AMERICAN ARBITRATION ASSOCIATION

No. 70 Y 181 00364 03
Valerie Biggs Sarofim
vs.
Trust Company of the West

FINAL AWARD

This case is a dispute between Claimant Valerie Biggs Sarofim (hereinafter, "Claimant" and Trust Company of the West, Inc. (hereinafter, "TCW"). Claimant initiated the matter by the filing of her "Original Arbitration Demand and Statement of Claim" dated May 20, 2003. Respondent TCW filed its "Answering Statement: dated June 17, 2003, and its "Supplemental Answer to Statement of Claim: dated January 15, 2004.

Throughout these proceedings Claimant was represented by Justin M Campbell, III and John L. Dagley, Campbell, Harrison & Dagley, L.L.P. Respondent TCW was represented by Linda Brooks and Judith A. Meyer, Ogden, Gibson, White, Brooks & Longoria, L.L.P.

Following pre-hearing conferences, scheduling orders were issued providing for a discovery period and the setting of an evidentiary hearing. The parties filed extensive Pre-Hearing Briefs setting forth their respective positions. The Evidentiary Hearing commenced July 12, 2004, at the offices of the American Arbitration Association in Houston, Texas, and continued for a total of five days, July 12 - 16, 2004. At the end of the presentation of witnesses, closing arguments were heard. It was stipulated by the parties that the matter of attorneys' fees and expenses would be handled by affidavits and briefs, which were subsequently filed with the Panel. The hearing was declared closed on July 30, 2004, upon receipt of the last filing.

Although the hearing was transcribed by a court reporter, the parties elected not to have a transcript prepared.

The parties submitted a joint set of exhibits. Exhibits 1 through 241, 275, 277-281

were admitted by stipulation. In addition, other exhibits were offered and admitted during the course of the hearings. The Panel also received certain demonstrative and illustrative exhibits. All exhibits referred to in the testimony were admitted.

After opening arguments, Claimant presented her case through the following witnesses: Valerie Biggs Sarofim, Claimant; Harold Williams, a professional financial advisor (testifying by telephone by agreement); Robert J. Piro, an attorney; William E. Fender, a professional financial advisor and expert witness for Claimant. Claimant also called as an adverse witness, Robert M. Hanisee, vice-president of TCW.

Respondent presented its case through the following witnesses: Robert M. Hanisee (on cross); Vicky L. Bull, vice-president of TCW; Joseph Magpayo, administrative officer with TCW; Michael D. Weiner, professional financial advisor and expert witness for Respondent.

SUMMARY OF THE DISPUTE

On May 23, 2000, Claimant talked with Mr. Joseph Magpayo of TCW about investing for her approximately $12,000,000 which she was receiving in a divorce settlement. She said she wanted to invest in "Bickerstaff". There is a dispute as to whether this was a request, a suggestion or a directive. The "Bickerstaff" investment, also known as the Concentrated Core Portfolio, was one of about fifty investment products offered by TCW for sale to clients. In addition to offering these products to institutional customers (TCW's primary business), TCW offered financial advisory services to high net worth individuals through its Private Client Services group ("PCS"). The size of Claimant's proposed investment placed her in the middle range of TCW's

individual clients.

Claimant transferred cash and securities to TCW, beginning July 13, 2000, and into August. By mid-August, 2000, TCW had received her assets and they were fully invested in TCW products. At August 30, 2000, her account consisted of the following: the Concentrated Core Portfolio, $10,447,345; and the Galileo High Yield Bond Fund, $2,238,321, for a combined portfolio value of $12,685,666.

The Concentrated Core Portfolio consists of stocks of large capitalization companies chosen with a growth bias. At any one time 25 to 40 companies were included in this portfolio, with the exact share holdings in each company being determined from time to time by the Portfolio Manager, Glen Bickerstaff. This investment for Claimant was not a mutual fund of these stocks; because of the size of her investment, Claimant had a separate portfolio of the individual shares of these companies (reflecting the same relative make-up as in the Concentrated Core Portfolio as a whole. Claimant's August 31, 2000 statement shows her holding shares in 22 of these companies. The number of her shares coming from each company was determined by Mr. Bickerstaff's team in accordance with the strategy at the time.

