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**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant

Nancy Reichle as Trustee of the DD Trust  
u/a/d February 23, 1993 (the "Trust") on behalf of  
the Trust and its beneficiaries

Case Number: 03-00775

Name of the Respondent

Morgan Stanley DW, Inc.

Hearing Site: Tampa, Florida

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

For Nancy Reichle as Trustee of the DD Trust u/a/d February 23, 1993 (the "Trust") on behalf of the Trust and its beneficiaries, hereinafter referred to as "Claimant": Brenda M. Combs, Esq. and William J. Schifino, Jr., Esq., Williams Schifino Mangione & Steady, P.A., Tampa, Florida.

For Morgan Stanley DW, Inc. ("MSDW"), hereinafter referred to as "Respondent": Todd Zuckerbrod, Esq., Greenberg Traurig, L.L.P., West Palm Beach, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: February 3, 2003.

Claimant Nancy Reichle as Trustee signed the Uniform Submission Agreement: November 26, 2002.

Statement of Answer filed by Respondent on or about: April 18, 2003.

Respondent signed the Uniform Submission Agreement: June 3, 2003.

Motion to Strike Trust Beneficiaries as Claimants filed by Respondent on or about: January 5, 2005.

Claimant's Response to Motion to Strike Trust Beneficiaries as Claimants filed on or about: January 5, 2005.

Motion for Leave to File Third Party Claim filed by Respondent on or about: January 10, 2005.

Third Party Statement of Claim filed by Respondent on or about: January 5, 2005.

Claimant's Response to Respondent's Motion for Leave to File Third Party Claim and

Claimant's Motion to Dismiss Third Party Statement of Claim filed on or about: January 5, 2005.

**CASE SUMMARY**

Claimant asserted the following causes of action: violation of Chapter 517 of the Florida Statutes; breach of fiduciary duty; negligence and negligent supervision; and, common law fraud. The causes of action relate to the purchase of mutual funds, including but not limited to, MSDW

American Opportunities Class B, MSDW Developing Growth Class B, MSDW Equity Fund Class B, MSDW European Growth Fund Class B, MSDW Growth Fund Class B, MSDW Health Sciences Fund Class B, MSDW Information Fund Class B, MSDW Market Leader Trust Class B, MSDW Mid-Cap Equity Trust Class B, MSDW Pacific Growth Class B, MSDW S&P 500 Index Class B, MSDW Small Cap Growth Class B, and MSDW Total Return Trust Class B, in Claimant's accounts.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested the following relief:

1. compensatory damages in the amount of \$315,805.77;
2. pre-award and post-award interest;
3. punitive damages;
4. costs;
5. a finding that Claimant is the prevailing party under Chapter 517 of the Florida Statutes, and as such, is entitled to seek an award of attorneys' fees and costs from a court of competent jurisdiction; and,
6. such other and further relief as the Panel deemed just and proper.

Respondent requested that the claim be denied in its entirety. In addition, Respondent asserted their intent to seek attorneys' fees as a prevailing party from a court of competent jurisdiction pursuant to Section 517.211(6) of the Florida Statutes.

### **OTHER ISSUES CONSIDERED AND DECIDED**

During the evidentiary hearing, on or about January 14, 2005, Respondent withdrew its Motion to Strike Trust Beneficiaries as Claimants based on the parties' stipulation that if any award is rendered against Respondent, it would be solely in favor of Claimant Nancy Reichle as Trustee. In addition, the Panel determined that Courtney Brooke Davis and Shannon Bayly Davis, as individuals, were not parties to this matter and ordered that they not be reflected in the caption of this matter.

During the evidentiary hearing, on or about January 14, 2005, the Panel denied Respondent's Motion for Leave to File Third Party Claim.

