

Award
NASD Dispute Resolution

COPY

In the Matter of the Arbitration Between:

Luther D. Hutson and Estate of Mona L. Hutson, Claimants v. Morgan Stanley Dean Witter Inc.,
Respondent

Case Number: 03-03149

Hearing Site: San Francisco, California

Nature of the Dispute: Customers vs. Member

REPRESENTATION OF PARTIES

For Claimants:

Val D. Hornstein, Esq.
Hornstein Law Offices
San Francisco, California

For Respondent:

Katherine J. Hart, Esq.
Reed Smith
Oakland, California

CASE INFORMATION

Statement of Claim filed: April 28, 2003

Claimants' Hearing Brief filed: March 23, 2004

Claimants' Uniform Submission Agreement signed: April 7, 2003

Statement of Answer filed by Respondent Morgan Stanley Dean Witter Inc., also known as
Morgan Stanley DW Inc. ("Morgan Stanley"): July 29, 2003

Respondent's Hearing Brief filed: March 23, 2004

Respondent's Uniform Submission Agreement signed: July 7, 2003

CASE SUMMARY

Claimants alleged the following claims with respect to investments in JDS Uniphase, Sun Microsystems, Intel, Solectron CP, Brocade Communications and BEA Systems: 1) Negligence; 2) Breach of Fiduciary Duty; 3) Constructive Fraud (Civil Code Section 15731); 4) Fraud and Deceit; 5) Failure to Supervise; 6) Violation of California Corporate Securities Act Section

25400 et. seq.; 7) Violation of California Corporate Securities Act Section 2550 et. seq.; 8) Violation of Federal Securities Laws; NASD Rules of Fair Practice and NYSE Rules; and 9) Violation of California Elder Abuse and Dependent Adult Civil Protection Act (Cal. Welf. & I.C. Section 15600 et. seq.).

Respondent denied Claimants' allegations of wrongdoing and denied any liability to Claimants. Respondent also asserted affirmative defenses.

RELIEF REQUESTED

Claimants requested:

1. Compensatory damages in an amount according to proof;
2. Consequential damages in an amount according to proof;
3. Disgorgement and restitution of all earnings, profits, compensation and benefits received by Respondent as a result of its unlawful acts and practices in an amount according to proof;
4. Rescission of all monies and other consideration paid or given Respondent by Claimants;
5. The lost opportunity cost of what Claimants' investment funds would have earned if suitably invested;
6. Claimants' pain and suffering under Welf. & I.C. Section 15657(b);
7. Costs of suit;
8. Attorneys' fees and costs under Welf. & I.C. Section 15657(a);
9. Pre- and post judgment interest at the legal rate;
10. Trebling of Claimants' compensatory damages under Civ. Code Section 3345;
11. Punitive damages in an amount according to proof; and
12. Such other and further relief as the Panel may deem just and proper.

Respondent requested an award in its favor and requested costs.

OTHER ISSUES CONSIDERED AND DECIDED

On April 7, 2003, Claimants and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On June 11, 2003, Respondent's counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

NARRATIVE DISCUSSION

Respondent Superior. Claimant asserts that Respondent Morgan Stanley should be held liable for the actions of its broker/financial advisor Mark Lobdell. The panel so finds.

The Testimony and Evidence.

This case concerns itself with a \$100,000 investment by Claimant Luther Hutson and his late wife with and through Respondent Morgan Stanley DW, Inc., and specifically Respondent's broker/financial adviser, Mark Lobdell, arising out of two meetings in Mr. Lobdell's Benicia, California, office on or about June 30 and July 3, 2000.

Approximately three months after opening this first account, the Hutsons opened three more, small accounts with Respondent, two IRA accounts and one small "Active Assets Account." Claimant includes the net losses of these three accounts in his claim for damages. However, no specific details of the circumstances of the opening of any of these accounts were given, nor was there any substantive evidence regarding investment decisions that may have taken place in the accounts. The panel is therefore unconvinced that any culpable wrongdoing attended them. As a consequence, we restrict our consideration and ruling to the initial \$100,000 investment.