On the other hand, Claimant's holdings in the Galileo High Yield Bond Fund were in the form of an interest in a mutual fund of bonds (admitted to be "junk bonds").

(The Concentrated Core "Strategy" or "Portfolio" or "Fund" will hereafter be referred to as "ConcCore" and the Galileo High Yield Bond Fund will be referred to as "HYB".)

Between May 23, 2000 and May 22, 2003, the market value of Claimant's portfolio fell almost $6,000,000. Because of this market loss, together with withdrawals Claimant had made from the account, there was only $2,393,634 to be transferred to her on May 22, 2003, when she closed the TCW account.

The Panel must resolve this basic issue: Was TCW responsible for the loss sustained by Claimant?

SUMMARY OF CLAIMANT'S POSITION

Claimant says that TCW, as her financial advisor, had a fiduciary duty to make a *suitable* investment for Claimant (a term of art in investment and securities law); that TCW breached this duty by investing all of her money in ConcCore and HYB; that had TCW made a *suitable* investment for her — one properly *diversified* (another word of art) - she would have had only a slight loss during the intense bear market of 2000-2003; and that TCW is therefore responsible for the loss resulting from such breach, measured by the amount of that market loss in her portfolio.

Claimant has asserted breaches of other fiduciary duties related to the breach of the obligation to make a suitable investment, particularly TCW's duty to educate themselves about Claimant's needs and the duty to educate Claimant about the risks of any particular investment strategy and investment products. In general, Claimant asserts a continuous breach of a financial advisor's duties throughout the relationship (May 23, 2000 to May 22, 2003).

SUMMARY OF RESPONDENT'S POSITION

TCW's position in its Pre-hearing Brief (i.e., that TCW is not in the business of being a personal advisor with control over a client's full assets) was not consistent with its position during the hearing. During the hearing, TCW acknowledged that it had a fiduciary relationship with the Claimant, but asserted that it was a *limited* fiduciary

relationship, and accordingly, the fiduciary duties were likewise *limited*.

Based upon its witnesses, TCW is arguing that its duties were limited by the *control* which Claimant retained and exercised over her TCW account. TCW argues that Claimant was in *control* of the account at all times, not TCW (again, a word of art in the investment and securities law). Because of this, TCW only had a limited duty to place Claimant in a *suitable* investment. Once TCW had educated her on the risks involved, and advised her on TCW's recommendations, she was free to make her own decisions, and TCW was entitled to assist her in those decisions by selling her TCW's investment products: ConcCore and HYB.

Initially TCW seemed to be saying it acted on behalf of Claimant as a "broker-dealer" whose duty was limited to faithfully executing the orders it was given by the client. TCW did, however, acknowledge that it was in the "financial advisory" business with the Private Client Services group (the "PCS"), and that Claimant was a client of this group and asked for and received its services. Again, TCW is saying that those services were limited to assisting Claimant in the execution of her decisions. TCW acknowledges a two-fold duty of education: *first*, to educate themselves on Claimant, her needs, her total financial situation, and especially her tolerance for risk; and *second*, to educate the Claimant on the risks of investing with TCW in any particular strategy. TCW argues that it adequately performed both these education tasks and thereby discharged its fiduciary duties to Claimant. Seeing no reason at that point (after the education process) to refuse to execute her decision to invest as she did, that investment thereby became and was *suitable* for Claimant. The ensuing loss in the investment was simply the result of Claimant's withdrawals and a down market, regrettable but not the fault of TCW.

THE ISSUES

The presentations of the parties revolved around these issues:

1. What was the nature of the relationship between TCW and Claimant?
2. What were the obligations of TCW in the education process?
3. What were TCW's efforts at education?
4. Who had "control" of Claimant's TCW investment account?
5. Were the ConcCore and HYB investments "suitable"?

In determining the facts which control the foregoing issues, the Panel heard from two main witnesses: for the Claimant, the Claimant herself, Valerie Biggs Sarofim; and for the Respondent, Robert M. Hanisee, TCW's vice-president, and by his admission, the primary contact and supervisor of Claimant's account.

