

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

Case Number: 01-01866

Gerald and Phillis Chazan

Name of the Respondents

Hearing Site: Philadelphia, Pennsylvania

Robert B. Fitzpatrick,
Gerald F. O'Neill, and
First Union Securities, Inc.

REPRESENTATION OF PARTIES

Claimants Gerald and Phillis Chazan, hereinafter collectively referred to as "Claimants", were represented by Nicholas J. Guiliano, Esq., Attorney at Law, Philadelphia, Pennsylvania.

Respondents Robert B. Fitzpatrick ("Fitzpatrick"), Gerald F. O'Neill ("O'Neill"), and First Union Securities, Inc. ("First Union"), hereinafter collectively referred to as "Respondents", were represented by Harris L. Kay, Esq., LeClair Ryan, Richmond, Virginia.

CASE INFORMATION

Statement of Claim filed on April 10, 2001.

Claimants signed the Uniform Submission Agreement on April 10, 2001.

Statement of Answer filed by Respondents on June 28, 2001.

Respondent Fitzpatrick signed the Uniform Submission Agreement on June 6, 2001.

Respondent O'Neill filed an unsigned Uniform Submission Agreement.

Robert T. Mooney, Director of Compliance, executed Respondent First Union's Uniform Submission Agreement on June 8, 2001.

CASE SUMMARY

Claimants seek damages under the Federal Securities Laws for fraud in connection with the sale of securities, excessive activity, the sale of unsuitable securities, unauthorized trading, fraudulent use of a margin account, common law fraud, breach of fiduciary duty, and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Act. The causes of action relate to the purchase and sale of unspecified securities.

Respondents generally denied the allegations in the Statement of Claim, contending that Claimants transactions, were "unsolicited" by Respondent Fitzpatrick, and that Claimants ratified the transactions in their account by signing an excessive activity letter and by failing to object to transactions which may have been effected in their account without their prior approval.

RELIEF REQUESTED

Claimants in their Statement of Claim requested:

Compensatory Damages	\$ 1,600,000.00
Punitive Damages	amount unspecified
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified

Respondents in their Statement of Answer requested that the Statement of Claim be dismissed, and that they be awarded the costs, fees and expenses, including attorney's fees, incurred in their defense.

AWARD

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

A. Investment Experience

The Panel finds that the most credible evidence regarding Claimants experience in the Stock market is that which Respondents have set forth in their post hearing Brief. According to Respondents the evidence and testimony elicited at the hearing indicated the following:

- a) "The Chazans have been active stock market traders since the early 1980's. (Transcript Vol. 1, p. 86)
- b) The Chazans had various brokerage accounts at Dean Witter, Meriel Siebert, T.D. Waterhouse, U.S. Trust, and Smith Barney. (Transcript Vol. 1, pp. 162 and 170)
- c) The Chazans have a history of engaging in speculative and aggressive stock and option trading. (Transcript Vol. 1, pp. 89, 162 and 165)
- d) The Chazans traded stocks, options and used margin aggressively in their Dean Witter account. (Transcript Vol. 1, pp. 162 and 165)
- e) The Chazans traded stocks, options and used margin aggressively in their TD Waterhouse account. (Transcript Vol. 1, p. 89)
- f) At the time the Chazans had their account at First Union, they had a joint brokerage account at U.S. Trust valued at over \$1.4 million and an IRA valued at over \$1.1 million. (Transcript Vol. 1, pp. 198-200)
- g) Mr. Chazan read numerous US investment publications, including Forbes, Investors Daily, Bull Market Review and Hoovers. (Transcript Vol. 1, pp. 135 and 277, Vol. 2, p. 90)
- h) Mr. Chazan subscribed to various investment newsletters, including Guilder Technology Report, Prohost Medical Letter, Jack Adomo 21st Investor,

Undiscovered Stocks, Forbes Situational, and Blazing Hot Tech Stocks. (Transcript Vol. 1, pp. 103 and 273)

- i) Mr. Chazan subscribed to various "800" number investment telephone hotlines and investment fax services. (Transcript Vol. 1, pp. 248-249 and 254)
- j) Mr. Chazan is a member of a stock-picking group that requires its members to make recommendations on securities based on investment research reports, including Value Line. (Transcript V 01. 1, p. 177)"

As to the issue of whether or not the Claimants were experienced investors, the Panel find that the evidence strongly supports Respondents' contention that Claimants, and in particular Mr. Chazan, were very astute and knowledgeable of the stock market. Clearly, the weight of the evidence indicates that the Claimants were experienced and knowledgeable investors who understood the risks associated with investing in securities. The record does not support the Claimants' contention that they were inexperienced investors.

