

SEP 12 2023

David W. Slayton, Executive Officer/Clerk of Court
By: M. Ventura, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
DEPARTMENT 17

MICHAEL HORNER, ET AL.,
Plaintiff,
vs.
STRONG WEALTH MANAGEMENT,
GEORGE G. STRONG,
Defendant

Case No.: 21STCV17667

FINAL STATEMENT OF DECISION
(AMENDED)

Following the presentation of evidence in the non-jury trial from February 6-10, 2023, the Court finds in favor of the Plaintiff, Michael Horner, against the Defendants Strong Wealth Management and George G. Strong, and awards Plaintiff \$2,556,040.20 in compensatory damages, plus double damages based on a finding of financial elder abuse finding for a sub-total of \$5,112,080.40 plus 7% simple interest for a total of \$6,082,676.40.

I. Background

Plaintiff, Michael Horner, 86, was a successful businessperson having made money from the operations of two camps for children, Tom Sawyer and Catalina Camp. He has an MBA from Wharton School of Business and for 50 years managed his own stock portfolio engaging in about 30 trades a year.

In 2019, Mr. Horner met Defendant George Strong at a classic car show. Defendant was a financial advisor. With similar interests in cars, finance, and a common

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1 neighborhood, the two became friends. During casual conversation, they discussed their
2 belief the stock market was overheated, due for a correction, and how Mr. Horner could
3 protect himself from a downturn.

4 At the time, Mr. Horner was spending a tremendous amount of time managing his
5 investment portfolio. Due to his age and the amount of work it took away from his
6 personal time, Mr. Horner decided to turn over management of his \$2.6 million stock
7 portfolio to Defendant, but with specific instructions.

8 II. Financial Goals and Conditions

9 In addition to not having to spend as much time working on managing his
10 portfolio, the 86-year-old retired widower wanted to draw \$10,000 a month for living
11 expenses and wanted to leave his children some money. Because of his age, Mr. Horner
12 made it clear he favored low-risk investments over high-yield speculations.

13 When filing out a Client Profile on 7/18/19, under objectives and purpose of
14 trading, Mr. Horner circled "income," leaving blank "preservation of capital," "growth,"
15 "trading profits," "speculation," and "hedging." (Exh. 23-02). When given a Client
16 Questionnaire to complete, Mr. Horner, under Investment Objectives checked "Capital
17 Preservation" and "Income" and dated it 8/21/19 (Exh. 2-08). In filing out his financial
18 profile, Mr. Horner circled "preservation of capital" (Exh. 32). When asked to fill out the
19 Morningstar Risk Assessment Questionnaire, Mr. Horner indicated he was satisfied with
20 trailing the market in return for modest risk (Exh. 14), but he told Defendant he wanted
21 protection against downward movements of the market.

22 Despite the time and care Mr. Horner put into filling out these forms, Defendant
23 apparently did not review them and saw some of them for the first time at his deposition.

24 Most importantly, Mr. Horner made it clear there were stock holdings he did not
25 want touched, and if advantageous, he wanted them added to; stocks such as: Amazon,
26 Apple, CostCo, Microsoft, Boeing, Google, Visa, Ford, and others (*See*, email, Exh. 41-
27 13). These "do-not-touch keepers" made up 40 percent of Mr. Horner's holdings.

28 III. Financial Goals and Conditions Were Changed

In order to trade securities, Defendant used a company called Interactive Brokers
(IB) to make the transactions. Interactive Brokers had certain protections in its software
to safeguard its clients. If an IB client had investment goals of "preservation of capital"
or "income," the IB software would not allow certain trades involving "speculation" and
"hedging." While Mr. Horner filled out his financial objectives questionnaires in July

1 2019, his IB quarterly report starting July 1, 2019, showed Mr. Horner's financial
2 objectives as "trading" and "hedging"¹ (See, Exh. 49). This "trading" and "hedging"
3 carried over to Q4 2019 (10/1/19 - 12/31/19) (Exh. 50).² By the first quarter of 2020
4 (1/1/2020 - 3/31/2020), Mr. Horner's IB statement reflected the investment objectives of
"trading," "hedging," and now "speculation" (Exh. 51).