The testimony of these two witnesses is generally consistent as to what happened during the relationship, especially during the initial contact period through full funding of the investments (May 23, 2000, to August 31, 2000), a period of about ten weeks. There is a documentary trail which enables the Panel with some confidence to detail a chronology of the phone calls, the faxes, the correspondence, and the in-person meetings.

What is not consistent are the words purportedly used in the oral communications, and the depth and tenor of those communications. Each witness painted a different picture, especially of the Claimant herself.

In brief, Claimant portrayed herself in those first ten weeks as a woman distraught from the rigors of a contentious divorce between uncooperative principals and equally contentious attorneys; a woman who did not learn visually, but orally; a people person who accepted her friends at face value, and did not conduct her affairs with a healthy sense of skepticism; an unsophisticated person (in the realm of economics and investments) who for the previous seven years had spent her time organizing charity functions and fund raising events; a woman who left it to her husband, a financial consultant, to totally manage and control her separate property brokerage account with

over a million dollars in assets; a woman who came to TCW to be taken care of, who expected the services of a full service financial advisor who would control and direct not only her investments, but guide her in the use of those investments; a person who needed a close, highly interactive and personal relationship with her financial advisor; and finally a person who needed a basic education in the management of money, presented in a very basic way.

A very different person was described by Mr. Hanisee. According to him, Claimant presented herself as a strong, capable woman who knew what she wanted, was completely capable of understanding risk and reward. She had already decided on what she wanted to do before she contacted TCW, and even after Mr. Hanisee thoroughly educated her about alternatives and made recommendations for those alternatives, she wanted to proceed with her own plans and decisions. Further, during the course of the relationship, Claimant simply did whatever she wanted to do, when she wanted to do it, without consulting Mr. Hanisee or anyone else at TCW (and if she did, she did not take TCW's advice), referring particularly to the sizable withdrawals made by Claimant to make other investments with friends and family. Finally, Mr. Hanisee offered the picture of a woman who continually over-spent her assets, regardless of Mr. Hanisee's best efforts to the contrary.

Obviously the credibility of these two main witnesses is of considerable importance. A number of alleged statements were denied as ever having been said, while others were not remembered. It is clear to the Panel that each of these two witnesses expressed her or his recollection of the facts in as positive a light as possible for her or his side, that each has "shaded" if not "stretched" the facts to present her or his side favorably. Nevertheless, the Panel has decided to generally accept the testimony as true, even including the contradictions, because based on the documentary evidence the controlling facts can be determined with reasonable certainty.

Two exhibits have been particularly useful to the Panel. The first is Exhibit 69, which was a listing of all deposits and withdrawals, dates and amounts in Claimant's account at TCW. This was stipulated as accurate by the parties. The other was Exhibit 12, which was a printout of notes kept electronically by TCW over the account period. The three witnesses from TCW who testified for Respondent all had notes recorded. These notes, internally called the "Avenue Notes", reflected the contacts between Claimant and TCW, including all meetings and most of the telephone calls. Mr. Hanisee testified that he did not regularly note his phone calls, and that there were numerous other calls with Claimant which are not reflected in the Avenue Notes. Claimant did not dispute that there may have been other calls.

SUMMARY OF THE EVIDENCE

We will now review the evidence as it relates to the issues in this case.

1. The nature of the relationship between TCW and Claimant.

The Panel concludes that TCW acted for the Claimant from the inception of the relationship as a financial consultant, and not just as a "broker" or an "order taker". While TCW initially seemed to be saying it was only a vendor of proprietary investment products sought to be purchased by investors, TCW later acknowledged it acted in an "advisory capacity" for some clients. TCW charged fees only in connection with specific product purchases, such as for ConcCore and HYB, and for acting as custodian of stocks in a portfolio – it did not charge separately for financial advisory services, and therefore was not really a "financial advisor." Mr. Hanisee testified that he was the chief

investment officer for PCS, that he was responsible for the investment allocations for all PCS clients, and that he was the "client advisor" for Claimant. A major problem in this case is the absence of any documentary evidence spelling out the relationship of the parties and the efforts made by TCW on behalf of Claimant. TCW had no form of written contract spelling out the advisory services between the Private Client Services Group and its high net worth customers like Claimant.

