -- you
3 know, he was a dentist, I knew he was doing his own
4 thing. And the fact is, he was. He was doing his own
5 thing. He was talking to the two Bennetts. He had both
6 his friend Jeff Bennett that he was getting some advice
7 from. He was also getting advice from his broker, the
8 other Mr. Bennett.

9 And then we get into the issue of the
10 responsibilities and the fiduciary duties that Morgan
11 Keegan has. And, again, I will encourage the Panel -- I
12 don't normally encourage a Panel to go back and read
13 someone's statement of claims so many times, but I'm
14 going to encourage you to do that. I'm going to
15 encourage you to look at Page 13 of the statement of
16 claim where they identify the specific duties that are
17 owed by a broker to his customer. Guess what, did they
18 identify -- and they are basically citing the Lieb
19 versus Getts case, or Lieb versus Merrill Lynch case.
20 And it's in here. It sets forth the six duties. And,
21 guess what, it's not in there. It's not in there.
22 These are the heightened duties that they are talking
23 about.

24 I would encourage you to look at the law that
25 is cited in our pre-hearing brief. And I think the

1 Panel probably is well aware of the Kwiatkowski case
2 that truly is the pinnacle of what the obligations are
3 in a non-discretionary account. And the duties in a
4 non-discretionary account are just that essentially
5 these duties at the time of sale; at the time of sale
6 you have an obligation, but you don't have an ongoing
7 obligation. Not only is it set forth in the law, but
8 it's also set forth in the contract that we had with Dr.
9 Diel. It specifically says, Dr. Diel, going forward
10 once we make a recommendation, we are not going to
11 follow up on that. If you are going to tell me that,
12 you know -- unless it's a discretionary account, which
13 he acknowledges he didn't have, we do not have this
14 duty. It is in our contract. It's the law. It's even
15 set forth in their statement of claim that there is no
16 such obligation because they set forth what the duties
17 are and they admit -- they set them forth and it's not
18 there.

19 So I would encourage you to look to the law
20 that we have cited, look to their statement of claim and
21 look to the contract that sets forth exactly what those
22 obligations are. But the fact of the matter is, we had
23 no responsibility. And even still, what was Dr. Diel
24 doing. Dr. Diel was getting -- he didn't need -- the
25 reason he didn't call Mr. Preis is because he was

1 getting his advice from other sources. He was getting
2 it from the two Bennetts. He testified to the fact
3 that, you know, I was talking to Mr. Bennett and, you
4 know, we sort of said, well, things have gone down in
5 the past, maybe this one will go down. He knew. He had
6 invested in the past. He knew things could go up,
7 things could go down. He was watching this decline. He
8 understood at that point -- you can't put your head in
9 the sand and say, oh, I wanted safe, low risk, income,
10 diversified -- you know, all of this stuff and say,
11 well, when it went down, I didn't realize it wasn't low
12 risk. You know, things don't -- as things are going
13 down, he was well aware at that point, if he wasn't
14 already. And we certainly think that the reams of
15 evidence demonstrate that he was at that point in time
16 already well cognizant of the risks of investing in
17 these funds. But the fact of the matter is, is clearly
18 at that point he had firsthand knowledge that these
19 things were going down. Did he sell? No, he did not
20 sell. He held on thinking they would come back up, as a
21 lot of investors always do. But he never asked Morgan
22 Keegan for any opinions on that. And we had no duty to
23 give some if he did not ask us.

