

**Stipulated Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

William Bernard and Barbara Bernard, Claimants v. Morgan Stanley DW Inc., Jeffrey N. McFadden and Wayne L. Gilliam, Respondents

Case Number: 03-03565

Hearing Site: San Francisco, California

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Nature of the Dispute: Customers vs. Member and Associated Persons

**REPRESENTATION OF PARTIES**

For Claimants:

Timothy A. Canning, Esq.  
Novato, California

For Respondents:

Kenneth C. Mennemeier, Esq.  
Mennemeier, Glassman & Stroud  
Sacramento, California

**CASE INFORMATION**

Statement of Claim filed: May 13, 2003

Claimants' Uniform Submission Agreement signed: May 5, 2003

Joint Statement of Answer filed by Respondents Morgan Stanley DW Inc., also known as Morgan Stanley Dean Witter ("Morgan Stanley"), Jeffrey N. McFadden and Wayne L. Gilliam: July 30, 2003

Respondent Morgan Stanley's Uniform Submission Agreement signed: June 16, 2003

Respondent Jeffrey N. McFadden's Uniform Submission Agreement signed: July 29, 2003

Respondent Wayne L. Gilliam's Uniform Submission Agreement signed: July 28, 2003

### **CASE SUMMARY**

Claimants alleged that their securities accounts at Morgan Stanley were mishandled in that Respondent McFadden recommended unsuitable investments. Claimants also alleged that Respondents Gilliam and Morgan Stanley failed to properly supervise Respondent McFadden. Claimants' allegations involve investments in various unspecified high technology stocks.

Respondents denied the allegations of wrongdoing set forth in Claimants' Statement of Claim and asserted a number of affirmative defenses, including waiver, estoppel, laches, comparative and contributory negligence, lack of proximate cause and failure to mitigate damages.

### **RELIEF REQUESTED**

Claimants requested:

1. Damages in the amount of \$800,000.00;
2. Punitive damages;
3. Treble damages; and
4. Costs;

Respondents requested dismissal of Claimants' Statement of Claim in its entirety.

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

On June 20, 2003, and June 25, 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. Pursuant to the Code of Arbitration Procedure IM-10100 the waiver of the Claimants 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 Stipulated Award in this matter may be executed in counterpart copies or that a handwritten, signed Stipulated Award may be entered.

### **PRELIMINARY MATTERS**

The parties have submitted a Stipulation which provides in pertinent part that:

1. Each and every one of Claimants' claims asserted against Respondents is hereby dismissed with prejudice;

2. The Panel will recommend the expungement of all reference to the above-captioned arbitration from the registered records maintained by the NASD Central Registration Depository of Respondent Gilliam (CRD No. 221848); and
3. Respondent Morgan Stanley shall bear Claimants' share of any non-refundable NASD forum fees, up to \$1,500.00.

### AWARD

Pursuant to the agreement of the Parties, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Each and every one of Claimants' claims asserted against Respondents Morgan Stanley, Gilliam and McFadden is hereby dismissed with prejudice;
2. The Panel recommends the expungement of all reference to the above-captioned arbitration from Respondent Wayne L. Gilliam's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Wayne L. Gilliam must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
3. Morgan Stanley shall bear Claimants' share of any non-refundable NASD forum fees, up to but not exceeding \$1,500.00. Accordingly, Morgan Stanley is liable for and shall pay Claimants the sum of \$1,500.00 as reimbursement for Claimants' share of forum fees (\$1,200.00) and 50% of Claimants' adjournment fee (\$300.00).
4. Except as mentioned in paragraph 3 above, each party shall bear its own costs.
5. 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	= \$375.00
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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	= \$2,250.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$4,000.00</u>
Total Member Fees	= \$7,000.00

### **Adjournment Fees**

The following adjournment fees are assessed:

The Panel granted Respondents' request to postpone the June 15-18, 2004, hearing dates and assessed the postponement fee as follows: 50% to Claimants jointly and severally and 50% to Respondents, jointly and severally.