In the absence of such a contract, how is a client to know what services are being performed for him or her? When asked when Mr. Hanisee knew he was acting in an advisory capacity for a client, he said it depended on whether or not that client took his advice; when asked how the client knew whether or not Mr. Hanisee was acting as a financial advisor, he had no explanation.

This financial advisory role was accepted by TCW on May 23, 2000, when it agreed to act for Claimant in selecting about $10 million dollars in stock out of Claimant's ex-husband's $90 million portfolio (as part of an overall $14 million property settlement in the divorce). While this selection was apparently done in accordance with Claimant's wishes to be in the "Bickerstaff" product, it was clear TCW was acting independently, exercising its own discretion on how to do this most effectively. It further acted using its own discretion to determine which of the selected stocks would be kept in Claimant's portfolio and which would be sold. The selection was keyed to which stocks would be ConcCore stocks, along with three other factors: picking those stocks which had appreciated (the selection date was about two weeks after the valuation date); picking those stocks which had usable capital losses, and picking those stocks with the least amount of capital gains. With the exception of the shares in ConcCore companies, the rest of the shares were sold by TCW.

In addition to the picking of stocks from the ex-husband's portfolio, TCW also received a list of Claimant's holdings in a separate property Goldman Sachs brokerage account, and later instructed Claimant on which of these stocks should be transferred to TCW, and which should be sold by Goldman Sachs with the proceeds transferred to TCW. Besides the foregoing stock selection activity, the other crucial facts in evaluating the relationship of the parties are these two: first, Claimant gave TCW virtually all of her liquid assets to manage, and second, Claimant had no other source of money for living expenses than these assets and what income could be generated therefrom.

It is also the Panel's conclusion that the role of TCW as Claimant's financial advisor continued from May 23, 2000, for the next three years until Claimant closed her account with TCW on May 22, 2003.

2. The obligations of TCW in the education process.

The Panel concludes that TCW, as Claimant's financial advisor, had a two-fold duty to her with respect to education. First, TCW had a duty to educate themselves about the Claimant, her financial situation, her needs and, in general, to learn everything about her that would bear on the reasonableness of the investment program they were creating for her.

The second duty of TCW was to educate Claimant on the risks of each particular proposed investment. We find this duty can be satisfied only by ascertaining that Claimant not only has been taught but in fact has learned the applicable economic realities of the proposed investment program. It is not enough for the financial advisor to be able to prove that it told the client that investments can go down in value as well as up. It must also be able to prove that the client *understood* the realities of the economics of

the stock market, that is, the risk.

These two duties do not exhaust the list of fiduciary duties which TCW had to Claimant as her financial advisor, but they are, in this case, determinative of the claims of Claimant.

3. TCW's efforts at education.

The Panel has first looked at the question of when and where did TCW have an opportunity to educate itself and Claimant.

Between May 23, 2000, and August 15, 2000, by which time all of Claimant's funds entrusted to TCW had been invested in ConcCore and HYB, it appears that TCW had the following contacts with Claimant:

May 23	2-3 minute call with Mr. Magpayo.
May 24	10-15 minute call with Mr. Magpayo.
June 1	Letter to Claimant transmitting forms for opening a money-market account; letter from Claimant returning these signed forms.
June 1- 18	Although there are no documents establishing any telephone contacts between Mr. Hanisee and Claimant, he testified to, and Claimant did not dispute the likelihood of, "one to two" telephone calls between June 1 and June 18.
June 2	Letter to Claimant transmitting ConcCore Investment, Management and Custody Agreement, and Mid-Cap Investment, Management and Custody Agreement; letter from Claimant returning these signed Agreements.
June 5	Letter to Claimant transmitting a "Liquidating Agreement" in connection with future investments; letter from Claimant returning the signed agreement.

June 8 Letter to Claimant giving wiring instructions for transferring securities and money.

June 19 Meeting (30-45 minutes) with Claimant and Mr. Sandy Beckman, accountant hired by Claimant's divorce attorney to look at tax issues. Luncheon meeting (60-75 minutes) with Claimant and others. As a result of these meetings, all of Claimant's funds were to be invested 75% in ConcCore and 25% in HYB (and not the Mid-Cap Strategy).

