

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Claimant

Nanci K. DeLong

and

Case Number: 03-05985  
Hearing Site: Troy, Michigan

Respondents

Morgan Stanley DW, Inc., Jacqueline A. Antone,  
James G. Riley, Theodore J. Vogt, Jr., and  
Fifth Third Securities, Inc.

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**NATURE OF DISPUTE**

Customer v. Members and Associated Persons

**REPRESENTATION OF PARTIES**

Nanci K. DeLong ("Claimant") was represented by Peter A. Patterson, Esq., Ada, Michigan.

Morgan Stanley DW, Inc. ("MSDW"), Jacqueline A. Antone ("Antone"), and James G. Riley ("Riley") and Theodore J. Vogt, Jr., ("Vogt"), hereinafter referred to as "the MSDW Respondents," were represented by Mark R. Werder, Esq., Honigman Miller Schwartz and Cohn, LLP, Detroit, Michigan.

Fifth Third Securities, Inc. ("Fifth Third") was represented by Joseph M. Callow, Esq., Keating Meuthing & Klekamp, P.L.L., Cincinnati, Ohio.

**CASE INFORMATION**

The Statement of Claim was filed on or about August 12, 2003. The Amended Statement of Claim was filed on or about November 15, 2003. The Statement of Second Amended Claim was filed on or about January 9, 2004. The Submission Agreement of Nanci K. DeLong was signed on or about August 12, 2003.

The Statement of Answer was filed jointly by MSDW, Antone, and Riley on or about December 8, 2004. The Statement of Answer to Claimant's Amended Statement of Claim was filed jointly by the MSDW Respondents on or about December 1, 2003. The Statement of Answer to Claimant's Statement of Second Amended Claim was filed jointly by the MSDW Respondents on or about January 2004. The Submission Agreement of Morgan Stanley DW, Inc., was signed on or about September 19, 2003 by Timm A. VerDuin.

The Statement of Answer was filed by Fifth Third on or about October 23, 2003. The Statement of Answer to Claimant's First Amended Claim was filed on or about December 9, 2003. The Statement of Answer to Claimant's Second Amended Statement of Claim was filed on or about October 5, 2004. The Submission Agreement of Fifth Third was signed on or about October 23, 2003, by John McDaniel, AVP and Counsel.

Fifth Third filed a Motion for Summary Disposition on or about July 1, 2004. Claimant filed a Response to the Motion on or about July 17, 2004. Fifth Third and Claimant submitted additional materials regarding the Motion on or about August 10, 2004, and August 17, 2004, respectively.

Claimant filed a Motion for Sanctions against Fifth Third on or about November 19, 2004. Fifth Third filed a Response to the Motion on or about December 3, 2004.

Fifth Third filed a Renewed Motion for Summary Disposition on or about December 20, 2004.

#### **CASE SUMMARY**

Claimant asserted causes of action including the following: breach of contract; negligence; failure to supervise; breach of fiduciary duty; misrepresentations/non-disclosures; omission of facts; suitability; and conflict of interest. The causes of action relate to the recommendation and purchase of securities including the following mutual funds: Hartford Capital Appreciation Fund (Class "B"), Hartford Stock Fund (Class "B"), Putnam New Opportunities (Class "B"), Putnam Voyager 1 (Class "B"), and AIM Constellation Fund (Class "A"), which were not in accord with Claimant's investment goal of preservation of capital.

Unless specifically admitted in their Answer, the MSDW Respondents denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: Claimant, at all times, held exclusive control over the structure and makeup of her portfolio and transactions effected therein; no contract was ever contemplated or created between the parties to perform "management services" to which Claimant claims entitlement; and Claimant assumed the risks of investing in equities and stock mutual funds, including the risk of substantial adverse market movement.

Unless specifically admitted in its Answer, Fifth Third denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: Claimant's claims are barred by the applicable statute of limitations, estoppel, waiver; and/or by superceding and/or intervening factors and events and/or the actions of Claimant and third parties subsequent to September, 1998.

### **RELIEF REQUESTED**

Claimant requested an award of actual damages in the amount of \$500,000.00, plus punitive damages of \$500,000.00, interest, costs, forum fees, witness and production fees, and other costs.

The MSDW Respondents requested that the claims asserted against them be dismissed in their entirety and that the CRD records of Antone, Riley, and Vogt be expunged of all references to this matter.

Fifth Third requested that the claims asserted against it be dismissed in their entirety and that it be awarded its costs and fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondents, Jacqueline A. Antone, James G. Riley, and Theodore J. Vogt, Jr., did not file with the NASD Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, and appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.

In its order entered on August 26, 2004, the panel denied Fifth Third's Motion for Summary Disposition.

Claimant settled her dispute with Fifth Third on or about December 21, 2004. The panel did not adjudicate any further issues involving Fifth Third.

At the hearing on January 28, 2005, Respondents requested that the panel consider the length of the evidentiary portion of Claimant's case when assessing forum fees.