24 The other thing I want to point out, which is
25 pretty interesting about the statement of claim. And,

1 again, I would encourage the Panel to look at this as
2 well. There has been a request here for attorneys fees
3 and expenses. And as this Panel is aware, Louisiana,
4 just like all of the other states in the union, most of
5 them anyway, follow the American law, which effectively
6 means that unless there is a statute or a contract that
7 authorizes attorneys fees, they are not awarded; each
8 party is to bear their own costs. Their only basis for
9 attorneys fees in this case is a Louisiana Securities
10 Act. I will argue that there is no violation of that
11 act because it's basically what I talked about with
12 regard to misrepresentation and suppression before. But
13 I don't even have to get there, and the Panel doesn't
14 even have to get there. Take a look at the time of
15 claim. Take a look at Page 17 where it says, "Morgan
16 Keegan is liable for violations of the Louisiana
17 Securities Act by reasons of the manner above described.
18 Dr. Diel is entitled to recover on all of his damages,
19 including reasonable attorneys fees, on any purchases
20 that occurred within two years after March 10, 2006,
21 based on violations of the Louisiana Act." They filed
22 their statement of claim on March 9 of 2008. They are
23 basically acknowledging that that act -- and they set
24 forth that they are only asking for the Louisiana Act to
25 apply to all purchases after March 10. Guess what,

1 there were none.

2 So, effectively, by their own request of how
3 they are identifying how they are making a claim under
4 the Louisiana Act, there were no purchases after the
5 date they set forth. So not only did they not meet any
6 claim under the Louisiana Act; but by the way they pled
7 it, they did not plead a claim under the Louisiana Act
8 for any purchases because there were none after March
9 10, 2006. There were no representations made after that
10 point. The only additional purchases had to do with
11 re-investing of dividends, which, again, was a decision
12 made back in 2002, 2003, 2004. No additional agreements
13 to purchase were made after March 10 of 2006. So they
14 do not have a right to those attorneys fees. They do
15 not have a right to their expenses.

16 Now, we on the other hand do have a contract
17 that sets forth that we are -- our contract, as we set
18 forth, and Dr. Diel signed and is in entry, we do have
19 the right to our attorneys fees. We have capped those
20 fees, effectively, at \$25,000, but we believe that those
21 should be awarded as well as any FINRA fees for these
22 hearings themselves. And, frankly, you know, what we
23 have had here is for three days we have had an
24 investigation into a lot of issues relating to MAM, a
25 lot of issues that may be pertinent in other litigation

1 that is pending out there, but it was not pertinent in
2 this case. You know, the fact is we wanted to get into
3 all of these things that happened in 2005, 2006, 2007
4 with regards to -- or certainly 2006, 2007 with regard
5 to what sales literature was out there. That was a big
6 push. Guess what, he never saw any of it. It's clear
7 that all of that, with all due respect, was a ruse for
8 some other purpose. We have been put through -- and
9 Mr. Kelsoe, with all due respect, the man's father was
10 in the hospital. He had open heart surgery. He had two
11 strokes. We didn't hide him. We brought him here. We
12 let them ask questions if they were going to be relevant
13 questions. And the Panel allowed them to ask, with all
14 due respect, in my opinion, more questions than you
15 should have, but that is the way these things go
16 sometimes. But at that point in time, he was put
17 through that. All of these witnesses have been asked
18 and put through a lot for something unrelated to this
19 claim.

20 I'm sympathetic to Dr. Diel. It's difficult
21 for me to ask for attorneys fees in this case, but in
22 light of, frankly, what has happened here, we believe
23 that they are justified to be awarded pursuant to the
24 contract. And keep in mind, the contract sets forth
25 that if we succeed, we get our attorneys fees. There is

1 nothing illegal about having a one-sided attorneys fees
2 provision that we can get them. There is nothing that
3 sets forth in that contract that they can get them.
4 Only we can get them if we are successful. So they have
5 no basis for that.