### **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:

The Panel finds that Claimant failed to meet her burden of proving all of the essential elements of any of her causes of action, and therefore denies all relief requested by her. While the Panel had concerns about Respondent's new account form and procedures, the extent to which the brokers really knew their customer, and the diligence used in opening and servicing this account, it could not conclude that any deficiencies in those areas made the investments in question "unsuitable" or had been the cause of the losses suffered in the account in 2000 - 2001. The crux

of the case was the question of what, if anything, Claimant told Respondent about needing to preserve capital and avoid any volatility so that she could make substantial withdrawals for taxes and expenses in the short run. Respondent contended that Claimant gave no such indication and instead wanted the assets to be invested for long-term (i.e., 10-year) growth. In order to prevail, Claimant had to prove by a preponderance of the evidence that she had directed that the account be managed for capital preservation and not invested for the long term. Weighing the evidence, the Panel concluded that Claimant failed to prove she had adequately conveyed that message so as to render the subject investments unsuitable for this account. The Panel also noted that, even after the account decreased in value and margin privileges were used in 2000, Claimant reaffirmed the choice of long-term investments, which then continued to decline into 2001. As such, Claimant's claims are denied in their entirety.

Any and all relief not specifically addressed herein, including Claimant's request for punitive damages, Claimant's request for relief under Section 517 of the Florida Statutes and Respondent's request for relief under Section 517.211(6) of the Florida Statutes, are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (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
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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 firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, MSDW is a member firm and a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00
Total Member Fees	= \$5,200.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

No adjournment fees were incurred in this matter.

#### **Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

No three-day cancellation fees were incurred in this matter.

#### **Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional

arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

No injunctive relief fees were incurred in this matter.

#### **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 @ \$450.00/session	= \$ 450.00
Pre-hearing conference: January 10, 2005 1 session	
Two (2) Pre-hearing sessions with Panel @ \$1,125.00/session	= \$2,250.00
Pre-hearing conferences: September 30, 2003 1 session	
November 29, 2004 1 session	
Six (6) Hearing sessions @ \$1,125.00/session	= \$6,750.00
Hearing Dates: January 12, 2005 2 sessions	
January 13, 2005 2 sessions	
January 14, 2005 2 sessions	
Total Forum Fees	= \$9,450.00

The Panel assessed forum fees of \$4,725.00 to Claimant.

The Panel assessed forum fees of \$4,725.00 to Respondent.

#### **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 not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred in this matter.

#### **Fee Summary**

Claimants is solely liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$4,725.00
Total Fees	= \$5,025.00
Less payments	= \$1,837.50
Balance Due NASD Dispute Resolution	= \$3,187.50

Respondent is solely liable for:

Member Fees	= \$5,200.00
Forum Fees	= \$4,725.00
Total Fees	= \$9,925.00
Less payments	= \$7,437.50
Balance Due NASD Dispute Resolution	= \$2,487.50

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

**ARBITRATION PANEL**

Edith N. Dinneen, Esq.	-	Public Arbitrator, Presiding Chairperson
Franci G. Rudolph	-	Public Arbitrator
Mark M. Mercier	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/  
Edith N. Dinneen, Esq.  
Public Arbitrator, Presiding Chairperson

February 9, 2005  
Signature Date

/s/  
Franci G. Rudolph  
Public Arbitrator

February 9, 2005  
Signature Date

/s/  
Mark M. Mercier  
Non-Public Arbitrator

February 8, 2005  
Signature Date

February 9, 2005  
Date of Service (For NASD Dispute Resolution office use only)

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Franci G. Rudolph	-	Public Arbitrator
Mark M. Mercier	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

*Edith N. Dinneen*

Edith N. Dinneen, Esq.  
Public Arbitrator, Presiding Chairperson

2/9/05  
Signature Date

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Franci G. Rudolph  
Public Arbitrator

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

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Mark M. Mercier  
Non-Public Arbitrator

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Public Arbitrator, Presiding Chairperson

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Signature Date

*Franci G. Rudolph*

*2/9/2005*

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Franci G. Rudolph	-	Public Arbitrator
Mark M. Mercier	-	Non-Public Arbitrator


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Public Arbitrator, Presiding Chairperson

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Signature Date

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Franci G. Rudolph  
Public Arbitrator

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Signature Date

  
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Mark M. Mercier  
Non-Public Arbitrator

02-08-2005  
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Signature Date

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