July 12 Letter from Claimant authorizing withdrawal of funds.

July 13 Letter to Claimant transmitting fully executed copies of ConcCore Agreement, Mid-Cap Agreement, and Liquidation Agreement; approximated $2.5 million in cash transferred by Claimant to TCW Money Market Fund.

July 18 The divorce decree was signed by the Court on July 12, but effective as of May 23. Thereafter funds and stocks were transferred to TCW with the first investments in ConcCore being made on July 18, and in HYB on July 21, with other funds put into these two investments until August 15, such that by August 31 the value of the HYB account was $2,238,321, and the value of the ConcCore account was $10,447,345.

July 20 Letter from Claimant authorizing withdrawal of funds.

August 2 Letter to Claimant confirming transfer of funds and identifying stocks from Goldman Sachs account to be sold and stocks to be transferred.

In addition to the foregoing, TCW also had telephone and written communication with Claimant's divorce attorney, from which TCW learned the terms of the divorce settlement, and general information about Claimant and her assets. Further, there is some

evidence that printed information on TCW, ConcCore and HYB was sent to Claimant. Other than Mr. Hanisee's testimony that he talked with Claimant about risk and return, and Claimant's testimony that she had seen a graph comparison of the investment returns for ConcCore, a Fayez Sarofim fund, and an S&P fund, there is no evidence that TCW talked at length with Claimant, or made the necessary disclosures about the risk of investing, and particularly investing in just ConcCore and HYB. There was no evidence of any graph, chart or spread sheet offering alternative investment programs, with or without discussions of relative risk and return models, no questionnaire designed to elucidate Claimant's risk tolerance, no notes by any TCW representative on information or data taken from Claimant, and finally, no letter explaining the risk inherent in her proposed investments.

The graph shown to Claimant on June 19, 2000 comparing Bickerstaff's performance with two other indices, was incomplete, misleading and inflammatory in that it indicated "Bickerstaff" was doing much better than the Fayez Sarofim fund.

TCW's witnesses testified that Mr. Magpayo in his initiating conversations did not do any investigation of Claimant or her level of risk tolerance or her investment parameters, nor was the investigatory and education role taken by anyone other than Mr. Hanisee.

The Panel concludes that TCW never spent the required time with Claimant, and wholly failed to exercise due diligence to educate itself and Claimant with the basic information necessary to create a prudent investment program for her.

4. "Control" of Claimant's TCW investment account.

In considering whether or not a financial advisor has breached its duties to its client, the cases have often looked at the question of who had "control" of the account. A

discretionary account obviously gives control to the advisor, but establishing that the account is non-discretionary does not end the inquiry.

Here the agreements relating to the accounts are ambiguous as to discretion. But the Panel finds that it is not the words establishing the account which matter, as much as it is the total circumstances, looking at both TCW and Claimant.

TCW's argument on the matter of *control* seems to be that Claimant had control because she made withdrawals from the account at her sole discretion. That is not the issue, for even a totally discretionary account can be closed at any time. The issue is what control was exercised in the matter of directing the investments and account balances which were held by TCW, while they were held by TCW. TCW also attempted to argue that when withdrawals were made, it was Claimant who was directing from which account (ConcCore or HYB) those withdrawals would be paid. The evidence that Claimant was in fact making this decision was not credible.

We have no difficulty in concluding that TCW had *control* over Claimant's investment accounts and the funds she entrusted to TCW. It follows that TCW, having control of this account, had a fiduciary duty to act in good faith and in Claimant's best interest. Primary among such duties was the duty of TCW to place Claimant's assets in a "suitable" investment.

5. The suitability for Claimant of the investment in ConcCore and HYB.

The Panel concludes that TCW had the fiduciary duty to place Claimant in a suitable investment, and that the investments made by TCW were wholly and negligently un-suitable. The Panel concludes that it was unsuitable because it failed to reasonably diversify Claimant's assets so as to provide some measure of risk minimization in the

event of a down market (with 82% in ConcCore and 18% in HYB, these assets would all move in the market in the same direction and no balance was provided). TCW knew that Claimant intended to live off these investments, but no meaningful income stream was provided for.