5 Mr. Horner adamantly denies ever changing his financial objectives, and never
6 told Defendant he wanted to take on more risk. Defendant testified Mr. Horner agreed
7 orally during a lunch but that he never followed up with Mr. Horner to changes his
8 preferences on paper.³ Defendant states Mr. Horner must have changed the preferences
9 online or IB would not have allowed the transactions to be made. Mr. Horner testified he
did not know how to access his IB account online and asked that monthly statements be
mailed to him.⁴

10 The Court finds Mr. Horner's testimony to be highly credible, and is somewhat
11 suspect of Defendant's ability to communicate clearly. While the Court does not doubt
12 Defendant explained the need to change preferences from "preservation of capital" to
13 "hedging/speculation" to allow for Options trades to protect against market decline, it
should be noted Defendant is a real fast talker and somewhat difficult to follow.⁵

14 Furthermore, the Court is extremely mindful of the fact Mr. Horner was advised
15 and signed an acknowledgement of the risks involved with investment in stocks (See,
16 Exh. 44, IB Risk Disclosure Statement, and Exh. 2-04). If it were only Defendant's fast
17 speaking and the portfolio losses, there would be no problem. However, it is Defendant's
conduct that raises concerns.

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20 ¹ "Trading" is defined in Interactive Broker's statement as "Increase the principal value of your investments by
21 using shorter term trading strategies and by assuming higher risk." Likewise, "hedging" is defined by Interactive
22 Broker as "Take positions in a product in order to hedge or offset the risk in another product." (Exh. 49-07)

² There was testimony introduced which suggested Mr. Horner's initial objectives with IB were "preservation" and
"income," however the actual statement do not reflect this.

³ There is an Interactive Broker account application dated September 3, 2019, where the boxes checked are for
23 "trading profits" and "hedging," leaving blank "preservation of capital," "income," "growth," and "speculation."
24 (Exh. 3). These were electronically checked and not in Mr. Horner's handwriting like the others, however the
document was printed and signed by him. Mr. Horner testified he never filled out the form himself, never opted for
25 "hedging" over "preservation of capital" and is not sure he ever examined the form before signing. Exhibit 3 is in
stark contrast to Exhibit 2, the Client Questionnaire dated less than two weeks earlier (8/21/19) where under
Investment Objectives Mr. Horner in his own handwriting checked "Capital Preservation" and "Income."

⁴ Defendant's ex-wife Brooke worked in Defendant's office at the time. She testified she may have made the
26 changes to Mr. Horner's IB account online in his presence and with his consent.

⁵ The Court acknowledges this trial deals with highly technical area of securities trading but for the most part did not
27 struggle to understand Mr. Horner, Mr. Horner's expert Scott Hood, or Defendant's expert John Maine.

1 IV. Defendant's Performance as a Financial Advisor

2 Defendant took over managing Mr. Horner's portfolio in Quarter 3 (Q3) of 2019
3 (7/1/19 – 9/30/19) (Exh. 49). The first IB quarterly introduced into evidence was for Q4
4 (10/1/19 – 12/31/19) and shows Defendant did not do as well as the market (Exh. 50).
5 Defendant admits he made all trade decisions for Mr. Horner's account, and it
underperformed the Standard and Poor's (S&P)⁶ by almost 9 percent.

6 In March 2020, Covid-19 hit and the worldwide shutdown had a detrimental affect
7 on the stock market. While Defendant said he needed Mr. Horner to approve "hedging"
8 to protect against market downturns, the hedging strategy did not help⁷ and Mr. Horner's
9 account lost 21.8 percent, slightly worse than the market (*See*, IB Q1 statement, Exh. 51).
Mr. Horner said he noticed there was a lot of activity but was consumed by trying to save
his Tom Sawyer and Catalina camps.

