

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

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In the Matter of the Arbitration Between:

Alfonso G. Garcia, Claimant v. Morgan Stanley DW Inc. and Robert J. Rocha, Respondents

Case Number: 03-05393

Hearing Site: San Francisco, California

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Nature of the Dispute: Customer vs. Member and Associated Person

**REPRESENTATION OF PARTIES**

For Claimant:

Thomas D. Mauriello, Esq.  
Law Offices of Thomas D. Mauriello  
San Francisco, California

For Respondents:

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

**CASE INFORMATION**

Statement of Claim filed: July 21, 2003

Claimant's Opposition to Respondents' Motion to Dismiss filed: November 5, 2003

Claimant's Arbitration Brief filed: August 10, 2004

Claimant's Uniform Submission Agreement signed: July 8, 2003

Joint Statement of Answer and Motion to Dismiss filed by Respondents Morgan Stanley DW Inc. ("Morgan Stanley") and Robert J. Rocha: September 29, 2003

Respondents' Reply Brief in Support of the Motion to Dismiss filed: November 17, 2003

Respondents' Arbitration Brief filed: August 9, 2004

Respondent Morgan Stanley's Uniform Submission Agreement signed: August 11, 2003

Respondent Robert J. Rocha's Uniform Submission Agreement signed: September 16, 2003

### **CASE SUMMARY**

Claimant alleged the following claims with respect to investments in house mutual funds and/or in mutual fund "Class B" shares: 1) Failure to Comply With Industry Standards of Professional Conduct; 2) Negligence; 3) Breach of Fiduciary Duty; 4) Negligent Supervision; 5) California Corporations Code Section 25401; 6) Fraud and Deceit (Including Fraud on the market); and 7) Churning and Excessive Charges.

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

### **RELIEF REQUESTED**

**Claimant requested:**

1. Compensatory damages of \$654,429.00 consisting of the opening account value (\$387,000.00) plus profits that would have been achieved had the initial amount been reasonably well managed (totaling \$267,429.00, based on a 10% return compounded annually for the 5-1/2 year life of the account);
2. In the alternative, compensatory damages of \$438,000.00 consisting of the value of the account (approximately \$500,000.00) when Mr. Garcia began to urgently request that Mr. Rocha move his assets into safer investments minus the approximately \$62,000.00 value of the account at closing;
3. In the alternative, compensatory damages of \$325,000.00 consisting of the opening account value (\$387,000.00) minus the approximately \$62,000.00 value of the account at closing;
4. Commissions and transactions fees in amounts to be proven at the hearing;
5. Rescission of the transactions in Mr. Garcia's account to the extent the transactions, or any of them, were fraudulently induced;
6. An award of prejudgment interest at the California statutory rate of 10%, running from the date Claimant's monies were diverted until the date of the award;
7. An award of exemplary or punitive damages;
8. Costs of suit, including reasonable attorneys' fees, in an amount to be proved at hearing; and
9. Such other relief as the Panel may find appropriate under the circumstances.

**Respondents requested:**

1. Summary dismissal of Claimant's Statement of Claim with prejudice;
2. Expungement of this matter from Mr. Rocha's CRD record;
3. An award of attorney's fees and costs; and
4. Such further relief as the Panel deems just and proper.

**OTHER ISSUES CONSIDERED AND DECIDED**

On November 6, 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 August 11, 2003, Respondents' 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.

In their Statement of Answer and Motion to Dismiss filed September 29, 2003, Respondents moved to dismiss all claims on the grounds they were time-barred under applicable statutes of limitation. In his opposition to the motion, Claimant referred to portions of the Answer criticizing portions of the Statement of Claim (but not part of the dismissal motion). Claimant argued that pre-hearing motions to dismiss on the merits were not permissible, that Respondents' motion was in effect a premature one for summary judgment, and that applicable limitations periods had not expired. By its order dated March 3, 2004, the Panel denied Respondents' motion, without prejudice to renewal at the evidentiary hearings.

In a third session held late in the second day of the evidentiary hearings, Respondents renewed their dismissal motion, at the conclusion of Claimant's case in chief. At this time Respondents' motion was in effect bifurcated: a new portion was in effect a motion for a directed verdict, i.e., that Claimant's competent evidence was insufficient to satisfy his burden or proof, and because most of his proof was controverted by more reliable evidence. The other portion of the dismissal motion was the renewed claim that all of Claimant's claims, now that his case was submitted, were time-barred by applicable limitations periods.

On the next day of evidentiary hearings, August 19, 2004, the Panel denied the motion for directed verdict, and denied the motion for dismissal based on statute of limitations grounds, without prejudice to Respondents' renewal thereof at the conclusion of the submission of all evidence. Respondents included their statute of limitations contentions in their final argument.

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

### **FINDINGS**

In his Statement of Claim, Claimant sought compensatory damages of, in the alternative, \$654,429.00, or \$438,000.00 or \$325,000.00, based on alleged unsuitable investment recommendations, fraud (failure to disclose material facts about recommended investments), negligence in recommending investments, breach of fiduciary duty by the registered representative, Robert J. Rocha, negligent supervision by Respondent Morgan Stanley, securities fraud under Calif. Corp. Code Section 25401, churning, and improperly causing Claimant to invest in "house" mutual funds and/or in mutual fund "Class B" shares.

Claimant also sought recovery of commissions and transaction fees, rescission of fraudulently-induced securities transactions, prejudgment interest, punitive damages, attorneys' fees, and suit costs.

