

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Harry Berger

and

05-02190
Chicago, Illinois

Name of Respondents

Wachovia Securities, LLC
Ronald W. Fox
Stephen Heckmeyer
Neil R. Cooper and Douglas L. Meyer

Nature of the Dispute: Customer vs. Member and Associated Persons.

REPRESENTATION OF PARTIES

Harry Berger ("**Claimant**") was represented by Sandor L. Grossman, Esq., Chicago, Illinois and Andrew Stoltmann, Esq., Stoltmann Law Offices, P.C., Chicago, Illinois.

Wachovia Securities, LLC ("**Respondent Wachovia**"), Neil R. Cooper ("**Respondent Cooper**") and Douglas L. Meyer ("**Respondent Meyer**") were represented by Miriam G. Bahcall, Esq. and Brandon L. Spurlock, Esq., Morgan Lewis & Bockius LLP, Chicago, Illinois.

Ronald W. Fox ("**Respondent**") was represented by Bruce Lewitas, Esq., Lewitas and Associates, Chicago, Illinois.

Stephen Heckmeyer ("**Respondent Heckmeyer**") did not appear or participate. On or about September 13, 2005, NASD was advised that Respondent Heckmeyer was deceased.

CASE INFORMATION

The Statement of Claim was filed on or about April 25, 2005. Amended Statement of Claim was filed on or about October 31, 2005. Claimant's Response to Respondents Wachovia Securities, LLC Neil R. Cooper and Douglas L. Meyer's Motion for Summary Disposition was filed on or about February 23, 2006. Submission Agreement of Claimant Harry Berger was signed on February 25, 2005.

Motion to Dismiss Claims and Preliminary Statement of Answer was filed by Respondent Wachovia Securities, LLC on or about July 18, 2005. Wachovia Securities, LLC Neil R. Cooper and Douglas L. Meyer's Answer to Amended Statement of Claim was filed on or about January 12, 2006. Wachovia Securities, LLC Neil R. Cooper and Douglas L. Meyer's Motion for Summary Disposition was filed on or about February 8, 2006. Submission Agreement of Respondent Wachovia Securities, LLC was signed on July 15, 2005. Submission Agreement of Respondent Neil R. Cooper was signed on January 26, 2006. Submission Agreement of Respondent Douglas L. Meyer was signed on January 26, 2006.

Statement of Answer was filed by Respondent Ronald W. Fox on or about February 7, 2006. Submission Agreement of Respondent Ronald W. Fox was signed on February 15, 2006.

CASE SUMMARY

Claimant alleged that

Agents Heckmeyer, Fox, and later Cooper and Meyer placed their own interests and the interests of Wachovia ahead of those of Mr. Berger. The Agents made wholly unsuitable investment recommendations and engaged in unauthorized trading for an elderly, sick retiree who needed only capital preservation and income. The Agents also failed to disclose the risks associated with the securities purchased in the account. The Agents negligently failed to detect these violations. Because of Respondent Wachovia's actions, omissions, misrepresentations, negligence, breaches of duties and failure to properly supervise, it, along with the Agents, have become liable to Mr. Berger on a number of legal grounds, including, but not limited to, the following:

1. sale of unsuitable investments;
2. negligence; misrepresentations and omissions; failure to supervise; violations of the Illinois Securities Act of 1953, the Illinois Consumer Fraud and Deceptive Practices Act, the Illinois Elder Abuse Statute, and the NASD Conduct Rules;
3. breach of contract;
4. constructive fraud/breach of fiduciary duty; and
5. common law fraud.

In their Answer to Amended Statement of Claim, Respondents Wachovia, Cooper and Meyer denied the allegations set forth in the Statement of Claim. Respondents specifically stated:

The Amended Statement of Claim first alleges that, on or about September 6, 2005, Wachovia sent its representatives, Cooper and Meyer, to Claimant's residence to "work" Claimant's accounts even though Claimant had previously filed an Initial

Statement of Claim against Wachovia and litigation was pending. This allegation does not form the basis for a legitimate claim, and serves only to unfairly taint the records of both Cooper and Meyer. As previously represented to the Panel, Respondents expect to file a Motion for Summary Disposition, with affidavits, seeking the dismissal of this particular claim and requesting that Cooper and Meyer be dismissed from this litigation, as this is the only claim in the Amended Statement of Claim involving these financial advisors. Preliminarily, however, it should be noted that when Cooper and Meyer went to Claimant's residence, Claimant still maintained accounts at Wachovia and Claimant had been in regular contact with his financial advisors, Cooper and Meyer, since they inherited Claimant's account following Ronald Fox's departure from Wachovia on or about May 3, 2005. The purpose of the meeting was to review and discuss Claimant's estate planning. (See *Exhibit 1*). The meeting had been scheduled months in advance but was postponed due to several scheduling conflicts. Claimant and his self-described "business partner and confidant," Peter Fisher, knew about the meeting and approved of the meeting's agenda before hand. Cooper and Meyer were accompanied by an estate planning lawyer, whom Claimant not only knew was coming, but invited to stay after Cooper and Meyer were asked to leave by Claimant's counsel.