10 In Q2 (4/1/2020 – 6/30/2020), the market recovered substantially, and the S&P
11 was up 19.8 percent. However, Mr. Horner's holdings lost 35 percent and under
12 Defendant's management underperformed the S&P by 55 percent. By this time, Mr.
13 Horner's portfolio had lost half its value going from \$2.6 million to \$1.3 million (Exh.
52). Expert Hood said the trades were hard to follow and a "complete mystery."

14 The Q3 (7/1/2020 – 9/30/2020) IB statement was 220 pages long and no witness,
15 including Defendant, could explain what was done. The S&P was up another 8.5 percent
16 however Mr. Horner lost 61.5 percent, underperforming the market by a whopping 70
17 percent. Mr. Horner's initial nest-egg of \$2.6 million was now valued at \$507,702 (Exh.
53).

18 After seeing the Q3 statement, Mr. Horner told Defendant to halt Options trading
19 and shortly thereafter terminated Defendant as his financial advisor. On December 1,
20 2020, Mr. Horner was left with \$475,009.23 from his original \$2.6 million. The final Q4
21 statement was 675 pages long. While Defendant was not paid based upon any per-trade
22 commission, he did end up placing some 10,000 plus trades that not only destroyed Mr.
Horner's investments but cost him more than \$45,000 in transaction fees.

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26 ⁶ The Standard & Poor's is a stock market index tracking the stock performance of 500 of the largest companies
listed on stock exchanges in the United States.

27 ⁷ Plaintiff's expert Scott Hood testified that after his extensive review of all the trades Defendant made, he could not
28 find any hedging strategy.

1 What is even more shocking, much of Mr. Horner’s core holdings – the keepers –
2 were forced sold to cover Options calls (margin calls) Defendant had made, often times
3 exposing more of Mr. Horner’s stock holdings than he actually owned.

4 V. Defendant’s Malfeasance

5 Defendant cannot be liable to Mr. Horner for being a bad financial advisor or for
6 pursuing certain investment strategies based on his education, training, and experience.
7 In 2019 Defendant believed the market was overvalued and stock prices would decline.
8 Defendant testified he believed the market crash in March, 2020, was merely a “market
9 correction” partially caused by Covid-19 but that prices would continue to drop. While
10 one might question these beliefs, they do not in and of themselves make a financial
11 advisor responsible for client losses. However, what Defendant did could only be
12 described as having an escalating manic episode which led him to gamble with other
13 people’s money.⁸

14 Mr. Horner, his expert Scott Hood, Defendant, and Defendant’s expert John Maine
15 are all experience traders yet none of them could explain what Defendant did.
16 Defendant’s expert Maine admitted he could not follow Defendant’s trades and could not
17 explain how 80 percent of the value of Mr. Horner’s portfolio was lost in the 10,000 plus
18 trades but attributes it to hedging. He testified Defendant was hedging against the market
19 going down but instead it went up and continued to increase in value.

20 Plaintiff’s expert Hood also accused Defendant of engaging in purchases of highly
21 volatile super derivatives (UBXY and UVXY) which he called reckless and a “radical
22 departure from any suitable or requested strategy.” He described pages and pages of
23 these transactions inconsistent with an 86-year-old’s investment objectives of “capital
24 preservation” and “income.” Furthermore, Hood said none of Defendant’s strategies at
25 the time resembled those of other institutional investors.

26 In addition to betting the market would go down when it was clearly gaining
27 strength, Plaintiff’s expert Hood said some of Defendant’s strategies just made no sense.
28 He cited an example using one of Mr. Horner’s do-not-touch core stocks Apple. At
times, he said it did not matter whether Apple went up or down, Mr. Horner would not
have made a profit. Defendant gambled with and lost much of Mr. Horner’s core
holdings.

⁸ Similar fates befell Defendant’s other pre-Covid clients.

1 VI. Causes of Action

2 a. Fraud

3 The elements of fraud are: (1) misrepresentation (false representation,
4 concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud
5 or induce reliance; (4) justifiable reliance; and (5) damages. (See Civil Code §1709.)