It seems clear that the financial information given by Mr. Hutson to Mr. Lobdell, as an incident to making that first investment, was incorrect in significant particulars. Where the fault for this lies is not so clear. Mr. Lobdell would seem to have no reason to record other than what he was told and the Hutsons had an obligation to confirm the correctness of what Mr. Lobdell recorded, either at the time or shortly thereafter. Be that as it may, what Mr. Lobdell did with the information is essentially clear. On Mr. Hutson's advisement that he did not want to make the investment decisions himself, Mr. Lobdell recommended the utilization of one of the professionally-managed "managed accounts" offered by Respondent. Accordingly, the data given (with its several errors and overstatements) was entered into a computerized program, from which emerged the (computer's) recommendation of the particular type of "managed account" and the names of three potential Investment Managers for that type of managed account. Of the three names thus produced, Campbell, Cowperthwaite & Co., Inc., was a company with which Mr. Lobdell was favorably acquainted. He accordingly recommended that choice to the Hutsons and they agreed. The ensuing portfolio consisted of a mix of varying cap growth stocks, without regard for current income generation.

No real argument is made by Claimant that the selection of this specific managed account was unsuitable for the Hutsons; and indeed the resultant portfolio appears to have been quite congruous with Mr. Hutson's expressed desires. (We do however fault Mr. Lobdell's inclusion of the value of the Hutsons' residence -- with or without a mortgage -- in the calculation of the

Hutsons' net worth. It seems entirely possible to us that, absent this one element, the computer might have produced a quite different program recommendation.)

Claimant's central position is that no equities-only account, for the full \$100,000 investment, was suitable or proper for the Hutsons. In this base-point conclusion, the panel agrees.

Taking the Hutsons' financial information as recorded by Mr. Lobdell as true, and even assuming no knowledge on Mr. Lobdell's part of the Hutsons' various medical problems -- and also assuming, of course, no preknowledge of the severe bear market to come -- the placement of so very large a portion of the clients' net worth -- even as overstatedly presented -- in equities must be faulted. The Hutsons' age alone should have cautioned strongly against such a concentration.

The panel further faults Mr. Lobdell (and Morgan Stanley), in a second major particular, for failure to follow more closely the managed account over the ensuing months and years. The panel is unpersuaded that Mr. Hutson told Mr. Lobdell, at the initial meeting, to "sell if the market turns down." As Claimant's expert Mr. Breen himself noted, such a declaration would have precluded any investment in the equity market, whatsoever. But the panel does believe that Mr. Hutson made it clear that he expected Mr. Lobdell to monitor the account. The selection of the Campbell Cowperthwaite managed account provided, of course, a significant measure of the "professional management" which Mr. Hutson stated he wanted. But the panel does not believe that this selection was understood by the Hutsons as relieving Mr. Lobdell of all oversight responsibility for the account -- nor should it have. Mr. Lobdell was, after all, the Hutsons' Financial Advisor and their only face-to-face contact regarding the investment. The periodic investment reports, though reporting on Campbell Cowperthwaite activity, were Morgan Stanley reports, and the only individual's name shown on the reports was that of Mark Lobdell.

In the panel's judgment, Mr. Lobdell failed in this on-going obligation. Indeed, from all the record shows it appears that, once having put the Hutsons into the managed account, Mr. Lobdell then effectively relinquished all responsibility for the account. Not only did he not initiate any review of the account with the Hutsons, in the one meeting, approximately a year after the initial investment, in which Mr. Hutson came in to complain, it appears that Mr. Lobdell's only action was to advise "staying the course" -- but, insofar as the record shows, without actually looking to see what that "course" was. We do not fault Mr. Lobdell for the "stay the course" recommendation, per se; he sincerely believed it was the correct course and he certainly was not alone in that conclusion. The fault, rather, was his apparent failure to look at this managed account's performance and this asset portfolio, with a critical view toward possible change, before making that rather facile recommendation. Had the account been a regular, "non-managed" account with Morgan Stanley, one would have expected no less.

All the foregoing said, we do not consider Mr. Hutson without blame in the playout of his financial demise. Significantly, he must be faulted for his own failure to monitor his account. We do not believe that Mr. Lobdell told him to ignore the periodic statements he would be receiving; Mr. Lobdell's testimony of what he did state in that regard seems much more plausible, and quite proper. Regardless, Mr. Hutson was a sufficiently experienced investor to know his own self-interested obligation in this regard. This comparative fault necessarily offsets in some measure the fault attributable to the Respondent.

Finally, of course, we are obliged to recognize that this was a severe bear market; and while Mr. Breen was able to present investment scenarios which would have made a profit (as he testified he himself also did), Respondent can not be blamed entirely for the actual loss experienced.

