

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Peter H. Pollak and Ellen A. Pollak, individually and as Trustees of The Pollak Trust dated March 8, 1990, Claimants v. Morgan Stanley DW Inc. and Vincent August Caprio, Respondents

Case Number: 05-01152

Hearing Site: San Francisco, California

Nature of the Dispute: Customers v. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

Michael D. Liberty, Esq.
Law Office of Michael D. Liberty
Burlingame, California

For Respondents:

Jonathan D. Robbins, Esq.
Morgan Stanley Law Division
San Francisco, California

CASE INFORMATION

Statement of Claim dated: March 17, 2005

Claimants Peter H. Pollak and Ellen A. Pollak' Joint Uniform Submission Agreement signed:
February 23, 2005

Claimant The Pollak Trust dated March 8, 1990's Uniform Submission Agreement signed:
March 14, 2005

Joint Statement of Answer filed by Respondents: May 26, 2005

Respondent Morgan Stanley DW Inc.'s Uniform Submission Agreement signed: May 26, 2005

Respondent Vincent August Caprio's Uniform Submission Agreement signed: June 28, 2005

CASE SUMMARY

Claimants alleged fraud and deceit, negligent misrepresentation, negligence, breach of fiduciary duty, elder abuse, breach of written contract, unjust enrichment, and violation of California Business and Professions Code Section 17200, et seq. Claimants' allegations involved various unspecified securities.

Respondents denied the allegations of wrongdoing set forth in Claimants' Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimants requested \$600,000.00 in compensatory damages, \$400,000.00 in punitive damages, pre-judgment interest, and costs, including attorney's fees.

Respondents requested dismissal of Claimants' Statement of Claim in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

On June 4, 2005, Claimants and Claimants' 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.

Pursuant to the Code of Arbitration Procedure IM-10100, the waiver of Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

On December 29, 2005, Respondents filed a Motion to Dismiss. On January 16, 2006, Claimants filed an Opposition. On February 2, 2006, after considering the parties' pleadings, the Panel decided that oral argument was not necessary and denied Respondents' Motion to Dismiss.

During the hearing, Respondents moved to dismiss Claimants' request for emotional distress damages. Claimants opposed. After due deliberation, the Panel denied Respondents' motion. The Panel did, however, allow the parties to submit post-hearing briefs that included, among other things, arguments relating to Claimants' request for emotional distress damages.

At the hearing, Respondent Vincent August Caprio requested expungement of all references to this matter from his registration records maintained by the NASD Central Registration Depository ("CRD"). After due deliberation, the Panel denied his expungement request.

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

- 1) Respondents are jointly and severally liable to and shall pay Claimants the sum of \$44,500.00 in compensatory damages for negligence, specifically the unsuitability of certain investments.
- 2) Respondents are jointly and severally liable to and shall pay Claimants interest at the rate of 10% per annum on \$44,500.00 from October 29, 2003, until the date the compensatory damages are paid in full to Claimants.
- 3) The parties shall bear their respective costs, including attorney's fees.
- 4) All other relief requested, including damages for emotional distress, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

| | |
|--------------------------|-------------|
| Initial claim filing fee | = \$ 375.00 |
|--------------------------|-------------|

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, the member firm Morgan Stanley DW Inc. 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 forum fees for each session conducted or each decision rendered on a discovery-related motion decided on the papers. 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 conference session with the Panel @ \$1,200.00/session | = \$ 1,200.00 |
| Pre-hearing conference: July 28, 2005 1 session | |

| | |
|---|---------------|
| Eight (8) Hearing sessions @ \$1,200.00/session | = \$ 9,600.00 |
| Hearings: February 27, 2006 2 sessions | |
| February 28, 2006 2 sessions | |
| March 1, 2006 2 sessions | |
| March 4, 2006 2 sessions | |

| | |
|-------------------------|----------------------|
| Total Forum Fees | = \$10,800.00 |
|-------------------------|----------------------|

1. The Panel assessed \$10,800.00 of the forum fees jointly and severally to Respondents.

Fee Summary

1. Claimants are charged jointly and severally with the following fees and costs:

| | |
|----------------------|-----------------------|
| Initial Filing Fee | = \$ 375.00 |
| <u>Less payments</u> | = \$(1,575.00) |
| Refund Due | = \$(1,200.00) |

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

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

3. Respondents are charged jointly and severally with the following fees and costs:

| | |
|--|----------------------|
| Forum Fees | = \$10,800.00 |
| <u>Less payments</u> | = \$ (0.00) |
| Balance Due NASD Dispute Resolution | = \$10,800.00 |

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

ARBITRATION PANEL

| | | |
|----------------------|---|------------------------------------|
| David J. Meadows | - | Public Arbitrator, Presiding Chair |
| Peter John Wercinski | - | Public Arbitrator |
| Stephen A. Field | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures


David J. Meadows
Chair, Public Arbitrator

4-3-06
Signature Date

Peter John Wercinski
Public Arbitrator

Signature Date

Stephen A. Field
Non-Public Arbitrator

Signature Date

3/4/06
Date of Service

ARBITRATION PANEL

| | | |
|----------------------|---|------------------------------------|
| David J. Meadows | - | Public Arbitrator, Presiding Chair |
| Peter John Wercinski | - | Public Arbitrator |
| Stephen A. Field | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures:

David J. Meadows
Chair, Public Arbitrator

Signature Date



Peter John Wercinski
Public Arbitrator

4/3/06
Signature Date

Stephen A. Field
Non-Public Arbitrator

Signature Date

3/4/06
Date of Service

ARBITRATION PANEL

| | | |
|----------------------|---|------------------------------------|
| David J. Meadows | - | Public Arbitrator, Presiding Chair |
| Peter John Wercinski | - | Public Arbitrator |
| Stephen A. Field | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures:

David J. Meadows
Chair, Public Arbitrator

Signature Date

Peter John Wercinski
Public Arbitrator

Signature Date


Stephen A. Field
Non-Public Arbitrator

April 3, 2006
Signature Date

3/4/06
Date of Service