

**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimants

Helen McDonald, Frank S. McDonald  
and David A. McDonald

Case Number: 04-00479

Name of the Respondent

Stifel, Nicolaus & Co., Inc.

Hearing Site: St. Louis, Missouri

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**NATURE OF DISPUTE**

Customers vs. Member Firm

**REPRESENTATION OF PARTIES**

Richard B. Fosher, Esq. of the law firm Oakes & Fosher, LLC, located in St. Louis, Missouri, represented Claimants, Helen McDonald, Frank S. McDonald and David A. McDonald, hereinafter collectively referred to as "Claimants."

Jeffrey S. Jamieson, Esq. of the law firm, Blackwell, Sanders, Peper, Martin, LLP, located in St. Louis, Missouri, represented the Respondent, Stifel, Nicolaus & Co., Inc. ("Stifel"), hereinafter referred to as "Respondent."

**CASE INFORMATION**

Statement of Claim filed on January 15, 2004. Claimants McDonald jointly signed the Uniform Submission Agreement on December 15, 2003 and December 22, 2003.

Statement of Answer filed by Respondent Stifel on March 1, 2004. Respondent Stifel signed the Uniform Submission Agreement on February 2, 2004.

**CASE SUMMARY**

Claimants asserted the following causes of action: negligence, breach of fiduciary duty, failure to supervise, churning and misrepresentation. The causes of action relate to various Individual, Joint, IRA and Roth IRA Accounts whereby investments were made in high technology stocks including, but not limited to, JDS Uniphase, Palm, Ariba, Oracle, I2 Technologies, Checkpoint Software and other technology stocks. Claimants asserted that investments made with Stifel were high-risk and unsuitable to Claimants' needs and objectives.

Unless specifically admitted in its Answer, Respondent Stifel denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants are barred from recovering from Stifel damages under Section 8-319 of the Uniform Commercial Code because Claimants failed to object or notify Stifel of the acts and omissions of which Claimants complain.
2. As a result of Claimants' failure to notify Stifel of the alleged acts and omissions of which Claimants now complain promptly after review of written confirmations, monthly statements and other documents evidencing or setting forth transactions in Claimants' accounts and in any event promptly after Claimants discovered or reasonably should have discovered the alleged acts or omissions, Claimants are barred from recovering from Stifel under the doctrine of ratification, accounts stated, estoppel, waiver and laches because Stifel relied upon the aforesaid silence of Claimants.
3. Claimants failed to act promptly and with due diligence to mitigate Claimants' damages after Claimants knew or should have known of the alleged acts and omissions of which Claimant complain. Therefore, Claimants are barred from recovering such damages. In no event are Claimants entitled to recover damages sustained after Claimants' accounts with Stifel were closed.
4. By failing to exercise the degree of care over their affairs and investments which an ordinarily prudent investor would exercise, Claimants caused or contributed to cause the alleged damages of which Claimants complain herein and thus barred by their contributory negligence from recovering such alleged damages from Stifel.
5. The Claimants were aware from the outset of the risks of profit and loss associated with investing in securities and voluntarily assumed such risks. The Claimants' knowing and voluntary assumption of such risks was the sole and proximate cause of Claimants' alleged damages.
6. The damages allegedly suffered by Claimants were caused, if at all, by unforeseeable market factors and conditions affecting the value of securities in Claimants' accounts for which Stifel is not liable or responsible.
7. The Complaint and each count thereof fails to state a claim against Stifel upon which relief can be granted.
8. Claimants authorized the alleged conduct of Stifel about which Claimants complain.
9. Some, if not all, of Claimants' claims are barred by the applicable statutes of limitations.

#### **RELIEF REQUESTED**

Claimants McDonald requested damages in the amount of \$275,000.00, unspecified punitive damages, interest, attorney's fees, costs, filing fees, forum fees and for such other and further relief which the Panel deems just and proper.

Respondent Stifel requested denial and dismissal of all claims in their entirety, for fees and costs and for such other and further relief the Panel deems just and proper.

**OTHER ISSUES CONSIDERED AND DECIDED**

At the hearing of this matter, Respondent moved to dismiss claims of churning. After hearing the parties' arguments, the Panel granted Respondent's Motion and churning was dismissed from Claimants' Statement of Claim.