6 While the Court finds Defendant was grossly incompetent as a financial advisor,
7 there is no evidence his conduct rises to the level of fraud. Absent is evidence of
8 misrepresentation or an intent to defraud. The Court finds Defendant changed Mr.
9 Horner's investment objectives to trading, hedging, and speculation, but that it was done
10 so option contracts could be placed for the purposes of hedging (or protecting) against a
11 market decline.

12 b. Breach of Fiduciary Duty

13 The elements for a breach of fiduciary duty cause of action are "the existence of a
14 fiduciary relationship, its breach, and damage proximately caused by that breach."
15 (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604.)

16 As financial advisers, Defendants "shall be liable to any person to whom []
17 advisory services are furnished for compensation and who is damaged by reason of such
18 person's reliance upon such services, for the amount of such compensation and for such
19 damages, unless the person rendering such services proves that such services were
20 performed with the due care and skill reasonably to be expected of a person who is such
21 an expert." (Cal. Civ. Code § 3372(a).)

22 FINRA Rule 2111 provides:

- 23 (a) A member or an associated person must have a reasonable basis to
24 believe that a recommended transaction or investment strategy
25 involving a security or securities is suitable for the customer, based on
26 the information obtained through the reasonable diligence of the
27 member or associated person to ascertain the customer's investment
28 profile [which] includes, but is not limited to, the customer's age, other
investments, financial situation and needs, tax status, investment
objectives, investment horizon, liquidity needs, risk tolerance and any
other information the customer may disclose. . . ."

Supplementary Material

.04. Customer's Investment Profile. A member or associated person shall make a recommendation covered by this Rule only if, among other things, the member or associated person has sufficient information

1 about the *customer to have a reasonable basis to believe that the*
2 *recommendation is suitable for that customer.* The factors delineated
3 in Rule 2111(a) regarding a customer's investment profile generally are
4 relevant to a determination regarding whether a recommendation is
5 suitable for a particular customer, although the level of importance of
6 each factor may vary depending on the facts and circumstances of the
7 particular case. A member or associated person shall *use reasonable*
8 *diligence to obtain and analyze all of the factors delineated in Rule*
9 *2111(a) unless the member or associated person has a reasonable*
10 *basis to believe, documented with specificity, that one or more of the*
11 *factors are not relevant components of a customer's investment profile*
12 *in light of the facts and circumstances of the particular case.*

13 .05 Components of Suitability Obligations. Rule 2111 is composed of
14 three main obligations: reasonable-basis suitability, customer-specific
15 suitability, and quantitative suitability. "(a) The reasonable-basis obligation
16 requires a member or associated person to have a reasonable basis to
17 believe, based on reasonable diligence, that the recommendation is suitable
18 for at least some investors... A member's or associated person's
19 reasonable diligence must provide the member or associated person with an
20 understanding of the potential risks and rewards associated with the
21 recommended security or strategy. The lack of such an understanding when
22 recommending a security or strategy violates the suitability rule. "(b) The
23 customer-specific obligation requires that a member or associated person
24 have a reasonable basis to believe that the recommendation *is suitable for a*
25 *particular customer based on that customer's investment profile, as*
26 *delineated in Rule 2111(a).* "(c) *Quantitative suitability requires a*
27 *member or associated person to have a reasonable basis for believing that*
28 *a series of recommended transactions, even if suitable when viewed in*
isolation, are not excessive and unsuitable for the customer when taken
together in light of the customer's investment profile, as delineated in
Rule 2111(a). No single test defines excessive activity, but factors such as
the turnover rate, the cost-equity ratio, and the use of in-and-out trading in a
customer's account may provide a basis for a finding that a member or
associated person has violated the quantitative suitability obligation.

24 While the Court does not accuse Defendant of any self-dealing here, there is a
25 breach of the duty of care. Defendant's investment strategy did not seem to fall within the
26 reasonable scope of a competent investment strategy. It was completely contrary to Mr.
27 Horner's stated investment objectives, reckless, violated his request to hold certain
28 stocks, and at times did not make a lot of logical sense. In addition to a duty of loyalty, a
fiduciary has the duty to act competently. (§ 8:57 12A Blue Sky Law § 8:57) ("There is a
well-established body of law on fiduciaries and fiduciary duty, defined further as the duty

1 of loyalty (the client's interest must take precedence over the fiduciary's) and the duty of
2 care (the fiduciary must act competently).