6 Let's talk about the damages. And we have
7 talked about attorneys fees, we have talked about the
8 fact that they are not entitled to those and they are
9 not entitled to their expenses. But let's talk about
10 the actual 170, what he has lost. With all due respect,
11 at the time of the filing of the statement of claim, his
12 damages were -- he didn't have damages, but his losses
13 on these funds were \$40,000. The documents set forth
14 that. The fact is, is at that point in time when he
15 filed his statement of claim, he had losses on his
16 investments in these funds of \$40,000. He had -- he
17 says 170, but that includes two things. One, things
18 that happened after the filing of the statement of
19 claim. Clearly, if you are going to say, and I don't
20 think the Panel can, that there was any type of
21 misrepresentation or suppression. But, clearly, he knew
22 it at the point of sale following the statement of
23 claim. He probably even knew it before then, if,
24 quote/unquote, it happened. We can't have a situation
25 where heads I win and tails you lose. There is clearly

1 case law out there that says you can't do that. You
2 can't hold onto something and say, well, if it goes up,
3 I'll take the profits; but if it goes down, you are
4 responsible for it. That is, in essence, what he is
5 trying to do here.

6 The other thing is, you can't say -- you can't
7 exclude all of the income that has been provided here.
8 The fact is, is this income that was provided is because
9 it's a high-yield income. The income was significant.
10 It was significantly higher. It was 12, 13, sometimes
11 15 percent some of these years because these were high
12 income funds. And it's sort of like saying that I'm
13 going to, you know, invest in a bond that has \$100 price
14 but it has a 12 percent yield, I'm going to buy it at
15 104 because it's worth it and then say I lost \$4,000.
16 No, you made all of that interest. That is why you are
17 investing in these securities.

18 I want to touch briefly on -- you know, we
19 heard from one expert, and that was Mr. Evans. And,
20 effectively what he said was, is there was leverage in
21 these funds and there were asset-backed and
22 mortgage-backed securities that caused the losses. That
23 effectively was his testimony. Well, guess what,
24 everything we ever put out says that there was going to
25 be leverage in these funds. Everything we put out says

1 that there was going to be asset-backed and
2 mortgage-backed securities. The annual and semi-annual
3 statements talk about those things. The annual and
4 semi-annual reports talk about the actual investments
5 and show that there is asset-backed and mortgage-backed
6 securities. So there is nothing that in any way could
7 be used to say that that means anything. It's
8 irrelevant because it was all disclosed.

9 And, you know, frankly, at the end of the day,
10 we have had a lot of hoopla about the relationship
11 between Morgan Keegan and Morgan Asset Management. And
12 I was getting harassed yesterday because I probably said
13 "so what" too many times, but I'm going to say it one
14 last time. So what about the relationship; if it's
15 close, if it's not close. The fact of the matter is,
16 when you get down to the claims in this case, when you
17 get down to was the investment suitable, whatever the
18 relationship between the parties, the answer to that
19 question remains the same. And it was a suitable
20 investment. If you get back to the issue of was this
21 fund misrepresented at the point in time of sale, it
22 doesn't matter what the relationship was. It doesn't
23 matter anything about Mr. Kelsoe or anything else. He
24 wasn't there at that point in time. The fact of the
25 matter is, it was represented correctly and it was

1 represented for someone who wanted to be in that type of
2 investment, who wanted to get higher income.

3 The same thing on the issue of suppression. It
4 doesn't matter all of these other issues. It's
5 irrelevant. It may be relevant for other cases. It may
6 be relevant for the class actions, but it's not -- and
7 we will issue -- we will deal with those issues then and
8 we will make arguments then. But for this case, for
9 this case and for Dr. Diel with his case against Morgan
10 Keegan, it is not relevant. This was not misrepresented
11 to him. Nothing was suppressed from him. And it was,
12 frankly, a suitable investment in light of his
13 investment objectives, his desires, everything else and
14 the objectives of this fund and as part of an overall
15 portfolio. There is no way that this could be deemed to
16 be an unsuitable investment. And, frankly, no one on
17 our side has even really talked about it being such,
18 other than they have argued it.

19 So at the end of the day, you know, here we
20 have an individual, Dr. Diel, who came to Morgan Keegan
21 and made \$289,000 on his overall investments. Some of
22 his investments went down, but the majority of his
23 investments and the overall portfolio went up, and that
24 is really -- when you are dealing with suitability, you
25 want to look at something in the context of the overall

1 portfolio. He had a pretty good run at Morgan Keegan.
2 He made some good money. And that is what, at the end
3 of the day, Dr. Diel, with all due respect, should be
4 very happy that Wade Randolph did what he did. And he
5 said at the end, yes, I was with Wade Randolph because I
6 wanted to make money and he did make me money. Well, he
7 got the benefit of the bargain. He made the money that
8 he wanted to make.