It was also un-suitable for TCW to invest the account in a way which ignored the previously disclosed need of Claimant to make withdrawals. A glaring example is that TCW fully invested all funds in the two investment products (incurring sales commissions) by August 15, 2000, leaving no cash on hand to pay the income taxes known to be due September 15, 2000. $390,000 was taken from Claimant's ConcCore investments on September 15 and $85,000 was taken from Claimant's HYB account (presumably meaning another sales commission was charged) after only a month.

Claimant's account statement from TCW for September 30, 2000, shows in addition to the $475,000 withdrawn for taxes Claimant withdrew $25,000, presumably for living expenses, a not unreasonable amount in her circumstances. Failure to plan for these withdrawals was improper by TCW as Claimant's investment advisor.

Further, Claimant's September 30 statement showed that her account had lost $683,099 in market value in one month, over and above the necessary withdrawals of $500,000 for taxes and living expenses. Claimant expressed great concern about this loss in a telephone call on October 16, 2000. Although the Panel does not fault TCW for failing to predict the 2000 downturn in the market, it does fault TCW for failing to respond to its client's concern. Certainly another education session on the importance of diversification was warranted, if not an immediate effort at re-balancing the portfolio. The only evidence we have of a response was the advice from Ms. Bull to "hang in there." According to TCW's log, the first time diversification was mentioned to

Claimant was in mid-November, 2001, and then only in the context of waiting to balance the portfolio "until the ConcCore market had recovered". This advice was continued to be given over the next year-and-a-half until shortly before Claimant closed her account with TCW.

TCW had a duty to make investment recommendations which were suitable based on all relevant factors, such as the financial assets, income producing possibilities and needs of the Claimant. There is no written documentation of the efforts taken by TCW to determine suitability for the Claimant. From the evidence received at the hearing, the Panel questions whether even TCW believed that Claimant's investments at TCW were "suitable". Although Mr. Hanisee admitted that TCW had a duty to determine suitability for the Claimant and testified that TCW had determined that 82% in ConcCore and 18% in HYB was suitable, Mr. Hanisee also tried to draw a distinction between "suitability" and "appropriateness". Mr. Hanisee stated that he believed that Claimant's investment decision was suitable, but inappropriate. Mr. Hanisee also testified that he thought that what Claimant wanted was completely unreasonable, and that he told her so. However, there are no notes, letters, memos or other writings evidencing that anyone at TCW ever told the Claimant that her investment allocation was not appropriate or that her expectations were unreasonable.

TCW argued strongly that TCW should not be held responsible for the extended bear market, and that in any event Claimant's problems and losses were solely the result of over-spending and excessive withdrawals on her part, such that the investment strategy sold to her by TCW did not have a chance to unfold as intended.

Claimant's record of substantial withdrawals is uncontested. The testimony established that many of these withdrawals were for the purposes of investing in the ventures of family and friends, or paying taxes, or buying residences in Houston and in Jackson Hole, Wyoming. The record does not reflect a pattern of frivolous spending,

although Claimant's life style would not be considered frugal or average. It also appears that when given direct advice on her spending by TCW, Claimant responded positively. With respect to the funds she withdrew from TCW to invest elsewhere, there was no showing that these have been losses, although there was also no showing on the current value of such investments.

TCW testified it was told by Claimant that she would need $2 million per year, and on another occasion, $1.2 million a year. None of this was documented. She did provide a budget (really just a compilation of expenditures for a three month period, March - May, 2000, a pre-divorce period) which showed expenditures of $660,000 per year. A credible study was presented which showed that while generating $2 million a year would require an average 19.75% return on $12.7 million capital - an admittedly unreasonable expectation, providing $660,000 a year income from $12.7 million capital would require a return of 7.89%, a reasonably attainable return, especially in May, 2003. That is, a portfolio could have been designed at the time which would have produced such an income stream without substantial risk of the loss of capital.

In any event, the effect of these withdrawals must be taken into account in determining the measure of TCW's culpability for its breaches of its fiduciary duties.

