

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

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In the Matter of the Arbitration Between

Name of Claimant

Winston K. Smart

and

04-03442  
Nashville, Tennessee

Name of Respondent

Morgan Stanley DW Inc.

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

Winston K. Smart ("**Claimant**") was represented by John B. Veach, III, Esq., Falls & Veach, Asheville, North Carolina.

Morgan Stanley DW Inc. ("**Respondent**") was represented by James F. Sanders, Esq., Neal & Harwell, PLC, Nashville, Tennessee.

**CASE INFORMATION**

The Statement of Claim was filed on or about May 11, 2004. Submission Agreement of Claimant Winston K. Smart was signed on May 8, 2004.

Statement of Answer was filed by Respondent Morgan Stanley DW Inc. on or about August 3, 2004. Submission Agreement of Respondent Morgan Stanley DW Inc. was signed on August 2, 2004.

**CASE SUMMARY**

Claimant alleged that

MSDW purchased mostly risky, high technology securities for Mr. Smart's account. For example, in February 2001, the account consisted of the following stocks: Alliance Semiconductor, California Amplifier, Euroweb International Corporation, II VI, Inc., Immunex Corporation, Omnisky Corporation, and Viador, Inc. The account MSDW constructed for Mr. Smart was wildly unsuitable for him. Mr. Smart relied on MSDW to construct an account that was suitable for him.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically stated:

..., Initially, Mr. Smart's investments performed well, but as the equity markets started to decline in 20-00, so did the market value of his IRA. As with the market as a whole, Claimant's portfolio was further damaged by the terrorist attacks of September 11, 2001. But Claimant's investment was most adversely affected by the fact that, contrary to Mr. Kinser's repeated advice, Mr. Smart liquidated his equity positions so that he could withdraw additional funds when those stocks were at their lowest share price in the market. Had he followed Mr. Kinser's advice to hold his equity positions and permit the market an opportunity to recover, rather than to liquidate equity holdings at their lowest ebb, his account would likely have recovered as the market recovered in 2003. Throughout the period in question he withdrew approximately \$120,000.00, nearly half the amount he had invested initially. By making these withdrawals at the lowest point in the market, and against Mr. Kinser's advice, he eliminated all opportunities for restoration of the value of his account, and in doing so, incurred the losses that he complains of today.

### **RELIEF REQUESTED**

Claimant requested that he be provided the following relief:

1. Award judgment in favor of claimant and against respondents [sic] for the losses, in an amount to be determined at the hearing, and in excess of \$200,000.00, plus costs and expenses, claimant sustained as a result of the actions set forth above, plus prejudgment and post-award interest.
2. Award attorneys' fees in favor of claimant.
3. Award punitive damages against respondents [sic] in an amount to be determined by the panel.

Respondent requested that the Statement of Claim be dismissed with prejudice, that judgment be entered in its favor, that it awarded the costs (including reasonable attorney's fees and out-of-pocket expenses) incurred in defense of this action, and that the arbitration panel award Respondent such other and further relief to which it may be entitled.

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

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 the NASD Dispute Resolution (the "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. Respondent Morgan Stanley DW Inc. shall be and hereby is liable for and shall pay to Claimant Winston K. Smart the sum of **Seventy Five Thousand Dollars and No Cents (\$75,000.00)**.
2. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees, not specifically awarded or otherwise provided for above.

### **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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm(s) is Morgan Stanley DW Inc.

Member surcharge	\$	1,700.00
Pre-hearing process fee	\$	750.00
Hearing process fee	\$	2,750.00
Total Member Fees	\$	<u>5,200.00</u>

### **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:

1	Pre-hearing session(s) with Panel	x	1,125.00	\$	1,125.00
	October 4, 2004	1	session		
4	Hearing sessions	x	1,125.00	\$	4,500.00
	May 9, 2005	2	sessions		
	May 10, 2005	2	sessions		
	Total Forum Fees			\$	<u>5,625.00</u>

The Arbitration Panel has assessed \$5,625.00 of the forum fees to Morgan Stanley DW Inc.

### **Fee Summary**

Claimant, Winston K. Smart, shall be and hereby is liable for:

Initial Filing Fee	= \$	300.00
Total Fees	= \$	300.00
<u>Less payments</u>	= \$	-1,425.00
Balance to be refunded by NASD Dispute Resolution	= \$	-1,125.00

Respondent, Morgan Stanley DW Inc., shall be and hereby is liable for:

Member Fees	= \$	5,200.00
<u>Forum Fees</u>	= \$	5,625.00
Total Fees	= \$	10,825.00
<u>Less payments</u>	= \$	-5,200.00
Balance Due NASD Dispute Resolution	= \$	5,625.00

**All balances are due to NASD Dispute Resolution**

### **ARBITRATION PANEL**

Robert J Warner, Jr, LLB - Public Arbitrator, Presiding Chair  
Jeffrey M. Bain, Esq. - Public Arbitrator  
David T. Maddux - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Robert J. Warner, Jr.

Robert J Warner, Jr, LLB  
Public Arbitrator, Presiding Chair

May 12, 2005

Signature Date

/s/ Jeffrey M. Bain

Jeffrey M. Bain, Esq.  
Public Arbitrator

May 12, 2005

Signature Date

/s/ David T. Maddux

David T. Maddux  
Non-Public Arbitrator

May 12, 2005

Signature Date

5/12/05

Date of Service (For NASD office use only)

NASD Dispute Resolution

Arbitration No. 04-03442

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Concurring Arbitrators:



Robert J. Warner, Jr., LL.M.

Public Arbitrator, Presiding Chair

5/12/04  
Signature Date

Jeffrey M. Bain, Esq.

Public Arbitrator

Signature Date

David T. Maddux

Non-Public Arbitrator

Signature Date

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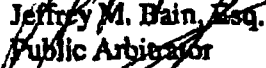
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**Concurring Arbitrators:**

Robert J. Warner, Jr., LL.B.  
Public Arbitrator, Presiding Chair

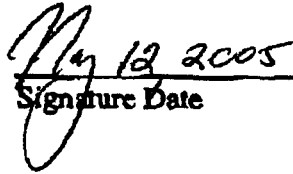


Jeffrey M. Bain, Esq.  
Public Arbitrator



David T. Maddux  
Non-Public Arbitrator

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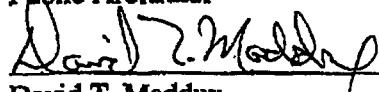
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Jeffrey M. Bain, Esq.  
Public Arbitrator

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Signature Date



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David T. Maddux  
Non-Public Arbitrator

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