3 While Mr. Horner failed to raise an issue over the early reports (whether for the
4 number of transactions or trading objectives), the evidence shows that he at all times
5 advocated a conservative strategy of preservation of capital and income. Moreover, it
6 seems that Defendant's strategy was so misguided, and so far in the opposite direction of
7 what he and Mr. Horner had talked about, that it is hard to possibly square the strategy
8 with what Plaintiff needed and wanted. As put by Mr. Horner in the closing brief:
9 "Strong pursued an investment strategy that was unsuitable for any investor and was
10 certainly not suitable for Mike. He did not document any basis to depart from a
11 reasonable suitability standard for someone in Mike's position, and he certainly did not
12 document a basis to depart from Mike's written investment objectives. It is difficult to
13 overstate the extent of Strong's departure from his basic duties to his client." (Brief, 7:28-
14 8:5.)

15 This, plus the degree of losses, would seem to indicate that even if there was not
16 an intentional plan to defraud, he did not perform his services with the due care and skill
17 reasonably to be expected of a person who is an expert. (*Stokes v. Henson* (1990) 217
18 Cal.App.3d 187, 197 ("Merely because Henson had no intent to defraud, i.e., to take their
19 funds for his personal use, is not to say there was no intent to deceive. The latter intent is
20 implied from his continuing failure to relay to the investors the highly significant risks
21 being taken with their cash, risks he was himself aware of while 'monitoring' their
22 investments."))

23 c. Negligence

24 To plead a cause of action for negligence, one must allege (1) a legal duty owed to
25 plaintiffs to use due care; (2) breach of duty; (3) causation; and (4) damage to plaintiff.
26 (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292, 318.)

27 Factors to consider in determining whether a defendant owes a duty of care are (1)
28 the extent to which the transaction was intended to affect the plaintiff, (2) the
29 foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered
30 injury, (4) the closeness of the connection between the defendant's conduct and the injury
31 suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of
32 preventing future harm. (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.)

33 Similar to the breach of fiduciary duty, there is considerable evidence that
34 Defendant's investment strategy was grossly incompetent and fell below what would be
35 reasonably expected of a professional in the field. As such, there seems to be solid
36 evidence of negligence.

1 d. Breach of Contract

2 "The standard elements of a claim for breach of contract are: '(1) the contract, (2)
3 plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4)
4 damage to plaintiff therefrom.'" (*Wall Street Network, Ltd. v. New York Times Co.* (2008)
5 164 Cal.App.4th 1171, 1178.)

6 Strong Wealth Management agreed to "supervise and direct the investments of the
7 Account in accordance with the investment objectives of Client as listed on the attached
8 Exhibit I, and as communicated hereafter in writing or other format to SWM from time to
9 time." Additionally, he was also not to touch certain core holdings.

10 Defendant does not argue that he did not breach the terms of the contract as
11 written. Rather, he argues that Plaintiff essentially ratified a modified contract by failing
12 to object to the stated objectives in the reports. However, Defendant apparently did not
13 assert an affirmative defense of a modification of contract at trial. As such, this defense
14 has been waived. (Waiver of Defense, 3 Cal. Affirmative Def. § 65:10 (2d ed.) ("Failure
15 to assert the defense [of modification] affirmatively in the answer will typically result in
16 waiver of the defense."). Moreover, even setting this aside, there does not seem to be
17 sufficient evidence that their conversations rose to the level of a modification of the
18 contract.

15 e. Financial Elder Abuse

16 Welf. and Inst. Code § 15610.30 defines Financial Elder Abuse as:

17 (a) "Financial abuse" of an elder or dependent adult occurs when a person
18 or entity does any of the following:

19 (1) Takes, secretes, appropriates, obtains, or retains real or personal
20 property of an elder or dependent adult for a wrongful use or with intent to
21 defraud, or both.