9 So with that, I thank the Panel again for their
10 time and would ask that the Panel at the end of the day
11 make an award in this case that holds that there is no
12 recovery for Dr. Diel. While we are sympathetic that
13 these funds lost money, the fact that something loses
14 money does not -- that is why he said he was suing, by
15 the way. I'm suing because I lost money. Well, guess
16 what, sometimes things go up in the market and sometimes
17 things go down. And Mr. Kelsoe -- no one obviously
18 wanted these funds to go down; but, unfortunately, due
19 to market conditions and everything else that is going
20 on in the credit markets, it had an effect on these
21 funds and they declined. That is unfortunate. It is
22 not grounds for a claim. So we would ask that no award
23 be issued, any monetary award be issued to Dr. Diel.
24 And based on the circumstances of what we have gone
25 through here, I would ask of an award of \$25,000 in

1 attorneys fees and costs for Morgan Keegan pursuant to
2 the contract. And I would ask for the fees of this
3 hearing be charged as well to Claimants. Thank you.

4 MR. KELLEY:

5 Okay. Mr. Caruso.

6 MR. CARUSO:

7 Thank you. Mr. Fruin talked about our
8 statement of claim and how we had nothing in there about
9 the duty to monitor the ongoing performance of
10 Dr. Diel's account. He directed you to Page 13, he
11 directed you to Page 12. If you look on Page 14 of our
12 statement of claim, there is the following language, "In
13 addition to its fraud in inducing Dr. Diel to purchase
14 the funds, Morgan Keegan's misconduct,
15 misrepresentations and omissions in inducing Dr. Diel to
16 continue to hold and not to sell the funds violated the
17 rules and the laws." Continuing to hold. Continuing to
18 hold. Dr. Diel didn't ask Morgan Keegan to put him on
19 the tip of a nuclear missile. He asked them for income.

20 And while defense counsel says mantra, mantra,
21 mantra; think about the four funds that he got into at
22 issue in this case. Select High Income, Multi-Sector
23 High Income, Advantaged Income and the regular high
24 income. High income. Every one, income, income,
25 income, income. That was his investing mandate. And

1 what happened, he had funds that collectively lost 75,
2 80 percent of their value. 75 to 80 percent of their
3 value. And nobody had the decency to even pick up the
4 phone and call him and tell him what was going on with
5 his funds. Now, I know you gentlemen probably all have
6 brokerage accounts. Mr. Kelley, I know that you have an
7 account with Regions. If something is blowing up in
8 your account, would you expect a phone call from your
9 broker. I would. 80 percent. The funds got decimated
10 and nobody called him. How do you explain that.

11 They talk about, well, he got a prospectus.
12 And if you are going to look at any of our exhibits
13 again as you deliberate, I would ask you to look at
14 Exhibit 7 in the black binder, the Kelsoe binder.
15 Notice to Members from '94, 1994. And it states as
16 follows, "Members are also advised that although the
17 prospectus and sales material of a fund include
18 disclosures on many matters, oral representations by
19 sales personnel that contradict the disclosures in the
20 prospectus or sales literature may nullify the effect of
21 the written disclosures and may make the member liable."
22 Think about that. You can give somebody a prospectus.
23 But if you lie to them, it doesn't negate the lie.

24 I would ask you to look at my Exhibit 8, Notice
25 to Members 9580. Fourteen years ago the NASD was

1 reminding people that brokerage firms must familiarize
2 themselves with a fund's investment objective, portfolio
3 techniques and policies as noted in the prospectus; so
4 the broker has to know those. And they should convey
5 such information to investors. Okay. Broker has the
6 duty to go through the information, call you up and say,
7 Mr. Upton, I'm going to put you into this fund, here is
8 what you need to know. Aside from the fact that the
9 prospectus gets mailed to Dr. Diel the day after the buy
10 is done, the day after. By the time he gets the
11 prospectus, we are over and done with. Think about
12 that.