### **3-Day Cancellation Fee**

On September 16, 2004, the parties advised that they had reached a settlement in this matter. Respondent Morgan Stanley agreed to pay the 3-Day Cancellation Fee in the amount of \$300.00.

### **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:

(2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$2,400.00
Pre-hearing conferences:      October 22, 2003	1 session
May 14, 2004	1 session

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<b>Total Forum Fees</b>	<b>= \$2,400.00</b>
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The Panel assessed \$1,200.00 in forum fees jointly and severally to Claimants.

The Panel assessed \$1,200.00 in forum fees jointly and severally to Respondents, Morgan Stanley, McFadden and Gilliam.

**Fee Summary**

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 375.00
Adjournment Fee	= \$ 600.00
<u>Forum Fees</u>	<u>= \$ 1,200.00</u>
Total Fees	= \$ 2,175.00
<u>Less Payments</u>	<u>= \$(1,575.00)</u>
Balance Due NASD-DR	= \$ 600.00

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

Member Fees	= \$ 7,000.00
<u>3-Day Cancellation Fee</u>	<u>= \$ 300.00</u>
Total Fees	= \$ 7,300.00
<u>Less Payments</u>	<u>= \$ (7,000.00)</u>
Balance Due NASD-DR	= \$ 300.00

3. Respondents Morgan Stanley, McFadden and Gilliam are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 1,200.00
<u>Adjournment Fee</u>	<u>= \$ 600.00</u>
Total Fees	= \$ 1,800.00
<u>Less Payments</u>	<u>= \$( 0.00)</u>
Balance Due NASD-DR	= \$ 1,800.00

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.

NASD Dispute Resolution  
Arbitration No. 03-03565  
Stipulated Award Page 6 of 6

**ARBITRATION PANEL**

Ferdinand Schoch	-	Public Arbitrator, Presiding Chair
Philip Aaron Tymon, JD	-	Public Arbitrator
James D. Murray	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

*Ferdinand Schoch*

Ferdinand Schoch  
Chair, Public Arbitrator

11/19/04

Signature Date

Philip Aaron Tymon, JD  
Public Arbitrator

Signature Date

James D. Murray  
Non-Public Arbitrator

Signature Date

11/29/04  
Date of Service

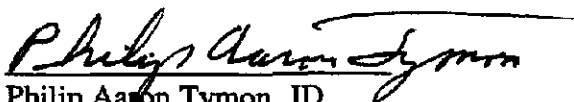
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James D. Murray	-	Non-Public Arbitrator

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Ferdinand Schoch  
Chair, Public Arbitrator

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

  
\_\_\_\_\_  
Philip Aaron Tymon, JD  
Public Arbitrator

11/23/04  
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Signature Date

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James D. Murray  
Non-Public Arbitrator

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Signature Date

11/29/04  
\_\_\_\_\_  
Date of Service

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James D. Murray  
Non-Public Arbitrator

11/19/04  
\_\_\_\_\_  
Signature Date

11/29/04  
\_\_\_\_\_  
Date of Service



KENNETH C. MENNEMEIER (SBN 113973)  
MENNEMEIER, GLASSMAN & STROUD LLP  
980 9<sup>th</sup> Street, Suite 1700  
Sacramento, CA 95814  
Telephone: 916-553-4000  
Facsimile: 916-553-4011

OCT 14 2004

Attorneys for Respondents Morgan Stanley DW Inc.,  
Wayne Gilliam, and Jeffrey McFadden

BEFORE THE NATIONAL ASSOCIATION OF SECURITIES DEALERS  
DISPUTE RESOLUTION, INC.

WILLIAM BERNARD and BARBARA  
BERNARD,

Claimants,

v.

MORGAN STANLEY DEAN WITTER,  
JEFFREY McFADDEN and WAYNE  
GILLIAM

Respondents.