22 (2) Assists in taking, secreting, appropriating, obtaining, or retaining
23 real or personal property of an elder or dependent adult for a wrongful use
24 or with intent to defraud, or both.

25 ...

26 (b) A person or entity shall be deemed to have taken, secreted,
27 appropriated, obtained, or retained property for a wrongful use if, among other
28 things, the person or entity takes, secretes, appropriates, obtains, or retains the
property and the person or entity knew or should have known that this conduct is
likely to be harmful to the elder or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes,
appropriates, obtains, or retains real or personal property when an elder or
dependent adult is deprived of any property right, including by means of an

1 agreement, donative transfer, or testamentary bequest, regardless of whether the
2 property is held directly or by a representative of an elder or dependent adult.

3 To establish financial elder abuse, the plaintiff must allege that the defendant took
4 or retained the plaintiff's property; that the plaintiff was 65 years of age or older at the
5 time of the conduct; that the defendant took or retained the property for a wrongful use or
6 with the intent to defraud; that the plaintiff was harmed; and that the defendant's conduct
7 was a substantial factor in cause the plaintiff's harm. (*See*, CACI, § 3100.)

8 The Court already found there is insufficient evidence of an intent to defraud. The
9 evidence shows Defendant went down the same path of financial destruction with all of
10 his clients' holdings, irrespective of their respective ages. Defendant did not take or
11 retain any of Mr. Horner's property nor did he obtain any benefit from his actions.

12 However, intent to defraud is not required in a financial elder abuse case if a
13 "person knew or should have known" the wrongful conduct is "likely to harm the elder."
14 *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1316-18.

15 Plaintiff, argues the "wrongful use" portion of Welf. and Inst. Code § 15610.30.
16 "[A] party may engage in elder abuse by misappropriating funds to which an elder is
17 entitled under a contract." (*Paslay v. State Farm General Ins. Co.* (2016) 248
18 Cal.App.4th 639, 656 [203 Cal.Rptr.3d 785]. "[U]nder subdivision (b) of section
19 15610.30, wrongful conduct occurs only when the party who violates the contract
20 actually knows that it is engaging in a harmful breach, or reasonably should be aware of
21 the harmful breach." (*Id.* at 658.). Defendant "wrongful[ly] used" Mr. Horner's core
22 holdings he was under contract to hold. He placed Option puts and calls for the do-not-
23 touch stocks just to have them called away (force sold) as their values increased.

24 VII. Mitigation of Damages

25 A party injured by a breach of contract is required to do everything reasonably
26 possible to mitigate his or her own loss and thus reduce the damages for which the other
27 party has become liable. (*See Johnson v. Comptoir etc.* (1955) 135 C.A.2d 683, 689;
28 *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 238.)

The Restatement observes that there is no "duty" to mitigate damages, because the
injured party incurs no liability for failure to act: "The amount of loss that he could
reasonably have avoided by stopping performance, making substitute arrangements or
otherwise is simply subtracted from the amount that would otherwise have been
recoverable as damages."

1 This defense is disingenuous. Is the argument an investor should have known
2 better than the financial advisor he hired? More significantly, Defendant's spiral
3 downward was extremely sudden and impossible to anticipate. Early losses were masked
4 by the market's Covid losses. There is evidence to suggest Mr. Horner did express
5 concern to Defendant and asked if the losses could be recovered, to which Defendant
6 gave him reassurance. From that point, how could any reasonable investor expect the
7 next quarter to have 675 pages of transactions?

8 Defendant has the burden of proof to show: (1) at what point Plaintiff could have
9 reasonably acted to decrease losses; (2) how, absent firing him, Plaintiff could have
10 materially acted to decrease losses; or (3) what amount of losses could have been
11 avoided. Defendant has not met this burden.

12 VIII. Damages

13 Plaintiff presents two scenarios for damages with varying interest calculations.
14 Both have an element of speculation as would any damage analysis involving investment
15 in the stock market.