DAMAGES

Claimant's expert witness, Mr. William Fender, presented evidence that TCW breached its duties as a financial advisor by failing to put Claimant in a diversified, balanced investment program. His damage model reflected what the results would have been had Claimant's assets been invested in a balanced and diversified portfolio, rather than in ConcCore and HYB. The Panel finds that this damage model is a reasonable way

of evaluating the harm done to Claimant, and that the difference between the yields for a balanced portfolio and what actually occurred is a proper measure of the damages.

In constructing this damage model, Mr. Fender included all and every withdrawal of funds made by Claimant, including the last withdrawal closing the account. This model shows that notwithstanding the bear market, and notwithstanding the money taken out of the account, a reasonably balanced portfolio would have resulted in the retention by Claimant of substantial assets in the account as of May, 2004. While the relationship of TCW and Claimant ended in May 2003, Claimant correctly points out that the damages continued to date in that she lost the opportunity to have capital for investment for the year May 2003 to May 2004.

Mr. Fender offered three model portfolios, the first a 50-50 split between equities and fixed income, the second a 60-40 split, and the third a 65-35 split. In each case the equities and fixed income portions were further diversified between a number of sub-investment categories, and the model was calculated on the basis of rebalancing the portfolio at the end of each quarter. After deducting all the withdrawals made by Claimant, as they were in fact made, these studies showed that instead of a zero account balance at May 23, 2003, as happened with TCW, Claimant could have had a portfolio with values of:

$6,631,413	50-50 model portfolio
$6,230,576	60-40 model portfolio
$6,024,123	65-35 model portfolio

The Panel has considered each of these models, and it is likely that any one of the three would have been deemed a "suitable" investment for Claimant.

Accordingly the Panel **AWARDS** Claimant actual damages in the amount of $6,300,000.

COSTS AND EXPENSES

The arbitration agreement in question states:

> ". . . The costs of the arbitration (other than fees and expenses of counsel, which shall be the responsibility of the parties retaining such counsel) shall be shared equally by the parties."

TCW also takes the position that under California law, the Uniform Arbitration Act, as codified in Cal. Code Civ. Pro. Sec. 1284.2, specifies that each party is to pay its pro rata share of the arbitrators fees and expenses of the arbitration, and is to pay its own attorney fees and expenses, unless the agreement states otherwise, or unless the parties otherwise agree.

The administrative fees and expenses of the American Arbitration Association ("the Association") totaling $12,500.00 and the compensation and expenses of the arbitrators totaling $69,313.82 shall be borne equally by the parties. Therefore, TCW shall pay to Claimant the sum of $2,731.91, representing Claimant's share of amounts previously advanced the Association.

In keeping with the terms of the Agreement between the parties and California law, the Panel makes no award of attorneys' fees.

PUNITIVE DAMAGES

Claimant has made a claim for an award of punitive damages. After carefully

considering the actions of the parties relative to all issues discussed herein, the Panel finds that breach of TCW's fiduciary duties justifies an award of punitive damages against it, and further finds that there is nothing in the Agreement between the parties preventing the Panel from making such an award.

Accordingly the Panel **AWARDS** Claimant punitive damages in the amount of $2,900,000.

The total **AWARD** for Claimant Valerie Biggs Sarofim and against Respondent Trust Company of the West, Inc. is **$9,200,000.** which amount shall be paid within thirty (30) days of this Award, and shall bear interest thereafter at the rate of 5% per annum.

Any and all other relief requested by either party is **DENIED.**

This award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

ENTERED at Houston, Texas this 19th **day of August, 2004.**

considering the actions of the parties relative to all issues discussed herein, the Panel finds that breach of TCW's fiduciary duties justifies an award of punitive damages against it, and further finds that there is nothing in the Agreement between the parties preventing the Panel from making such an award.

Accordingly the Panel **AWARDS** Claimant punitive damages in the amount of $2,900,000.

The total **AWARD** for Claimant Valerie Biggs Sarofim and against Respondent Trust Company of the West, Inc. is **$9,200,000.** which amount shall be paid within thirty (30) days of this Award, and shall bear interest thereafter at the rate of 5% per annum.

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