

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
Janet L. Mariani

Case Number: 03-05543

Name of the Respondents
Morgan Stanley DW Inc.;
Edward W. Butowsky; and,
Banc of America Securities, LLC

Hearing Site: Dallas, Texas

NATURE OF THE DISPUTE

Public Customer v. Member Firms and an Associated Person

REPRESENTATION OF PARTIES

Claimant Janet L. Mariani, hereinafter referred to as "Claimant": Robert L. Wright, Esq., of the firm of Wright & Berry LLP, located in Fort Worth, Texas.

Respondents Morgan Stanley DW Inc. ("Morgan Stanley") and Edward W. Butowsky, for the time he was employed at Morgan Stanley ("Butowsky"), hereinafter collectively referred to as the "Morgan Stanley Respondents": David D. Sterling, Esq., of the firm of Baker Botts LLP, located in Houston, Texas.

Respondent Edward W. Butowsky, for the time he was employed at Banc of America Securities, LLC ("Butowsky"): Ellen B. Sessions, Esq., of the firm of Jenkins & Gilchrist, located in Dallas, Texas.

Respondent Banc of Americas Securities, LLC ("BAS"): Scott T. Beall, Esq. of the firm of Tate, Lazarini & Beall, PLC, located in Memphis, Tennessee.

CASE INFORMATION

Statement of Claim filed: July 29, 2003.

Claimant signed the Uniform Submission Agreement: July 24, 2003.

Statement of Answer filed by Respondent Morgan Stanley: October 22, 2003.

Respondent Morgan Stanley signed the Uniform Submission Agreement: August 25, 2003.

Statement of Answer filed by Respondent Butowsky: October 24, 2003.

Respondent Butowsky signed the Uniform Submission Agreement: March 19, 2004

Statement of Answer filed by Respondent BAS on: October 22, 2003.
Respondent BAS signed the Uniform Submission Agreement: October 23, 2003.

Claimant's Amended Statement of Claim filed: December 29, 2003.
Respondent BAS's Motion to Strike Amended Statement of Claim, or, in the alternative, Answer, Affirmative Defenses and Motion to Dismiss filed: January 12, 2004.
Claimant's Response to Respondent BAS's Motion to Strike Amended Statement of Claim filed: January 19, 2004.
Claimant's Response to Respondent BAS's Motion to Dismiss filed: March 16, 2004.

Respondent BAS's Motion to Sever filed: February 27, 2004.
Claimant's Response to Respondent BAS's Motion to Sever filed: March 16, 2004.

Respondent Morgan Stanley and Butowsky's Pre-Hearing Brief filed on: November 4, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: negligence; breach of fiduciary duty; common law fraud; statutory fraud; violation of the Texas Deceptive Trade Practices Act; violations of the state and federal securities laws; failure to supervise against Morgan Stanley and BAS; and intentional misconduct. These allegations concerned the investment of Claimant's portfolio in numerous common stocks, including: Ask Jeeves; Atmel Corp.; Ebay, Inc.; Priceline.com; VeriSign; Veritas Software Corp.; and Vignette.

Unless specifically admitted in their Answer, Respondents Morgan Stanley and Butowsky denied the allegations made in the Statement of Claim and asserted the following defenses:

1. At no time did Butowsky exercise discretion with respect to Claimant's funds;
2. All of Claimant's investments were consistent with her objectives of achieving superior returns through investing in the equity markets;
3. The vast majority of Claimant's funds were under the control of her independent money managers and not Butowsky. Butowsky had absolutely no authority to control the transactions Claimant's half-dozen money managers engaged in on behalf of Claimant;
4. The losses in Claimant's accounts were due to market movements and events over which neither Butowsky or Morgan Stanley had any control;
5. Respondents did not violate the Texas Deceptive Trade Practices Act or any securities laws;
6. Claimant's claims are barred by the doctrines of ratification, waiver, laches and estoppel; and,
7. Claimant failed to mitigate her losses, as she continually insisted upon a strategy that she now claims she never wanted in the first place.

Unless specifically admitted in their Answer, Respondents BAS and Butowsky denied the allegations made in the Statement of Claim and asserted the following defenses:

1. The claims are barred by the doctrines of ratification, waiver, estoppel, contributory/comparative negligence and assumption of risk;
2. The claims are barred because Claimant ratified her investments and accepted the benefits of the investments for years;
3. The claims are time-barred and untimely under the statutes of limitations;
4. Claimant's unsuitability claim fails factually and as a matter of law. The NASD's suitability rules cannot form the basis for a private claim by an investor;
5. Respondents did not have (and did not breach) the duties claimed. Claimant's accounts were non-discretionary accounts that Claimant actively monitored and controlled;
6. Any injury or loss or damage was the result of superseding or intervening causes beyond the control of Respondents, including, but not limited to, external market conditions and Claimant's withdrawal habits;
7. The claims are barred by a failure to mitigate damages; and,
8. The Statement of Claim fails to state a claim upon which relief can be granted.

