

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Claimant

H & D Loucks Trust

v.

02-05272  
Denver, Colorado

Respondents

Raymond James Financial Services and Fred L. Dowd

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Nature of Dispute: Customer v. Member and Associated Person

**REPRESENTATION OF PARTIES**

H & D Loucks Trust ("Claimant") was represented by Steve A. Miller, Esq., of Steve A. Miller, P.C., Denver, Colorado.

Raymond James Financial Services ("Raymond James") and Fred L. Dowd ("Dowd") were represented by was represented by Joesph C. Coates, III, Esq., of Greenberg Traurig, P.A., West Palm Beach, Florida.

**CASE INFORMATION**

The Statement of Claim was filed on or about September 5, 2002. Submission Agreement of Claimant H & D Loucks Trust was signed on or about September 5, 2002 by Holly B. Loucks, Trustee, on behalf of H & D Loucks Trust.

A Joint Statement of Answer was filed by Respondents Raymond James Financial Services and Fred L. Dowd on or about November 15, 2003. Submission Agreement of Respondent Raymond James Financial Services was signed on or about September 16, 2003, by Scott W. Nagorka, Regional Compliance Officer, Raymond James Financial Services. Submission Agreement of Respondent Fred L. Dowd was signed on or about November 11, 2002.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty; suitability and failure to supervise. The causes of action related to Claimant's allegations that Dowd switched its investment strategy from one based in mutual and bond funds to a speculative strategy consisting of volatile high tech and over-the-counter stocks. Claimant also alleged that Raymond James failed to supervise Respondent Dowd, and as such was liable under respondeat superior and as a control person WS §17-4-122.

Respondents denied the allegations set forth in the Statement of Claim and asserted affirmative defenses including the following: Claimant was fully advised and understood the nature of the investments purchased in its accounts; Claimant had full, complete, accurate and contemporaneous knowledge of all transactions complained of in the Claim, and accordingly is precluded from any recovery in this action; Claimant had full control over the investment decisions in the accounts and any losses incurred were the result of market price fluctuations and risks Claimant knowingly assumed; Claimant received trade confirmations and account statements in a timely fashion indicating the securities purchased, sold or transferred, as well as the net worth for each of its accounts while maintained at Raymond James; Claimant continued dealing with Raymond James without complaining of the positions in or status of its accounts which constituted ratification and a waiver of any wrongdoing by Raymond James; Claimant failed to mitigate its damages through continued maintenance and pursuit of the trading strategy in the accounts at Raymond James; Claimant's claims are barred as a result of its failure to exercise due diligence and its failure to timely disaffirm the transactions and acts complained of in the Claim, despite its knowledge of any wrongdoing; and that Claimant is not entitled to recovery against Respondents in this arbitration because Raymond James and its agents acted at all times in good faith and exercised reasonable diligence.

#### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$143,000 in compensatory damages, in addition to attorneys' fees, interest, costs, witness fees and any other amount the Panel deemed appropriate.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees. In addition Respondents asked for such award to include an expungement of the claim from Dowd's CRD record and an assessment of all forum fees against Claimants.

#### **OTHER ISSUES CONSIDERED & DECIDED**

Respondents filed a Motion to Dismiss on or about September 10, 2003. Claimants orally responded at the Arbitration Hearing.

The parties accepted the Panel's composition at the hearing on September 16, 2003.

The Panel allowed the parties to submit post-hearing briefs in regard to the Wyoming securities statutes discussed at the arbitration hearing on or before September 25, 2003.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with NASD Dispute Resolution ("NASD").

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims, each and all, are denied and dismissed with prejudice in their entirety;
2. To the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief, including punitive damages, by any party hereto are denied with prejudice and;
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys' fees.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee = \$ 300

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, the member firm is Raymond James Financial Services.

Member surcharge = \$ 1,700  
Pre-hearing process fee = \$ 750  
Hearing process fee = \$ 2,750

#### **Forum Fees and Assessments**

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

One (1) Pre-hearing session with Panel x \$ 1,125 = \$ 1,125

Pre-hearing conference: 03/24/2003 1 session

Five (5) Hearing sessions x \$ 1,125 = \$ 5,625

Hearing Dates: 09/16/2003 2 sessions  
09/17/2003 2 sessions  
09/18/2003 1 session

Total Forum Fees = \$ 6,750

The Arbitration Panel has assessed \$ 3,375 of the forum fees to H & D Loucks Trust.

The Arbitration Panel has assessed \$ 3,375 of the forum fees jointly and severally to Raymond James Financial Services and Fred L. Dowd.

