

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

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In the Matter of the Arbitration Between:

Jack A. Sunseri Trust, Claimant v. Morgan Stanley DW Inc., Clifford M. Topol, and Salvatore Samperi, Respondents

Case Number: 03-04979

Hearing Site: San Francisco, California

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Nature of the Dispute: Customer v. Member and Associated Persons

**REPRESENTATION OF PARTIES**

For Claimant:

Jared R.B. Hutton, Esq.  
Attorney At Law  
Los Angeles, California

For Respondents:

Paul D. Allen, Esq.  
Bingham McCutchen LLP  
San Francisco, California

James D. Yellen  
Morgan Stanley DW Inc.  
New York, New York

**CASE INFORMATION**

Initial Statement of Claim filed: July 7, 2003

Amended Statement of Claim filed: April 7, 2004

Claimant's Hearing Brief filed: June 25, 2004

Claimant's Response to Motion to Dismiss filed: September 27, 2004

Claimant's Uniform Submission Agreement signed: July 3, 2003

Joint Statement of Answer filed by Respondents Morgan Stanley DW Inc. ("Morgan Stanley"), Clifford M. Topol, and Salvatore Samperi: September 30, 2003

Joint Amended Statement of Answer filed by Respondents Morgan Stanley, Clifford M. Topol, and Salvatore Samperi: October 20, 2003

Joint Amended Statement of Answer and Motion to Dismiss filed by Respondents Morgan Stanley, Clifford M. Topol, and Salvatore Samperi: August 26, 2004

Respondent Morgan Stanley DW Inc.'s Uniform Submission Agreement signed: None Filed

Respondent Clifford M. Topol's Uniform Submission Agreement signed: September 22, 2003

Respondent Salvatore Samperi's Uniform Submission Agreement signed: September 24, 2003

### **CASE SUMMARY**

In his Initial and Amended Statements of Claim, Claimant alleged failure to follow instructions, violation of the Exchange Act, Section 10(b) of Securities Exchange Act of 1934 and Rule 10b-5, violation of NASD rules and California securities laws, common law fraud and deceit, breach of agency duties, breach of contract, breach of fiduciary duty, common law negligence, and failure to supervise. Claimant's allegations involved transactions in Corporate High Yield Fund III, Senior High Income Portfolio, and Debt Strategies Fund II bonds.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statements of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In his Initial Statement of Claim, Claimant requested \$240,302.00 in bond fund losses, \$72,090.00 in accrued interest, and \$720,906.00 in punitive damages. In his Amended Statement of Claim, Claimant requested a total of \$431,813.00 in bond fund losses, \$90,680.00 in accrued interest, and \$1,295,439.00 in punitive damages.

Respondents requested dismissal of the Claimant's Statements of Claim in their entirety, expungement of the claim from Respondent Clifford M. Topol's and Respondent Salvatore Samperi's CRD records, and costs.

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

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

On or about November 8, 2004, the Panel made a decision to allow, without prejudice, the Claimant's Amended Statement of Claim dated April 7, 2004.

On August 18, 2003, Claimant 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.

At the hearing, Claimant made a motion to strike Respondents' subpoenas as late. The Panel denied the motion, but directed that Respondents may only utilize responses to subpoenas as rebuttal.

At the hearing, Claimant made a motion to strike Respondents' arbitration brief as late. The Panel granted the motion.

At the hearing, Respondent made a motion for verdict at the conclusion of Claimant's case. The Panel denied the motion.

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:

- 1) All claims by Claimant, including the claims for punitive damages, are dismissed.
- 2) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Clifford M. Topol's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondent Clifford M. Topol must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 3) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Salvatore Samperi's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondent Salvatore Samperi must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4) The parties shall bear their respective costs, including attorney's fees.

5) All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 500.00
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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, the member firm Morgan Stanley DW Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	= \$ 5,000.00
<b>Total Member Fees</b>	<b>= \$ 8,550.00</b>

#### **Adjournment Fees**

The following adjournment fees are assessed:

July 26-28, 2004, adjournment by Claimant	= \$1,200.00
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#### **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 or the parties and the Panel. The following fees are assessed:

(3) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$3,600.00
Pre-hearing conferences:	
March 11, 2004	1 session
July 26, 2004	1 session
November 8, 2004	1 session

(6) Hearing sessions @ \$1,200.00/session		=	\$7,200.00
Hearings:	May 16, 2005	2 sessions	
	May 17, 2005	2 sessions	
	May 18, 2005	2 sessions	

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<b>Total Forum Fees</b>		<b>=</b>	<b>\$10,800.00</b>
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The Panel assessed the \$10,800.00 in forum fees to Claimant.

**Fee Summary**

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

Initial Filing Fee	= \$	500.00
Adjournment Fee	= \$	1,200.00
<u>Forum Fees</u>	= \$	<u>10,800.00</u>
<u>Total Fees</u>	= \$	<u>12,500.00</u>
<u>Less Payments</u>	= \$(	<u>1,700.00)</u>
Balance Due NASD Dispute Resolution	= \$	10,800.00

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

Member Fees	= \$	8,550.00
<u>Less Payments</u>	= \$(	<u>10,100.00)</u>
Refund Due Morgan Stanley	= \$(	1,550.00)

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**

Isidoro Berkman	-	Public Arbitrator, Presiding Chair
Paul F. Faberman	-	Public Arbitrator
Carlos Richard Mangum	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Isidoro Berkman  
Chair, Public Arbitrator

5-24-05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Paul F. Faberman  
Public Arbitrator

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

\_\_\_\_\_  
Carlos Richard Mangum  
Non-Public Arbitrator

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

5/24/05  
\_\_\_\_\_  
Date of Service

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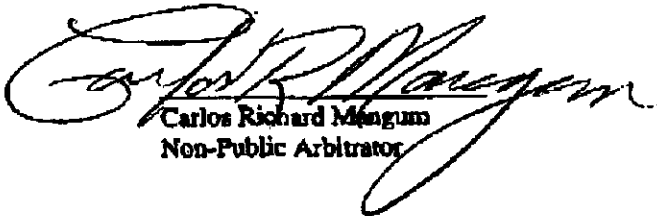
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