More specifically, Mr. Breen presented two hypothetical alternative portfolios under which, even in the bear market which actually occurred, a \$100,000 investment could actually have made money. Although not without educative value, the panel concludes that these hypotheticals bear little resemblance to likely reality. The hypotheticals are heavily weighted toward bonds, and it is clear from the testimony that Mr. Hutson was, himself, not at all interested in bonds. With proper guidance he could have been induced to allocate some portion of his \$100,000 to fixed assets, but nothing resembling the 60% to 70% used in the hypotheticals. Similarly, the panel is not persuaded that Mr. Hutson would have settled for the S&P 500 or its equivalent for the equity portion. The panel concludes, therefore, that, in common with the bulk of the investing public, the Hutsons' \$100,000, even suitably invested, would have ended up with a net loss in some amount.

California Elder-Abuse Statutes.

Claimant seeks invocation of two California statutory schemes, designed for the special protection of, and compensation for, *inter alia*, elder (and infirm) consumers, the Elder Abuse and Dependent Adult Protection Act (Welfare & Inst. Code §§15600 *et seq.*) and the Consumer Legal Remedies Act (Civil Code §§1750 *et seq.*; also §3345). The panel does not find, on the facts of this case, that either statute properly applies. Hence the special remedies there provided (specifically including treble damages) also do not apply.

Attorneys' fees; expert-witness fees; other costs; filing and forum fees. In view of our conclusion just recited, and in the absence of any express statutory authority otherwise, the panel is obliged to decline any award to Claimant of his attorney's fees, expert-witness fees, or costs as enumerated in counsel's post-hearing Declaration. We do however award Claimant his filing fees and forum costs, all of which are to be borne by Respondent.

AWARD

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

- 1) The foregoing all considered, and after carefully weighing all of the evidence and arguments, pro and con, the Panel has determined that Respondent is liable for and shall pay to Claimants the sum of \$43,500.00.
- 2) Respondent is liable for and shall pay to Claimants the sum of \$250.00 as reimbursement for Claimants' filing fee.
- 3) Claimants' claim for punitive damages is denied.
- 4) Except as mentioned in paragraph 2 above, each party shall bear all other respective costs, including attorney's fees.
- 5) All other relief not expressly granted is denied.

FEEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD-DR received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$250.00
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Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, Morgan Stanley is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$2,200.00
Total Member Fees	= \$4,450.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

(1) Pre-hearing conference session with the Panel @ \$1,000.00/session = \$1,000.00
Pre-hearing conference: October 29, 2003 1 session

(6) Hearing sessions @ \$1,000.00/session = \$6,000.00
Hearing: April 6, 2004 2 sessions
April 7, 2004 2 sessions
April 8, 2004 2 sessions

Total Forum Fees = \$7,000.00

The Panel assessed the \$7,000.00 in forum fees to Respondent.

Fee Summary

1. Claimants are charged with the following fees and costs.

Initial Filing Fee	= \$ 250.00
<u>Less Payments</u>	= \$(1,252.00)
Refund Due Claimants	= \$(1,002.00)

2. Respondent Morgan Stanley is charged with the following fees and costs:

Member Fees	= \$ 4,450.00
<u>Forum Fees</u>	= \$ 7,000.00
Total Fees	= \$11,450.00
<u>Less Payments</u>	= \$(4,450.00)
Balance Due NASD-DR	= \$ 7,000.00

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

ARBITRATION PANEL

F. Conger Fawcett, Esq.	-	Public Arbitrator, Presiding Chair
Joseph Berzok, J.D.	-	Public Arbitrator
David Edward Canter, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


F. Conger Fawcett, Esq.
Chair, Public Arbitrator

April 30, 2004
Signature Date

Joseph Berzok, J.D.
Public Arbitrator

Signature Date

David Edward Canter, Esq.
Non-Public Arbitrator

Signature Date

5/04/04
Date of Service

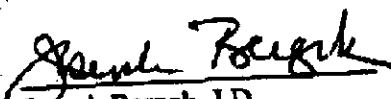
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David Edward Canter, Esq.

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

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Chair, Public Arbitrator


Joseph Berzok, J.D.
Public Arbitrator

David Edward Canter, Esq.
Non-Public Arbitrator

Signature Date

5/2/04
Signature Date

Signature Date

5/04/04
Date of Service

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David Edward Canter, Esq.	-	Non-Public Arbitrator


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Chair, Public Arbitrator

Signature Date

Joseph Berzok, J.D.
Public Arbitrator

Signature Date


David Edward Canter, Esq.
Non-Public Arbitrator

5/3/04
Signature Date

5/04/04
Date of Service