B. Suitability

The Panel finds that the weight of the evidence supports the Respondents' contention that the stocks traded in Claimants' account were suitable and were consistent with the Claimants' stated trading objectives. Initially, the investment experience was a factor considered by the Panel. The Claimants' First Union account opening document, signed by Claimants on November 11, 1999, reflects that the Claimants' investment objective was growth with a return emphasis. The First Union account-opening document also indicated that Claimants had 20 years experience in stocks, 20 years experience in bonds, 10 years experience in mutual funds and 5 years experience in Options. The Option Agreement, also signed by Claimants on November 11, 1999, indicates that their investment objectives included speculation and trading, and also indicated that Claimants had 20 years experience in stocks, 20 years experience in Bonds, 20 years experience in bonds and 10 years experience in Options. Respondents point out that the financial data on both of these agreements is consistent with Claimants' co-ownership of two warehouses and a parking lot in New York City and, as indicated on their tax returns, a gross income in excess of \$200,000 for the years 1998 and 1999. The Panel agrees.

The Panel finds that based on Claimants' investment experience and the weight of the evidence at the hearing, Claimants understood what they had signed, and understood that their objectives were consistent with taking a high degree of risk. Further, given Claimants' stated and signed investment objectives, and the financial data on the Opening and Option Agreements, it is difficult to find a basis for an unsuitability claim.

The Panel has also considered the Claimants' contentions that unsuitability lie in the fact that Respondents controlled Claimants' accounts by making recommendations and actually purchasing stock without the knowledge of Claimants. Respondents countered and asserted that Claimants were in complete control of everything that happened in their account and that they never voiced a complaint that any transaction had been improper. Respondent Fitzpatrick testified that that he wrote up a transaction slips for all of the transactions he made for Claimants, and that most of the stocks he purchased or sold for the Claimants were unsolicited, and that

when he made a recommendation he marked the slip solicited. Respondent Fitzpatrick testified that there were very many days when Mr. Chazan would spend 4 hours or more outside his office, and that Mr. Chazan would bring lists of stocks he had taken from publications and friends and ask Respondent Fitzpatrick about them. Respondent Fitzpatrick would oblige, however, most of what Respondent Fitzpatrick provided was hard data, publicly available, which he took from a computer program. Fitzpatrick both made opinions and gave recommendations. He differentiated between opinion and recommendation by describing an opinion as his belief, and something he would say in response to a question such as "How do you feel about this stock?" According to Fitzpatrick, his opinion was a gratuitous offering, and not what he would recommend to a client. On this issue, Respondent Fitzpatrick's testimony was clear and precise. Mr. Chazan's testimony, however, was vague and unspecific in describing how Respondent Fitzpatrick responded to his request for information about the stocks on the lists he provided to Respondent Fitzpatrick. While the parties dispute whether Respondent Fitzpatrick's opinions rose to the level of a recommendation to purchase unsuitable stock, it was undisputed that there were instances when Respondent Fitzpatrick gave a positive opinion about a stock, Mr. Chazan rejected his opinion, and did not buy. Conversely, there were also instances when Mr. Chazan bought, even after Respondent Fitzpatrick expressed a negative opinion. Based on the evidence presented at the hearing as described herein and based on the fact that the Panel has found that the Claimants were experienced and knowledgeable investors, the Panel finds that the weight of the evidence supports a finding that the Claimants were in complete control of their account, and that there were no unsolicited sales of unsuitable stock, and no unauthorized trading by Respondents.

C. Fraud.

To state a claim for fraud or unfair trade practices, the Claimants must establish (1) a representation (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. The Panel finds that there has been no competent evidence presented at the hearing that would support a claim of fraud by Respondents. To the contrary, the weight of the evidence supports a finding that there was no fraud, including both statutory and common law fraud.

D. Trading on Margin.

The Panel find that the Claimants, and in particular, Mr. Chazan, were very experienced with trading on margin. Claimants had had a margin account with Dean Witter at the time they came to First Union, and subsequently transferred the account to First Union. Based on the evidence herein, the Panel concluded that the opening of the Claimants' margin account did not constitute an act of unsuitability, and that there was no fraud by the Respondents either in opening the account or in the day-to-day management or use of the account. Further, given the high degree of control exercised over the account by Mr. Chazan, what happened in the day-to-day operation of the account was a direct result of Mr. Chazan's own actions, and not the fault of Respondents.

E. Excessive Activity, Excessive Commissions.

Claimants contend that commissions which manifested themselves as mark-ups and mark downs of purchases or sales were excessive, and deceptive. Initially, the Panel reject Claimants' contention that a commission based on mark-ups and mark-downs was, somehow, deceptive. The mark-ups/mark-downs were clearly visible on the sales confirmations provided to Claimants.

The computation involved understanding mathematical concepts of division, multiplication, decimals, percents and fractions- essentially sixth grade arithmetic. One did not have to be an expert mathematician to understand the information provided by Respondents' purchase/sales confirmation. There was no evidence introduced to show that neither of the two Claimants had the ability to understand the mathematics used to calculate mark-ups and mark-downs, nor that the existence of any such inability by either Claimants was ever conveyed to Respondents. There is no issue as to commissions that were indicated as commissions on the purchase/sales confirmations. Notwithstanding, the Panel finds as a fact that such commissions were not excessive.

As to excessive trading, the Panel finds that the weight of the evidence does not support Claimants' allegation of excessive trading in their account by Respondents. Given the high degree of investment knowledge and the high degree of control exerted over the account by Claimants, had there been excessive trading, Claimants had the knowledge and ability to discover it immediately upon receipt of any given monthly statement. As stated above, the evidence is that Claimants never complained of excessive or unauthorized activity in their account.