16 Plaintiff's expert Hood testified if Defendant had done absolutely nothing with the
17 portfolio, Mr. Horner's initial \$2,628,951.90 in August 2019 would have increased to
18 \$3,158,679.31 by December 1, 2020.

19 Plaintiff also proposes if Defendant's financial advisory had merely kept pace with
20 the market, Mr. Horner's holdings would have been \$3,302,244.42.

21 The Court believes the former is more appropriate and awards Mr. Horner
22 \$3,158,679.31 minus the \$475,099.23 he was left with, minus the \$106,000 in
23 withdrawals, and minus \$21,539.92 in Defendant's management fee for a total of
24 \$2,556,040.20.⁹ To require Defendant to produce as well as the market potentially
25 hamstrung with the do-not-sell stocks seems to mandate Defendant be above average in
26 competence. The Court is not finding liability based on his competence but rather his
27 gross incompetence and breach of duty. Further, to award damages consistent with the
28 S&P would be inconsistent with Mr. Horner's investment objectives to trail the market
and avoid risk.

⁹ The Court initially relied on Exh. 59 for an award of \$2,599,120, but later found a subtraction error and adjusted the total amount to \$2,556,040.20.

1 IX. Treble and Punitive Damages

2 a. Financial Elder Abuse

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4 Liability under the Financial Elder Abuse Act triggers the right to an award of up
5 to treble damages pursuant to Cal. Civ. Code § 3345. Damages under Section 3345 are in
6 addition to compensatory damages.¹⁰ Here, as a result of Defendant's conduct, Mr.
7 Horner had to move from his apartment on Orange Grove in Pasadena to a small
8 apartment in Arcadia. He now has financial instability as his status and lifestyle have
9 been forced to change. He can no longer donate to his favorite charities, schools, and
10 church, and has little to leave for his children.

11 Accordingly, the Court finds additional damages under Civ. Code § 3345 to be
12 appropriate. However, based on the evidence presented, primarily that Mr. Horner was
13 not targeted because of his age and that Defendant did not benefit in any way from the
14 financial elder abuse, the Court finds treble damages excessive. The Court awards
15 double damages or an additional \$2,556,040.20.

16 b. Punitive Damages

17 The Court also finds punitive damages are appropriate.

18 Civil Code section 3294, subdivision (a) authorizes the recovery of punitive
19 damages where the defendant has been guilty of oppression, fraud, or malice, express or
20 implied. Malice means conduct which is intended by the defendant to cause injury to the
21 plaintiff or despicable conduct which is carried on by the defendant with a willful and
22 conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).)
23 Oppression is despicable conduct that subjects a person to cruel and unjust hardship in
24 conscious disregard of that person's rights. (*Id.*, subd. (c)(2).) Fraud means an intentional
25 misrepresentation, deceit, or concealment of a material fact known to the defendant with

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¹⁰ Treble damages under Section 3345 do not require the showing required under Cal. Code Civ. Proc. § 3294.
Rather, the Court is required to consider the following factors, and may impose up to treble damages based upon the
presence of one or more of them:

(1) Whether the defendant knew or should have known that his or her conduct was
directed to one or more senior citizens or disabled persons.

(2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss
or encumbrance of a primary residence, principal employment, or *source of income*; *substantial loss of*
property set aside for retirement, or for personal or family care and maintenance; ... *or assets essential to*
the health or welfare of the senior citizen or disabled person.

Cal. Civ. Code § 3345(b) (emphases added; subsection (3) omitted).

1 the intention on the party of the defendant of thereby depriving a person of property or
2 legal rights or otherwise causing injury. (*Id.*, subd. (c)(3).)

3 A breach of a fiduciary duty alone without malice, fraud or oppression does not
4 permit an award of punitive damages. The wrongdoer must act with the intent to vex,
5 injure, or annoy, or with a conscious disregard of the plaintiff's rights. Punitive damages
6 are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation
7 of law or policy. The mere carelessness or ignorance of the defendant does not justify the
8 imposition of punitive damages. Punitive damages are proper only when the tortious
9 conduct rises to levels of extreme indifference to the plaintiff's rights, a level which
decent citizens should not have to tolerate. (*Lackner v. North* (2006) 135 Cal.App.4th
1188, 1210; quoting *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269,
1287.)