13 If you look at my Exhibit 9, Notice to Members
14 04-30. Right in the middle of Dr. Diel's account with
15 Morgan Keegan, NASD puts out another notice to members
16 setting forth their standards for all brokerage firms,
17 including Morgan Keegan. And in the discussion on the
18 fourth page of that notice to members is the following:
19 "NASD reminds firms that simply providing a prospectus
20 does not cure unfair or unbalanced sales or promotional
21 materials, whether prepared by the firm or the issuer."
22 Or the issuer. Think about that notice to members.
23 It's not what we are saying, it's not what they are
24 saying, it's the standard in the securities industry.
25 They talk about his investment objective was

1 growth. And if you remember when Mr. Preis was here, he
2 was asked about what Dr. Diel's investment objectives
3 were. And this is on Page 126 of the transcript, and I
4 know you don't have the transcript yet. Question:
5 "What are his investment objectives?" Answer: "To make
6 money." Question: "Okay. What else?" Answer: "That
7 is about it. I mean, that is why people have brokers."
8 Saying you want growth doesn't mean you want to gamble
9 your money away. Mr. Preis himself said it. Why do
10 people have brokers; to make money. I have never opened
11 an account to lose money. Chairman Kelley, have you
12 ever opened an account where your objective was to lose
13 money? No. Everybody wants to make money.

14 And then we get to the middle of 2007, and in
15 the middle of the night there is a divorce. Morgan
16 Keegan says we are done with these funds. We are not
17 selling them. They are off of our recommended list.
18 There is a divorce in the middle of the night. Does
19 anybody notify the clients? And it's not just Dr. Diel.
20 Think about the thousands of clients who were in that
21 fund. Would you want to know that your brokerage firm
22 that initially told you this thing is the best thing
23 since sliced bread now has washed their hands of it.
24 Decency. Would you want that phone call? Nobody did
25 it.

1 Think about Ms. Stelly's testimony on Page 74
2 of the transcript. Question: "Ms. Stelly, did you
3 become aware in 2007 that the Morgan Keegan bond funds
4 were starting to decline in value?" Answer: "Yes,
5 through conversations." Question: "From conversations
6 with whom?" Answer: "The office, because the brokers
7 were so upset the funds were down." Morgan Keegan
8 brokers. They are upset the funds are down. Does
9 anybody get on the phone, put a dime even into the
10 phone, call Dr. Diel and say, Hey, Doc, you ought to
11 know there are bad things going on. Nobody does it.
12 That is not right. It's not decent. And it's not what
13 should have happened.

14 Quickly think about the people who testified
15 here and why did we have to bring these people in.
16 Let's begin with Mr. Kelsoe. We tried to get certain
17 documents through discovery. We were not successful.
18 We understood about his dad. It was after we asked for
19 the subpoena. We said we will work with you on the
20 timing. If it works this week, great. If not, we will
21 come back. It isn't that we just wanted to bring him
22 here to build up his flyer miles. He was the brain of
23 this operation. And what did he say? He is licensed at
24 Morgan Keegan, until he gave up his license. He
25 received a W-2 from Morgan Keegan. He participated in

1 conference calls with Morgan Keegan brokers. And why?
2 Why? And his testimony is, he was asked to do so by
3 Morgan Keegan corporate communications. The marketing
4 materials he testified they all came -- every piece of
5 marketing material for his fund came from Morgan Keegan.
6 That is at Page 116 of the transcript. And then I took
7 him through Exhibit 13 to show the connection between
8 these funds. Morgan Keegan did all of the accounting
9 services. They did all of the record-keeping. They did
10 the pricing. They did the compliance. And, finally,
11 Morgan Keegan is the one who gave Kelsoe his portfolio
12 management reports; every day they went to his
13 assistant, Mary. Morgan Keegan did that. But there is
14 no connection here. Two totally separate entities.

