

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

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In the Matter of the Arbitration Between:

Larry Willard, Claimant v. Morgan Stanley DW Inc., formerly known as Morgan Stanley Dean Witter, Inc., Respondent

Case Number: 03-03563

Hearing Site: San Francisco, California

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Nature of the Dispute: Customer vs. Member

**REPRESENTATION OF PARTIES**

For Claimant:

Steven L. Miller, Esq.  
Attorney At Law  
Encino, California

For Respondent:

Eric G. Wallis, Esq.  
Reed Smith LLP  
Oakland, California

**CASE INFORMATION**

Statement of Claim filed: May 12, 2003

Claimant's Arbitration Brief filed: August 31, 2004

Claimant's Uniform Submission Agreement filed: May 12, 2003

Statement of Answer filed by Respondent Morgan Stanley DW Inc., formerly known as Morgan Stanley Dean Witter, Inc. ("Morgan Stanley"): July 28, 2003

Respondent's Arbitration Brief filed: September 2, 2004

Respondent Morgan Stanley's Uniform Submission Agreement signed: June 17, 2003

**CASE SUMMARY**

Claimant alleged that Respondent Morgan Stanley and its registered representative, Dieter Ramaekers mishandled his account and further alleged the following claims with respect to investments on margin and investments in various unspecified technology stocks: 1) Churning; 2) Breach of Fiduciary Duty; and 3) Failure to Supervise.

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

### **RELIEF REQUESTED**

At hearing, Claimant requested:

1. Damages of approximately \$1,484,041.00;
2. Pre-judgment interest;
3. Disgorgement of approximately \$102,022.00;
4. Punitive damages; and
5. Costs, expenses and attorney fees.

Respondent requested an award in its favor, costs, and an order expunging this claim from Dieter Ramaekers' CRD record.

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

On September 15, 2003, Claimant and Claimant'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.

On July 29, 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.

Pursuant to the Code of Arbitration Procedure IM-10100 the waiver of the Claimant shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

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

### **AWARD**

After considering the pleadings, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows: All claims by Claimant, including the claims for punitive damages and disgorgement are denied. Claimant shall not recover from Respondent. The causes of action alleged are reviewed as follows:

1. Churning. The Panel found that a) Respondent did not have control of Claimant's non-discretionary account; b) the various transactions during the time Claimant's account was active were not excessively traded in size or frequency given the account's objectives and financial resources; and c) churning for the purpose of generating commissions was not possible since Claimant had a "wrap" account in which fees were based on the size of the account, and no commissions per trade were earned.<sup>1</sup>

2. Breach of Fiduciary Duty. The Panel found that Respondent owed a fiduciary duty to Claimant in accepting and executing Claimant's buy and sell orders as directed by Claimant. Claimant approved every transaction that Respondent solicited and Claimant directed Respondent to make many trades unsolicited by Respondent<sup>2</sup> – some of which were contrary to Respondent's advice. The Panel concluded that Respondent did not breach its fiduciary duty to Claimant.

3. Failure to Supervise. The panel found that the transactions Respondent's broker made for Claimant were suitable<sup>3</sup> based upon Claimant's investment objectives of capital appreciation and speculation. Therefore, no corrective action on the part of Respondent's management was warranted. Claimant alleged that various omissions on the part of Respondent's management caused Claimant's losses. However, the Panel found that Claimant's losses were the result of the following:

- Claimant bought highly speculative, stock unsolicited by Respondent, and often contrary to the latter's advice;
- Claimant's account was heavily leveraged through excessive use of margin;
- Claimant was an aggressive, speculative investor who concentrated his investments in one industry sector - technology;
- Claimant either ignored or did not review the monthly account statements or trade confirmations submitted to him by Respondent showing severe declines;
- after precipitous drops in the value of his account, Claimant continued to make further high risk investments; and
- Claimant opened his account with Respondent shortly before the market reached its peak in 2000 and closed the account at the bottom of the bear market in 2002.