F. Breach of Fiduciary Duty

Based on a consideration of all of the evidence presented at the hearing, and consistent with the findings of the Panel, as set forth herein, the Panel further finds that the weight of the evidence supports a finding that there was no Breach of Fiduciary Duty by Respondents.

G. Failure to supervise by Respondents First Union and O'Neil.

Based on a consideration of all of the evidence presented at the hearing, and consistent with the findings of the Panel, as set forth herein, the Panel further find that the weight of the evidence supports a finding that there was no failure to supervise by Respondents First Union and O'Neil.

It should be noted that, with respect to complaints filed against Respondent Fitzpatrick, unproven allegations contained in customer complaints were not considered as competent evidence by the Panel, nor were customer complaints related to the global settlement by Prudential, over which neither Respondent Fitzpatrick nor any other broker had any control. Similarly, not considered as evidence of Respondent Fitzpatrick's credibility, character or ability vis-à-vis his being employed by Respondent First Union were complaints where there was a finding that Respondent Fitzpatrick was not at fault, or where a complaint was withdrawn by the customer.

H. Absence of Negligent or Intentional Wrongdoing on the Part of Respondents Fitzpatrick and O'Neil.

Based on the consideration of all of the evidence presented at the hearing, the Panel finds that the weight of the evidence supports a finding that there was no wrongdoing of any nature, and specifically, but not limited to, either negligent or intentional acts or omissions, on the part of Respondents Fitzpatrick and O'Neill

The Panel therefore rules as follows:

1. All claims against Respondents are denied in their entirety;
2. The parties shall bear their respective costs, including attorney's fees, except as Fees are specifically addressed below; and,
3. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 500.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Respondent First Union is a party.

Member surcharge	= \$ 2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 4,500.00
Total Member Fees	= \$ 7,600.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

May 14-17, 2002, adjournment by the Parties	= fee waived
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Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the Panel(s), including a pre-hearing conference with the Panel(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ \$ 450.00	= \$ 450.00
Pre-hearing conference: March 7, 2002 1 session	

One (1) Pre-hearing session with Panel @ \$ 1,200.00 = \$ 1,200.00
Pre-hearing conference: December 3, 2001 1 session

Six (6) Hearing sessions @ \$ 1,200.00 = \$ 7,200.00
Hearing Dates: September 3, 2002 2 sessions
September 4, 2002 2 sessions
September 5, 2002 2 sessions

Total Forum Fees = \$ 8,850.00

1. The Panel has assessed \$4,425.00 of the forum fees to Claimants.
3. The Panel has assessed \$4,425.00 of the forum fees jointly and severally to Respondents.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimants requested copies of tapes = \$ 195.00
2. Respondent First Union requested copies of exhibits = \$ 170.00
3. Respondent First Union requested copies of tapes = \$ 195.00

EEE SUMMARY

1. Claimants are assessed the following fees:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 4,425.00
<u>Administrative Costs</u>	<u>= \$ 195.00</u>
Total Fees	= \$ 5,120.00
<u>Less payments</u>	<u>= \$ 1,700.00</u>
Balance Due NASD Dispute Resolution	= \$ 3,420.00

2. Respondent First Union is assessed the following fees:

Member Fees	= \$ 7,600.00
<u>Administrative Costs</u>	<u>= \$ 365.00</u>
Total Fees	= \$ 7,965.00
<u>Less payments</u>	<u>= \$ 7,600.00</u>
Balance Due NASD Dispute Resolution	= \$ 365.00

4. Respondents are jointly and severally assessed the following fees:

Forum Fees	= \$ 4,425.00
Balance Due NASD Dispute Resolution	= \$ 4,425.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.


ARBITRATION PANEL

Nickolas F. Monteforte, Esq.	-	Public Arbitrator, Presiding Chairperson
Jordan Roy Nelson, Ph.D.	-	Public Arbitrator, Panelist
John T. Hausladen	-	Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

Nickolas F. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date



Jordan Roy Nelson, Ph.D.
Public Arbitrator, Panelist

1/26/03

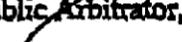
Signature Date

John T. Hausladen
Non-Public Arbitrator, Panelist

Signature Date

January 10 2003

Date of Service (For NASD Dispute Resolution office use only)


Nickolas F. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson

Jun 6, 2003
Signature Date

Signature Date

Signature Date

January 10, 2023
Date of Service (For NASD Dispute Resolution office use only)

Arbitration No. 01-01866

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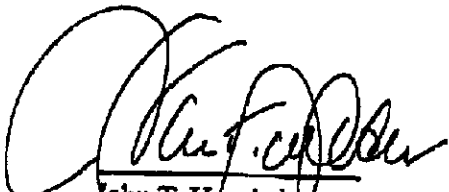
Consenting Arbitrators' Signatures

Nickolas F. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Jordan Roy Nelson, Ph.D.
Public Arbitrator, Panelist

Signature Date


John T. Hausladen
Non-Public Arbitrator, Panelist

1/17/03
Signature Date

January 10, 2003
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