15 Then we had Mr. Stringer in. Decent enough
16 fellow, and I think he gave it to you straight. Morgan
17 Keegan employee. Did due diligence. Morgan Keegan, the
18 marketing materials. He arrives there in 2005 and
19 immediately is concerned about the appearance of bias --
20 that is at Page 194. And he also testifies that in
21 August of '07 when it comes off the recommended list,
22 nobody told the customers. Nobody. This morning we had
23 Ms. Wood. Again, Morgan Keegan employee. The only
24 person -- the only person -- doing any compliance on
25 these funds was Ms. Wood. The only person. And she is

1 a Morgan Keegan employee. Morgan Keegan was the
2 underwriter, Morgan Keegan was the main selling agent
3 for these funds. These were their products. And I
4 think it's unseemly and disingenuous and dishonest for
5 Morgan Keegan to now claim, well, wait a minute, that is
6 a different company, we didn't have any involvement in
7 that. Maybe this Panel will buy that argument. I don't
8 know. Legally I don't think they can do it. And I
9 really hope that you think about it.

10 In my binder, again, Tab 2, as you are
11 considering this argument, I would ask you to take a
12 look at Mr. Kelsoe's CRD report, and specifically on
13 Page 7. And, again, the page numbers are on the bottom
14 right-hand corner. This is where Mr. Kelsoe gets to put
15 his own description in about different arbitrations that
16 have been filed against him. And he describes himself
17 as an officer of an affiliated mutual fund, an
18 affiliated fund. What does that mean? It's not a
19 totally separate and distinct entity. Not at all.

20 And, finally, as you are considering that
21 fiction -- again, I'm only asking you to take one last
22 look. Don't be in a hurry to get that award form into
23 Boca today. It can be done later. But think about this
24 exhibit as you consider this fiction. The orange book,
25 Tab 6, the Regions form 10-K. Regions Financial form

1 10-K. And if you look at the second page, the second
2 page of that exhibit at Tab 6. Are you there,
3 Mr. Upton?

4 MR. UPTON:

5 I'm in Tab 6.

6 MR. CARUSO:

7 On the second page.

8 MR. UPTON:

9 I'm looking at Page 36.

10 MR. CARUSO:

11 Yes, sir. If you look at that second to
12 last paragraph from the bottom, it reads as follows:
13 "Morgan Keegan's pre-tax income was negatively affected
14 during 2007 by 42.8 million in losses on investments in
15 two open-ended mutual funds managed by" -- what is the
16 answer? Morgan Keegan. It doesn't say Morgan Asset
17 Management. Now, either these fellows committed fraud
18 in their securities filings, or you can believe what
19 they filed here. And is it a typo? Well, if you turn
20 to the next page, what does it say again? Is that your
21 final answer? Yes, it is. Morgan Keegan mutual funds.
22 Please don't buy this fiction that it was Morgan Asset
23 Management. That is a dance that doesn't have any music
24 and it must be shut down. Dr. Diel deserves better than
25 what he has had to sit through for three days. And to

1 sit here and make him pay the price either for my own
2 representation of him -- because I defend my clients and
3 represent them to the death. It is not what should be
4 done. It would not be fair. It would not be decent.
5 Thank you.

6 MR. KELLEY:

7 Okay. I think that the claims have been
8 initiated by the parties. We have all of the
9 information needed to accurately and completely
10 calculate the claims. Have we not? And we don't have
11 -- I believe they entered it.

12 MR. DOMBALAGIAN:

13 I think you have given us the damage of
14 summary, right, so we don't need to go through that
15 item.

16 MR. KELLEY:

17 Okay. And then inquiries prior to closing.
18 Do the parties have any other issues or objections that
19 you would like to raise or that you have not previously
20 raised?