After the close of the factual portion of Claimant's case-in-chief on January 28, 2005, Respondents moved to dismiss James G. Riley. Claimant confirmed that she had no further fact witnesses to present and that her expert would only be testifying as to damages. The panel granted Respondents' motion in its Interim Order entered on or about February 8, 2005.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Dispute Resolution ("NASD").

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1.) Claimant's claims, each and all, are denied and dismissed with prejudice;
- 2.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter;
- 3.) The panel recommends the expungement of all reference to the above captioned arbitration from James G. Riley's and Theodore J. Vogt, Jr.'s registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondents Riley and Vogt must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
- 4.) Respondent Antone's request for expungement is denied; and
- 5.) Any relief not specifically enumerated, including punitive damages and attorney fees, is hereby denied with prejudice.

### **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 = \$ 375.00

#### **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 persons at the time of the events giving rise to the dispute. In this matter, the member firms are Morgan Stanley DW, Inc., and Fifth Third Securities, Inc.

Member surcharge = \$ 2,250.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$ 4,000.00

### **Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing 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 a single arbitrator x \$450.00	= \$ 450.00
Pre-hearing conference: December 17, 2004	1 session

Four (4) Pre-hearing sessions with Panel x \$1,200.00	= \$ 4,800.00
Pre-hearing conferences: June 24, 2004	1 session
August 9, 2004	1 session
August 26, 2004	1 session
December 6, 2004	1 session

Sixteen (16) Hearing sessions x \$1,200.00	= \$19,200.00
Hearing Dates: January 24, 2005	2 sessions
January 25, 2005	2 sessions
January 26, 2005	2 sessions
January 27, 2005	2 sessions
January 28, 2005	2 sessions
April 4, 2005	2 sessions
April 5, 2005	2 sessions
April 6, 2005	2 sessions

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Total Forum Fees	= \$24,450.00
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The Arbitration Panel has assessed \$11,350.00 of the forum fees to Nanci K. DeLong.

The Arbitration Panel has assessed \$11,350.00 of the forum fees jointly and severally to Morgan Stanley DW, Inc. Jacqueline A. Antone, James G. Riley, and Theodore J. Vogt, Jr.

The Arbitration Panel has assessed \$1,750.00 of the forum fees to Fifth Third Securities, Inc.

**Fee Summary**

Claimant, Nanci K. DeLong, is liable for:

Initial Filing Fee	= \$ 375.00
<u>Forum Fees</u>	<u>= \$11,350.00</u>
Total Fees	= \$11,725.00
<u>Less payments</u>	<u>= \$ 1,575.00</u>
Balance Due NASD Dispute Resolution	= \$10,150.00

Respondent, Morgan Stanley DW, Inc., is liable for:

<u>Member Fees</u>	<u>= \$ 7,000.00</u>
Total Fees	= \$ 7,000.00
<u>Less payments</u>	<u>= \$ 7,000.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent, Fifth Third Securities, Inc., is liable for:

Member Fees	= \$ 7,000.00
<u>Forum Fees</u>	<u>= \$ 1,750.00</u>
Total Fees	= \$ 8,750.00
<u>Less payments</u>	<u>= \$ 7,000.00</u>
Balance Due NASD Dispute Resolution	= \$ 1,750.00

Respondents, Morgan Stanley DW, Inc., Jacqueline A. Antone, James G. Riley and Theodore J. Vogt, Jr., are jointly and severally liable for:

<u>Forum Fees</u>	<u>= \$11,350.00</u>
Total Fees	= \$11,350.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$11,350.00

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

**ARBITRATION PANEL**

Marvin I. Horowitz, Esq. - Public Arbitrator, Presiding Chair  
Robert J. Scafuri, Esq. - Public Arbitrator  
Larry C. Kreul - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Marvin I. Horowitz, Esq.  
Marvin I. Horowitz, Esq.  
Public Arbitrator, Presiding Chair

04/14/05  
Signature Date

/s/ Robert J. Scafuri, Esq.  
Robert J. Scafuri, Esq.  
Public Arbitrator

04/14/05  
Signature Date

/s/ Larry C. Kreul  
Larry C. Kreul  
Non-Public Arbitrator

04/14/05  
Signature Date


04/14/05  
Date of Service (For NASD office use only)

NASD Dispute Resolution  
Arbitration No. 03-05985  
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Robert J. Scafuri, Esq. - Public Arbitrator  
Larry C. Kreul - Non-Public Arbitrator

Concurring Arbitrators:

  
Marvin I. Horowitz, Esq.  
Public Arbitrator, Presiding Chair

4/14/05  
Signature Date

Robert J. Scafuri, Esq.  
Public Arbitrator

                      
Signature Date

Larry C. Kreul  
Non-Public Arbitrator

                      
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Public Arbitrator

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Larry C. Kreul  
Non-Public Arbitrator

APRIL 14, 2005  
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Robert J. Scafuri, Esq.  
Public Arbitrator

Signature Date

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Larry C. Kreul  
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