Respondents also requested that Panel not allow Claimants to argue a *Dram Shop* theory. After hearing parties' arguments, the Panel denied Respondent's 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, 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. Respondent, Stifel, Nicolaus & Co. Inc., is solely liable for and shall pay to Claimant, Helen McDonald, the sum of \$82,596.00 as compensatory damages.
2. Respondent, Stifel, Nicolaus & Co., Inc., is solely liable for and shall pay to Claimant, Helen McDonald, the sum of \$82,596.00 in punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimant Helen McDonald.
3. Respondent, Stifel, Nicolaus & Co. Inc., is solely liable for and shall pay to Claimant, Frank S. McDonald, the sum of \$53,846.00 as compensatory damages.
4. Respondent, Stifel, Nicolaus & Co., Inc., is solely liable for and shall pay to Claimant, Frank S. McDonald, the sum of \$53,846.00 in punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimant Frank S. McDonald.
5. Respondent, Stifel, Nicolaus & Co. Inc., is solely liable for and shall pay to Claimant, David A. McDonald, the sum of \$13,594.00 as compensatory damages.
6. Respondent, Stifel, Nicolaus & Co., Inc., is solely liable for and shall pay to Claimant, David A. McDonald, the sum of \$13,594.00 in punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimant David A. McDonald.
7. Respondent, Stifel, Nicolaus & Co., Inc., is solely liable for and shall pay to Claimants, Helen McDonald, Frank S. McDonald and David A. McDonald, the sum of \$65,700.00 in attorney's fees. In deciding to award attorney's fees, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of attorney's fees to Claimants McDonald.
8. Respondent, Stifel, Nicolaus & Co., Inc., is solely liable for and shall pay to Claimants, Helen McDonald, Frank S. McDonald and David A. McDonald, the sum of \$9,939.00 in costs.

9. Respondent, Stifel, Nicolaus & Co., Inc., is solely liable for and shall pay to Claimants McDonald the sum of \$300.00 as reimbursement for the non-refundable NASD Dispute Resolution filing fee.
10. Parties shall bear all other costs, except as specified herein.
11. Any and all relief not specifically addressed herein 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 = \$ 300.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Stifel, Nicolaus & Co., Inc. is a party.

Member surcharge = \$ 1,700.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 2,750.00

#### **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, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel @ \$1,125.00 = \$ 1,125.00

Pre-hearing conference: June 23, 2004 1 session

Eight (8) Hearing sessions @ \$1,125.00 = \$ 9,000.00

Hearing Date): December 6, 2004 2 sessions

December 7, 2004 2 sessions

December 8, 2004 2 sessions

December 9, 2004 2 sessions

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Total Forum Fees = \$10,125.00

1. The Panel assessed 100% of the forum fees in the amount of \$10,125.00 solely to Respondent, Stifel, Nicolaus & Co., Inc.

**FFF SUMMARY**

1. Claimants, Helen McDonald, Frank S. McDonald and David A. McDonald, are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,125.00

2. Respondent, Stifel, Nicolaus & Co., Inc., is solely liable for:

Member Fees	= \$ 5,200.00
<u>Forum Fees</u>	<u>= \$10,125.00</u>
Total Fees	= \$15,325.00
<u>Less payments</u>	<u>= \$ 5,200.00</u>
Balance Due NASD Dispute Resolution	= \$10,125.00

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

**ARBITRATION PANEL**

Richard H. Potter	-	Public Arbitrator, Presiding Chairperson
D. Richard Dennis	-	Public Arbitrator
Mark E. Kessinger	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Richard H. Potter  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
12/23/04  
Signature Date

\_\_\_\_\_  
D. Richard Dennis  
Public Arbitrator

\_\_\_\_\_  
12/22/04  
Signature Date

\_\_\_\_\_  
Mark E. Kessinger  
Non-Public Arbitrator

\_\_\_\_\_  
12/22/04  
Signature Date

\_\_\_\_\_  
12/23/04  
Date of Service (For NASD Dispute Resolution office use only)

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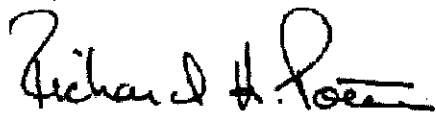
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12.23.2004  
Signature Date

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**Concurring Arbitrators' Signatures**

Richard H. Potter  
Public Arbitrator, Presiding Chairperson

Signature Date

  
D. Richard Dennis  
Public Arbitrator

December 22, 2004  
Signature Date

Mark E. Kessinger  
Non-Public Arbitrator

Signature Date

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

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