21 MR. MADDOX:

22 Nothing from the Claimant.

23 MR. FRUIN:

24 Nothing from Respondent.

25 MR. DOMBALAGIAN:

1 Can I make one disclosure. I hate to do
2 this, but I have to do it. Respondent referenced a
3 case, De Kwiatkowski versus Bear Stearns. I just want
4 to note for the record I was on brief for one of the
5 trade associations that submitted an amicus brief in
6 that case. It does not affect my partiality. I just
7 think in fairness I should note.

8 MR. CARUSO:

9 Can we get disclosure of what trade
10 association?

11 MR. DOMBALAGIAN:

12 I can probably guess. I think at the time
13 it was the Bond Market Association, I think the Futures
14 Industry Association. I can't remember who else was on
15 brief. You can look it up in West Law. I assume it's
16 publicly available. Again, this was many years ago.
17 But since the case name was mentioned in the closing
18 argument, I felt it's only fair to note that I was
19 involved in that case when I was at Cleary Gottlieb.

20 MR. FRUIN:

21 I don't think the disclosure was necessary,
22 but thank you.

23 MR. DOMBALAGIAN:

24 You can look it up in West Law. It's
25 there. So I'm just telling you it's there in West Law

1 if you want to look it up.

2 MR. KELLEY:

3 Okay. The decision will be forwarded to
4 the parties and/or counsel. In order to expedite the
5 delivery of the Panel's decision to parties, the Panel
6 may either execute a handwritten copy of the award or
7 each arbitrator may execute a counter party copy of the
8 award. Party evaluations, as I mentioned in the
9 beginning of the case, I asked each party or
10 representative to complete an evaluation of this
11 arbitration. Your participation, while strictly
12 voluntary, would greatly assist FINRA to dispute
13 resolutions in an ongoing effort to improve the
14 arbitration process. You can find the evaluation form
15 at FINRA.org under arbitration evaluation. If you do
16 not have internet access or have difficulty completing
17 an evaluation online, please ask your case administrator
18 to provide a paper version and an evaluation will be
19 mailed.

20 FINRA is not responsible to secure any or
21 dispose of any documents left by the Panel through
22 parties following the proceeding. The hearing facility
23 will dispose of all remaining materials in its usual
24 manner. If a party wishes to retain secure control,
25 they must take them when they are leaving. And the

1 record remains open until the Panel arrives at a
2 decision or the Panel determines it's closed. No party
3 will contact any member of this arbitration Panel
4 directly. All communications are to be directed to
5 staff for each side of the case. And I request all
6 parties leave the room at the same time.

7 (Whereupon, the proceedings were concluded.)

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I, LAINEY B. MARGAVIO, Certified Court

Reporter, in and for the State of Louisiana, the

officer, as defined in Rule 28 of the Federal Rules of

Civil Procedure and/or Article 1434 (B) of the Louisiana

Code of Civil Procedure, before whom this sworn

testimony was taken, do hereby state on the Record;

That due to the interaction in the

spontaneous discourse of this proceeding, dashes (--)

have been used to indicate pauses, changes in thought,

and/or talkovers; that same is the proper method for a

Court Reporter's transcription or proceeding, and that

dashes (--) do not indicate that words or phrases have

been left out of this transcript; that any words and/or

names which could not be verified through reference

material have been denoted with the phrase "spelled

phonetically."

Lainey B. Margavio, CCR

Certified Court Reporter

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C E R T I F I C A T E

I, LAINEY B. MARGAVIO, Certified Court Reporter, in and for the State of Louisiana, do hereby certify that the above-named witnesses, after having been first duly sworn by me to testify to the truth, did testify as hereinabove set forth;

That the testimony was reported by me in shorthand and transcribed under my personal direction and supervision, and is a true and correct transcript, to the best of my ability and understanding;

That I am not of counsel, not related to counsel or the parties hereto, and not in any way interested in the outcome of this suit.

Lainey B. Margavio, CCR
Certified Court Reporter