Case No. 03-03565

**STIPULATION OF DISMISSAL WITH  
PREJUDICE WITH REQUEST THAT  
PANEL ISSUE AN ORDER  
RECOMMENDING EXPUNGEMENT  
OF MATTER FROM RESPONDENT  
WAYNE GILLIAM'S C.R.D. RECORD**

By and through their counsel of record, Claimants William and Barbara Bernard  
("Claimants") and Respondents Morgan Stanley DW Inc. ("Morgan Stanley"), Wayne Gilliam,  
and Jeffrey McFadden agree and stipulate as follows:

A. Claimants have brought certain claims against Morgan Stanley, Jeffrey  
McFadden, and Wayne Gilliam (collectively "Respondents") before the National Association of  
Securities Dealers Dispute Resolution, Inc. ("NASD") for arbitration and resolution, and that  
matter was assigned claim No. 03-03565.

B. The Respondents denied all material allegations of Claimants' claims.

C. Claimants now wish to dismiss this matter with prejudice, and hereby  
stipulate to dismissal with prejudice.

1 D. During the pendency of this matter, the parties conducted discovery and  
2 investigated Claimants' allegations and Respondents' defenses.

3 E. After conducting discovery and completing their investigation, the parties  
4 stipulate that the following facts are undisputed:

- 5 1. At the time of the matters at issue, Gilliam was the branch office  
6 manager for Morgan Stanley's office in Citrus Heights, California,  
7 which was the office from which the Claimants' Morgan Stanley  
8 accounts were serviced during the period in question;
- 9 2. Gilliam was named as a respondent in Claimants' statement of  
10 claim in his supervisory capacity only, and the only claim asserted  
11 against Gilliam was for an alleged failure to supervise;
- 12 3. After discovery in this matter, Claimants are aware of no evidence  
13 that Gilliam failed to satisfy his supervisory responsibilities with  
14 respect to Claimants' accounts.

15 F. Based on the foregoing, Respondents contend that the claims against  
16 Gilliam were without factual basis, although that fact would not have been apparent to Claimants  
17 at the time they filed their Statement of Claim;

18 G. In light of the foregoing undisputed facts, Claimants request the  
19 expungement of all reference to this arbitration from Gilliam's registration records maintained by  
20 the NASD Central Registration Depository ("CRD"), and they further agree that good cause  
21 exists to have the matter so expunged; and

22 H. The parties agree that any Stipulated Award may be executed in  
23 counterparts.

24 WHEREFORE, through their respective counsel of record, Claimants and  
25 Respondents hereby stipulate to, and seek the arbitrators' approval of, the following order:

- 26 1. Each and every one of Claimants' claims against Respondents is hereby  
27 dismissed with prejudice.

1           2.     The Panel recommends the expungement of all reference to the above-  
2 captioned arbitration from Respondent Wayne Gilliam's registration records maintained by the  
3 NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD  
4 Notice to Members 99-09, Respondent Wayne Gilliam must obtain confirmation from a court of  
5 competent jurisdiction before the CRD will execute the expungement directive.

6           3.     Morgan Stanley shall bear Claimants' share of any non-refundable NASD  
7 forum fees, up to but not exceeding \$1,500.

8           4.     All other relief not expressly granted is denied.

9           5.     Morgan Stanley shall bear any additional forum costs or forum fees  
10 charged by the NASD in connection with any proceedings that occur in connection with this  
11 Stipulation.

12           6.     The parties have approved the form of stipulated award attached hereto as  
13 Exhibit A, and request that the arbitrators execute an award substantially in that form.

14 Dated: September 21, 2004

LAW OFFICES OF TIMOTHY CANNING

15 By: Timothy Canning

Timothy Canning

16 Attorneys for Claimants William and Barbara  
17 Bernard

18 Dated: September 27, 2004

MENNEMEIER, GLASSMAN & STROUD LLP

19 By: Kenneth C. Mennemeier

Kenneth C. Mennemeier

20 Attorneys for Respondents Morgan Stanley DW Inc.,  
21 Wayne Gilliam, and Jeffrey McFadden