10 The Court finds Defendant's manic, voluminous trading patterns and blatant
11 disregard of Mr. Horner's core holdings "malicious," demonstrating despicable conduct
12 which was carried on with a willful and conscious disregard of the rights or safety of
13 Plaintiff. The Court also finds the conduct "oppressive" in that it was despicable conduct
14 that subjected Mr. Horner to cruel and unjust hardship in conscious disregard of his
rights. Plaintiff has proven this by clear and convincing evidence.

15 However, based upon a concession by plaintiff due largely in part to Mr. Horner's
16 advanced age,¹¹ the Court chooses not to further prolong proceedings with a Phase II
17 punitive damages trial. The findings of malicious and oppressive conduct are adequately
addressed by the enhanced financial elder abuse award.

18 c. Total Damages Awarded

19 The Court awards \$2,556,040.20 in compensatory damages which is doubled
20 based on the financial elder abuse finding for a total of \$5,112,080.40.

21 The Court exercises its discretion and awards prejudgment simple interest of 7%
22 in this matter pursuant to CCP section 3288. The issue of prejudgment interest was not
23 thoroughly briefed by Plaintiff, however Defendant did have notice of the request from
24 the initial filing of Plaintiff's Closing Brief filed February 23, 2023. Interest is not
25 awarded under CCP section 3287, as the Court finds the contract damages are
"speculative" (unliquidated), however based on "oppression, fraud, or malice" discussed

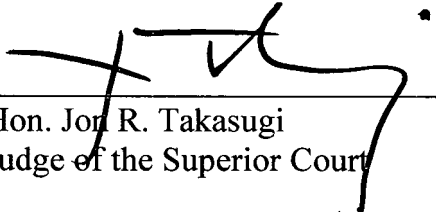
26
27 ¹¹ See, Alternative #1, Plaintiff's Combined Response to Defendant's Objections to Proposed Statement of Decision
28 filed July 10, 2023.

1 above, the Court finds prejudgment interest is appropriate under CCP section 3288. For
2 discretionary interest, the Court believes it has discretion to choose the date it is to be
3 calculated from¹² and there is a split of authority as to whether it is simple or compound
4 interest.¹³ The Court chooses the approximate date Mr. Horner closed his account with
Defendant, December 1, 2020, and 7% simple interest.

5 Simple 7% annual interest on \$5,112,080.40 from December 1, 2020, to August
6 18, 2023 (990 days at \$980.40 per day) is \$970,596 making the total damages with
interest \$6,082,676.40.

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8 It is so ordered.

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10 Dated: September 12, 2023

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14 Hon. Jon R. Takasugi
Judge of the Superior Court

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23 ¹² CCP section 3287 has the provision that holds that discretionary damages are calculated from the day the action is
24 filed. CCP section 3288, on the other hand, does not have a set date for the accrual of interest. Rather, per *Brunson*
25 v. *Babb* (1956) 145 Cal.App.2d 214, 230, it is for the trier of fact to determine the date interest accrued based on the
26 facts at trial. More specifically, it is for the trier of fact to determine the date of monetary loss. (See, *Stein v.*
Southern Cal. Edison Co. (1992) 7 Cal.App.4th 565, 572, 8 Cal.Rptr.2d 907 [“Section 3288...allows interest from
the date of monetary loss at the discretion of the trier of fact even if the damages are unliquidated.”])

27 ¹³ See, e.g., *Wheeler v. Bolton* (1891) 92 Cal. 159, 172, 28 P. 558; *McNulty v. Copp* (1954) 125 Cal.App.2d 697,
28 712, 271 P.2d 90 [compound interest properly awarded because evidence supported conclusion that defendant was
guilty of fraud]; and also, CACI No. 3935 noting that this question is unresolved.