Fee Summary

Claimant, H & D Loucks Trust, is liable for:

Initial Filing Fee	= \$ 300
Forum Fees	= \$ 3,375
Total Fees	= \$ 3,675
Less payments	= \$ 1,425
Balance Due NASD Dispute Resolution	= \$ 2,250

Respondent, Raymond James Financial Services, is liable for:

Member Fees	= \$ 5,200
Total Fees	= \$ 5,200
Less payments	= \$ 5,200
Balance Due NASD Dispute Resolution	= \$ 0

Respondents, Raymond James Financial Services and Fred L. Dowd are jointly and severally liable for:

Forum Fees	= \$ 3,375
Total Fees	= \$ 3,375
Less payments	= \$ 0
Balance Due NASD Dispute Resolution	= \$ 3,375

**All balances are due to NASD Dispute Resolution pursuant to Rule 10330(g) of the Code of Arbitration**

**ARBITRATION PANEL**

Jess Burton Cohen – Non-Public Arbitrator, Presiding Chair  
William Joseph Lippman, Esq. - Public Arbitrator  
Roy J. Burr, Jr. – Non-Public Arbitrator

**Concurring Arbitrators:**

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William Joseph Lippman, Esq.  
Public Arbitrator

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Signature Date

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Roy J. Burr, Jr.  
Non-Public Arbitrator

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Signature Date

**Dissenting Arbitrator:**

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Jess Burton Cohen  
Non-Public Arbitrator, Presiding Chair

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Signature Date

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William Joseph Lippman, Esq. - Public Arbitrator  
Roy J. Burr, Jr. – Non-Public Arbitrator

**Concurring Arbitrators:**

  
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William Joseph Lippman, Esq.  
Public Arbitrator

12/30/03  
\_\_\_\_\_  
Signature Date

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Roy J. Burr, Jr.  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

**Dissenting Arbitrator:**

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Jess Burton Cohen  
Non-Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

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William Joseph Lippman, Esq. - Public Arbitrator  
Roy J. Burr, Jr. ~ Non-Public Arbitrator

Concurring Arbitrators

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William Joseph Lippman, Esq.  
Public Arbitrator

\_\_\_\_\_  
Roy J. Burr, Jr.  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Signature Date

10/28/03

Dissenting Arbitrator:

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Jess Burton Cohen  
Non-Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

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**ARBITRATION PANEL**

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William Joseph Lippman, Esq. - Public Arbitrator  
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**Concurring Arbitrators:**

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William Joseph Lippman, Esq.  
Public Arbitrator

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Signature Date

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Roy J. Burr, Jr.  
Non-Public Arbitrator

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Signature Date

**Dissenting Arbitrator:**

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Jess Burton Cohen  
Non-Public Arbitrator, Presiding Chair

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10-31-03  
Signature Date

## DISSENT

I can not vindicate or exonerate the respondents in this case. Therefore I respectfully dissent. In this case the respondent, Dowd, a registered investment advisor and admitted fiduciary in June of 2000, invested, on his sole discretion, \$250,000 of a trust with assets of \$1,000,000 and whose primary beneficiaries were Mr. Loucks 86, and Mrs. Loucks, 84. He purchased 25 stocks, which mostly had six figure price earnings ratios, and were non dividend paying, highly volatile, and had enjoyed rapid price appreciation. The issues in this case are: 1. Was this portfolio of stocks suitable under NASD rule 2310? 2. Did the respondent Dowd violate his fiduciary duty to the Claimants?

Mr. Loucks wanted growth, but did he want, need or deserve, without written warning, the kind of high powered, high risk, go-go growth Mr. Dowd gave him? In June of 2002 there was a big party going on in the stock market. Mr. Loucks wanted to go to the dance, and he asked Mr. Dowd to take him, That doesn't mean that at his age, he was asking to be thrown into the mosh pit.

Mr. Dowd testified he had great success creating fast growing portfolios for young high income earning doctors. A one size fits all manager, Mr. Dowd gave that type of portfolio to the Loucks. However, that type of portfolio is not suitable for a couple in their eighties on a fixed income. As a fiduciary Mr. Dowd must take age into consideration and balance risk and reward. This portfolio concentrated solely on reward, and ignored risk. Mr. Dowd admitted he had no risk control mechanism other than staying the course if the fundamentals didn't change. If the market's valuation of the unchanged fundamentals changes dramatically downward this is a recipe for uncontrolled disaster..

The volatile characteristics of the stocks in this portfolio are closer to an investment in a speculative commodity like pork bellies than to an investment in growth stocks like Johnson and Johnson or Coca Cola. To justify his investment in one stock, Mr Dowd said that a well known speculator had a position in the stock. There was no evidence Warren Buffet had a position in any of these stocks. These stocks were not suitable for the Loucks, and to buy them and hold them without a risk control mechanism was a violation of fiduciary duty. This is not hindsight, it is prudence. I believe a fiduciary must be prudent when dealing with elderly people. If I directed in my will that part of my estate be invested in growth, and the trustees invested in this portfolio for my 85 year old widow, regardless of her other assets, I would turn in my grave. I think this is analogous to a 86 year old man who goes to a ski instructor and says, " I am tired of the beginners hill. I want you to take me to the top of the mountain, and get me down." If the instructor sends him down the "plunge" a mogul filled, highly dangerous, run, without warning. The instructor must be held responsible if the client is badly hurt. The fact that a sudden storm wiped out everyone else on the plunge is not a defense. The client should not have been there.

Damages should have been the difference between the losses on this speculative portfolio, and the losses on a reasonable index, like the DJIA.

Oct. 30, 2003  
J. 3 G.H.  
CHAIRMAN