At the evidentiary hearings, Claimant either abandoned or did not present any evidence of any damages proximately caused to him by reason of his claims of Respondents' alleged liability to him because of his investing in Morgan Stanley mutual funds as "house" funds, or from Respondents allegedly recommending or causing his investment in "Class B" mutual fund shares, or from any alleged "churning" transactions in his account. Claimant also did not present any evidence of scienter or of any of the other elements of actionable fraud due to alleged intentional misrepresentations, by either Respondent.

In the evidentiary hearing, Claimant sought recovery of compensatory damages in the alternative amounts of \$382,951.00, \$293,346.00, or \$218,046.00. He did not assign a figure to his punitive damage claim.

In their Statement of Answer and Motion to Dismiss, Respondents denied all of Claimant's charges, asserted the affirmative defense that all of the claims were barred by the applicable statutes of limitation, along with other affirmative defenses; requested dismissal of all claims with prejudice, for an order expunging information about this case from the CRD records of Respondent Robert J. Rocha, and for recovery of their attorneys' fees and costs from Claimant.

### **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 exemplary or punitive damages, are dismissed with prejudice.

- 2) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Robert J. Rocha'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 Robert J. Rocha must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

The Panel makes the following findings in support of its directive for expungement:

1. Under any of the evidence submitted, the registered person (Respondent Rocha) was not at all involved in the alleged investment-related sales practice of negligent supervision.
2. At the evidentiary hearings, Claimant abandoned his original claims against Respondents, including the registered person, of alleged "churning", or of improperly causing Claimant to invest in and hold "B Class" mutual fund shares, or shares of the mutual funds of Respondent Morgan Stanley. Consequently, under the evidence submitted, the registered person was not at all involved in any of the foregoing alleged investment-related sales practices.
3. Claimant failed to produce any evidence, including the evidence of any scienter on the part of either Respondent, tending to prove any element of his claims of "fraud", including fraudulent misrepresentations, negligence or intentional, or of securities fraud, or of alleged violations of California Corporations Code Section 25401. Consequently, as to these claims or allegations or information regarding the registered person, the actual evidence showed them to be false. Accordingly, these claims are dismissed with prejudice in the award.
4. Claimant failed to prove the remaining claims against Respondents set out in his Statement of Claim - primarily in the nature of alleged negligent recommendation of "unsuitable" investments by the registered person (the claim of alleged negligent supervision was not directed at that party, see above). As a result, these claims are also dismissed with prejudice in the award.
5. No meaning prophylactic effect for the securities industry would be served by leaving any of the information concerning this case in Respondent Robert J. Rocha's records at the CRD. His conduct as the registered representative serving the Claimant as the customer, as demonstrated by all of the evidence presented at the evidentiary hearings in this case, was and is not at all below

or at variance with accepted, and expected, norms of registered representative conduct in the securities industry. He demonstrably did not cause his client's securities portfolio losses in the "tech bubble" bear market of 2000-2001, by his recommendations concerning securities investments by the Claimant, or otherwise, and the accusations in the Statement of Claim of that nature against him, were found under the actual evidence to be completely unproven, and to that extent therefore, also "false."

- 3) Each party shall bear its own costs, including attorney's fees.
- 4) 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

#### **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 a single arbitrator @ \$450.00/session	=	\$450.00
Pre-hearing conference: June 23, 2004	1 session	

(2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	=	\$2,400.00
Pre-hearing conferences: February 5, 2004	1 session	
March 3, 2004	1 session	

(8) Hearing sessions @ \$1,200.00/session			= \$9,600.00
Hearing:	August 17, 2004	2 sessions	
	August 18, 2004	3 sessions	
	August 19, 2004	3 sessions	
<b>Total Forum Fees</b>			<b>= \$12,450.00</b>

The Panel assessed \$6,225.00 in forum fees to Claimant.

The Panel assessed \$6,225.00 in forum fees jointly and severally to Respondents, Morgan Stanley and Robert J. Rocha.

**Fee Summary**

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

Initial Filing Fee	= \$ 375.00
<u>Forum Fees</u>	<u>= \$ 6,225.00</u>
Total Fees	= \$ 6,600.00
<u>Less Payments</u>	<u>= \$ (1,575.00)</u>
Balance Due NASD-DR	= \$ 5,025.00

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

Member Fees	= \$ 7,000.00
<u>Less Payments</u>	<u>= \$(7,000.00)</u>
Balance Due NASD-DR	= \$ 0.00

3. Respondents Morgan Stanley and Robert J. Rocha are charged jointly and severally with the following fees and costs:

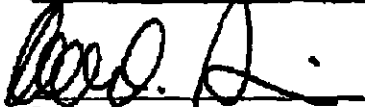
Forum Fees	= \$ 6,225.00
<u>Less Payments</u>	<u>= \$ ( 0.00)</u>
Balance Due NASD-DR	= \$ 6,225.00

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**

Edwin C. Shiver, Esq.	-	Public Arbitrator, Presiding Chair
Lee A. Wolterding	-	Public Arbitrator
John E. Molnar, CFP, ChFC	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**



Edwin C. Shiver, Esq.  
Chair, Public Arbitrator

8/30/2004  
Signature Date

\_\_\_\_\_  
Lee A. Wolterding  
Public Arbitrator

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

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John E. Molnar, CFP, ChFC  
Non-Public Arbitrator

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

9/01/04  
Date of Service



NASD Dispute Resolution

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Public Arbitrator, Presiding Chair

Lee A. Wolterding

Public Arbitrator

John E. Molnar, CFP, ChFC

Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Edwin C. Shiver, Esq.  
Chair, Public Arbitrator

Signature Date

*Lee A. Wolterding*

*08/30/04*

Lee A. Wolterding  
Public Arbitrator

Signature Date

John E. Molnar, CFP, ChFC  
Non-Public Arbitrator

Signature Date

*9/01/04*  
Date of Service

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