

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
Mark A. Shapiro

Case Number: 02-07770

Name of the Respondent/Third-Party Claimant
Morgan Stanley DW, Inc.

Name of Third-Party Respondent
Kimberlyn C. Underwood

Hearing Site: Chicago, Illinois

Type of Controversy: Customer v. Member Firm v. Associated Person

REPRESENTATION OF PARTIES

Claimant Mark A. Shapiro ("Shapiro") was represented by Mitchell L. Marinello, Esq. and Laura Duprey, Esq. of the firm Novack & Macey located in Chicago, Illinois.

Respondent/Third-Party Claimant Morgan Stanley DW, Inc. ("Morgan Stanley") was represented by Gilbert R. Serota, Esq. of the firm Howard Rice Nemerovski Canady Falk & Rabkin located in San Francisco, California.

Third-Party Respondent Kimberlyn C. Underwood ("Underwood") did not appear.

CASE INFORMATION

Statement of Claim filed on or about: December 24, 2002.

Amended Statement of Claim filed on or about: November 20, 2003.

Claimant Shapiro signed the Uniform Submission Agreement: December 19, 2002.

Statement of Answer and Third-Party Claim filed by Morgan Stanley on or about: March 11, 2003.

Motion for Default as to Underwood filed by Morgan Stanley on or about: August 18, 2003.

Underwood did not appear.

CASE SUMMARY

Shapiro asserted the following causes of action: Error in classifying a fund as growth rather than value.

The causes of action relate to the Berkeley Capital Management Madison Investment Advisors, Inc. Morgan Stanley IM Value.

Unless specifically admitted in its Answer, Morgan Stanley denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Shapiro's contracts with Morgan Stanley expressly bar any claim arising from losses incurred as a result of a manager's investments for the accounts.
2. Shapiro's conduct in selecting portfolio managers and his failure to timely object to the selection of Berkeley for an Aggressive Equity portfolio after receiving information putting him on notice of the style being employed on his behalf constitutes waiver, ratification and estoppel of the claims now made by Shapiro barring any recovery on his behalf.
3. Shapiro's failure to act promptly and reasonably upon suspecting an alleged error also constitutes a failure to mitigate his damages, barring his recovery in whole or in part.
4. Any losses incurred as a result of the management of Portfolio VI in a growth style should be offset, in whole or in part, by the losses that would have occurred if that portion of the portfolio had continued to be managed in a value style.
5. Shapiro expressly assumed the risk of losses as a result of an Aggressive Equity management style.
6. Shapiro losses are in whole or in part the result of market conditions outside of the control of Morgan Stanley.
7. Any losses incurred by Shapiro should be assessed against Third Party Respondent Underwood.
8. Any damages assessed against Morgan Stanley should be indemnified by Third Party Respondent Underwood.

Morgan Stanley asserted the following causes of action: Negligence and indemnification.

RELIEF REQUESTED

Shapiro requested:

Compensatory Damages

Interest

Other Monetary/Non-Monetary Relief if any:

\$240,000.00 (raised to
\$336,188.51 in the amended
statement of claim)
unspecified
any relief the panel deems
just and equitable

Morgan Stanley requested:

Compensatory Damages

indemnification from
Underwood

Other Monetary/Non-Monetary Relief if any:

denial and dismissal of
Claimant's claims

OTHER ISSUES CONSIDERED AND DECIDED

Shapiro noticed NASD of settlement with Morgan Stanley, as a result the only remaining claim is Morgan Stanley's Third Party Claim. Morgan Stanley requested that the remaining claim be decided on the papers by a single arbitrator. The panel granted the request.

Third Party Claimant, Morgan Stanley, opted to proceed against Third Party Respondent Underwood pursuant to Rule 10314(e) of the *NASD Code of Arbitration Procedure* ("Code"). The arbitrator determined that Respondent Underwood was properly served notice of the Statement of Claim and Notification of the Arbitrator by certified mail, and that Respondent is required to submit to arbitration pursuant to the Code and is bound by the determination of the Arbitrator on all issues submitted.

Morgan Stanley DW, Inc. did not file with NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

AWARD

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

1. Any and all claims asserted by Morgan Stanley DW, Inc. against Kimberlyn C. Underwood are denied.
2. Any and all relief not specifically addressed herein, including punitive damages, is denied.

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	= \$ 300.00
Third-party claim filing fee	= \$ 1,000.00

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. Accordingly, Morgan Stanley DW, Inc. is assessed the following fees:

Member surcharge	= \$ 1,700.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 2,750.00</u>
Total	= \$ 5,200.00

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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 a single arbitrator at \$450.00	= \$ 450.00
Pre-hearing conferences: November 19, 2003 1 session	
One (1) Pre-hearing session with Panel at \$1,200.00	= \$ 1,125.00
Pre-hearing conferences: October 9, 2003 1 session	
<u>Total Forum Fees</u>	<u>= \$ 1,575.00</u>

The Panel has assessed \$1,575.00 of the forum fees to Kimberlyn C. Underwood. The Panel also assessed an additional forum fee of \$300.00 for the default decision in this matter.

FEE SUMMARY

1. Claimant Mark A. Shapiro is solely liable for:

<u>Initial Filing Fee</u>	<u>= \$ 300.00</u>
Total Fees	= \$ 300.00
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,125.00

2. Respondent Morgan Stanley DW, Inc. is solely liable for:

Third-party Filing Fee	= \$ 1,000.00
Member Fees	= \$ 5,200.00
Total Fees	= \$ 6,200.00
<u>Less payments</u>	<u>= \$ 7,325.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,125.00

3. Respondent Kimberlyn C. Underwood is solely liable for:

Forum Fee	= \$ 1,875.00
Balance Due NASD Dispute Resolution	= \$ 1,875.00

3. Respondent Kimberlyn C. Underwood is solely liable for:

Forum Fee	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$ 1,575.00

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

ARBITRATION PANEL

Richard A. Van Kalker, Esq.

Public Arbitrator

Arbitrator's Signature



Richard A. Van Kalker, Esq.
Public Arbitrator, Presiding Chairperson

6/18/04
Signature Date

2/18/05
Date of Service (For NASD Dispute Resolution office use only)