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1 Claimant's expert witness acknowledged that no churning occurred in his account.

2 Evidence showed that Claimant spoke with Respondent's broker on a daily basis, sometimes as much as three or four times a day.

3 Claimant's expert witness testified that Respondent's investment advice was suitable.

4. The Panel recommends the expungement of all references, if any, to this arbitration from Dieter Ramaekers' registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Dieter Ramaekers must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

5. Each party shall bear its own costs, including attorney and expert witness fees.

6. All other relief not expressly granted is denied.

### **FEES**

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 = \$600.00

#### **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	= \$3,350.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$5,500.00
Total Member Fees	= \$9,600.00

#### **Adjournment Fees**

The following adjournment fees are assessed:

September 27-30, 2004, requested by Morgan Stanley = \$1,200.00

#### **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.

Cancellation of September 27-30, 2004 hearing dates: = \$300.00

1. The Panel assessed the 3-day cancellation fee of \$300.00 to Respondent Morgan Stanley.

**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 @ \$1,200.00/session = \$1,200.00  
Pre-hearing conference: November 25, 2003 1 session

(7) Hearing sessions @ \$1,200.00/session = \$8,400.00  
Hearings: January 31, 2005 2 sessions  
February 1, 2005 2 sessions  
February 2, 2005 2 sessions  
February 3, 2005 1 session

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**Total Forum Fees = \$9,600.00**

The Panel assessed \$4,800.00 in forum fees to Claimant.

The Panel assessed \$4,800.00 in forum fees to Respondent.

**Fee Summary**

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 600.00
<u>Forum Fees</u>	= \$ 4,800.00
Total Fees	= \$ 5,400.00
<u>Less Payments</u>	= \$( 1,800.00)
Balance Due NASD-DR	= \$ 3,600.00

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

Member Fees	= \$ 9,600.00
Adjournment Fee	= \$ 1,200.00
3-Day Cancellation Fee	= \$ 300.00
<u>Forum Fees</u>	= \$ 4,800.00
Total Fees	= \$ 15,900.00
<u>Less Payments</u>	= \$(11,100.00)
Balance Due NASD-DR	= \$ 4,800.00

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.



Sheldon Michaels, J.D.  
Chair, Public Arbitrator

2/17/05  
Signature Date

Jonathan Holman Hathaway  
Public Arbitrator

Signature Date

Omar J. Brubaker  
Non-Public Arbitrator

Signature Date

Date of Service

2/18/05

Sheldon Michaels, J.D.	-	Public Arbitrator, Presiding Chair
Jonathan Holman Hathaway	-	Public Arbitrator
Omar J. Brubaker	-	Non-Public Arbitrator

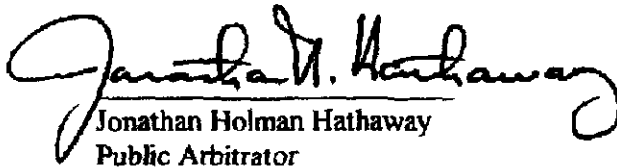
Concurring Arbitrators' Signatures

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Sheldon Michaels, J.D.  
Chair, Public Arbitrator

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Signature Date

  
Jonathan Holman Hathaway  
Public Arbitrator

2-17-2005

Signature Date

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Omar J. Brubaker  
Non-Public Arbitrator

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Signature Date

2/18/05  
Date of Service

ARBITRATION PANEL

Sheldon Michaels, J.D.  
Jonathan Holman Hathaway  
Omar J. Brubaker

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator


Concurring Arbitrators' Signatures

Sheldon Michaels, J.D.  
Chair, Public Arbitrator

Signature Date

Jonathan Holman Hathaway  
Public Arbitrator

Signature Date

  
Omar J. Brubaker  
Non-Public Arbitrator

2/17/05  
Signature Date

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