RELIEF REQUESTED

Claimant requested:

Compensatory Damages (Morgan Stanley and Butowsky)	Not less than \$1,000,000.00
Compensatory Damages (BAS and Butowsky)	Not less than \$100,000.00
Unnecessary Taxes (Morgan Stanley and Butowsky)	Not less than \$300,000.00
Lost Opportunity Costs(All three Respondents)	Unspecified amount
Punitive Damages (All three Respondents)	Three times actual damages
Interest (All three Respondents)	Pre-hearing and post-hearing as determined by the Panel
Attorneys' Fees (All three Respondents)	In an amount to be proven at the final hearing
Other Costs (All three Respondents)	Unspecified amount, including forum fees

Respondents Morgan Stanley and Butowsky requested that the claim be denied in all respects and that they be awarded the relief to which they may be entitled.

Respondents BAS and Butkowsky requested that the Statement of Claim be immediately dismissed and that they be awarded their costs and attorneys' fees for defending the claim

OTHER ISSUES CONSIDERED AND DECIDED

On June 28, 2004, Claimant filed a notification that she had reached a settlement with Respondent BAS. Pursuant to the settlement, Claimant withdrew and dismissed her claims against Respondent Banc of Americas Securities, LLC. As a result, all pending Motions filed for and against Respondent Banc of Americas Securities, LLC were moot.

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, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Morgan Stanley DW Inc. and Edward W. Butowsky are jointly and severally liable for and shall pay to the Claimant, Janet L. Mariani, the sum of \$300,000.00 plus interest at the rate of 5% per annum accruing from January 1, 2005 until the sum is paid in full;
2. In addition, Respondents Morgan Stanley DW Inc. and Edward W. Butowsky are jointly and severally liable for and shall pay to the Claimant, Janet L. Mariani, the sum of \$75,000.00 as attorneys' fees. In deciding to award attorneys' fees, the Panel considered the arguments and pleading filed by counsel, as well as Texas statute, and determined that authority existed for an award of attorneys' fees to the Claimant;
3. The claims asserted against Respondent Edward W. Butowsky relating to his employment at Banc of Americas Securities, LLC are dismissed and denied in their entirety;
4. All remaining costs of arbitration, including any additional attorneys' fees, shall be borne by the party incurring the cost; and,
5. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 500.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Morgan Stanley DW Inc. and Banc of America Securities, LLC were parties to the arbitration and the following member fees are assessed:

<u>Morgan Stanley</u>	
Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

BAS

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed: None.

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel @ \$1,200.00	= \$ 1,200.00
Pre-hearing conference: July 19, 2004 1 session	

Eight (8) Hearing sessions @ \$1,200.00	= \$ 9,600.00
Hearing Dates: November 8, 2004 2 sessions	
November 9, 2004 2 sessions	
November 10, 2004 2 sessions	
November 11, 2004 2 sessions	

Total Forum Fees	= \$10,800.00
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The Panel has assessed \$10,800.00 of the forum fees, jointly and severally, to Respondents Morgan Stanley DW Inc. and Edward W. Butowsky.

SEE SUMMARY

Claimant Janet L. Mariani is solely liable for:

Initial Filing Fee	= \$ 500.00
Less payments	= \$ 1,700.00
Balance Refunded by NASD Dispute Resolution	= \$ 1,200.00

Respondent Morgan Stanley DW Inc. is solely liable for:

Member Fees	= \$ 8,550.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent Banc of Americas Securities, LLC is solely liable for:

Member Fees	= \$ 3,550.00
Less payments	= \$ 3,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents Morgan Stanley DW Inc. and Edward W. Butowsky are jointly and severally liable

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for:

Forum Fees	= \$10,800.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$10,800.00

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

ARBITRATION PANEL

Frederick P. Ahrens, Esq. - Public Arbitrator, Presiding Chairperson
D. Richard Dennis - Public Arbitrator
Jack R. Settles - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Frederick P. Ahrens

Frederick P. Ahrens, Esq.
Public Arbitrator, Presiding Chairperson

11/30/04

Signature Date

D. Richard Dennis
Public Arbitrator

Signature Date

Jack R. Settles
Non-Public Arbitrator

Signature Date

11/30/04 MM
Date of Service (For NASD Dispute Resolution office use only)

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Frederick P. Ahrens, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

D. Richard Dennis
D. Richard Dennis
Public Arbitrator

11-24-04
Signature Date

Jack R. Settles
Non-Public Arbitrator

Signature Date

11/30/04 Mhm
Date of Service (For NASD Dispute Resolution office use only)

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Frederick P. Ahrens, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

D. Richard Dennis
Public Arbitrator

Signature Date



Jack R. Settles
Non-Public Arbitrator

11-24-2004

Signature Date

11/30/04 

Date of Service (For NASD Dispute Resolution office use only)