Beyond the initial claim against Cooper and Meyer, the rest of the Amended Statement of Claim is equally vacuous. The gravamen of the remaining allegations is that Wachovia, through its representatives, engaged in unsuitable and unauthorized trading in Claimant's accounts. The Amended Statement of Claim asserts that Claimant was a conservative investor who "should have been exclusively invested in bonds, certificates of deposit, and cash." These allegations have no merit. The evidence will show that Claimant is a sophisticated investor with significant investment experience in equities, mutual funds, and bonds, and that Claimant's investments were eminently suitable considering his experience, investment objectives and risk tolerance. The evidence will further show that all of the allegations in the Amended Statement of Claim to include misrepresentations and omissions, failure to supervise, negligence, violation of the Illinois Securities Act of 1953, the Illinois Consumer Fraud and Deceptive Practices Act, the Illinois Elder Abuse Statute, the NASD Conduct Rules, breach of contract, breach of fiduciary duty, constructive fraud, and common law fraud, are lacking any legal or factual basis. Indeed, the Amended Statement of Claim conveniently ignores the following irrefutable facts, which expose its prevarications:

- Claimant is a multi-millionaire worth approximately \$12 million, who, prior to his retirement, owned and operated his own food manufacturing company.
- Claimant has more than 50 years of experience investing in stocks, bonds, and mutual funds.

- Contrary to the Amended Statement of Claim, Claimant did not want safe, low-risk, conservative investments, but wanted a stock portfolio with a primary emphasis on growth.
- Claimant maintained non-discretionary accounts and authorized and ratified every transaction. Indeed, Claimant solicited the purchase of many (if not most) of the investments in his accounts.
- Claimant's main account, worth more than \$8 million, was actually profitable.

Instead of presenting all of the material facts, the Amended Statement of Claim relies on half-truths and presents a wholly distorted recollection of the actual events in an attempt to stake a claim for \$4 million in alleged damages, an amount Claimant conjured up without any factual basis whatsoever. At the end of the day, the evidence will show that Wachovia's recommendations to Claimant were consistent with his stated objectives and suitable for the investing he engaged in. The evidence will also show that Wachovia reasonably supervised Claimant's account. In sum, the Amended Statement of Claim is without merit and should be denied.

Respondent Fox denied any allegations of wrongdoing and specifically stated:

Claimant's amendment of his Statement of Claim to include Mr. Fox is curious in light of the fact that the relatively minimal activity was entirely benign, not to mention rather profitable. Factoring in Claimant's complete satisfaction with Mr. Fox as late as July 2004, the situation becomes truly puzzling. One thing is clear, however, and that is that the Statement of Claim spins a tale bearing little resemblance to actual events. While Claimant was advanced in years, he was not "sick," he was not "dying" and was in no way mentally impaired. On the contrary, he was very much in possession of his mental faculties.

Overall, Claimant's portfolio was appropriately invested. The portfolio's fixed income allocation increased from an already conservative 85% to 89% during the time period Mr. Fox serviced Claimant's accounts. Any allegations that Mr. Fox's recommendations in this regard were unsuitable are ludicrous. As for Claimant's unauthorized trading allegations, such a prospect must be dismissed out of hand in light of Claimant's July 2004 conversation with Wachovia supervisory personnel. Because all of Claimant's other counts are derivative to these allegations, they must also fail.

RELIEF REQUESTED

Claimant requested an award as follows:

1. actual damages in the amount of \$550,000;
2. attorney fees and costs of arbitration, including but not limited to expert witness fees, expenses and accounting fees as specifically authorized under the Illinois Securities Law of 1953 (815 ILCS 5/13-A-2) and the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/10a);
3. lost interest at the statutory rate of 10% annually, as specifically authorized under the Illinois Securities Law of 1953 (815 ILCS 5/13-A-1) and the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/10a);
4. pre and post award interest at the statutory rate; and
5. punitive damages.

Respondents Wachovia Securities, LLC Neil R. Cooper and Douglas L. Meyer requested that the Panel enter an award as follows:

- a) denying Claimant's claim in its entirety;
- b) dismissing Claimant's claim with prejudice;
- c) awarding Respondents such other and further relief as the Panel deems just and proper, including attorneys' fees and costs.

Respondent Fox requested that this matter be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

On or about March 10, 2006, the Arbitration Panel entered the following Order:

The claim against respondents Cooper and Meyer is dismissed without hearing insofar as there is no claim pertaining to the purchase or sale of a security arising out of the contact between them and the claimant.

The records of Cooper and Meyer shall have the claim asserted by Berger expunged.

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 undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1) On or about July 21, 2006, NASD was advised that the remaining parties had reached a *confidential resolution of the claims asserted in this matter. Therefore, this matter is dismissed with prejudice.*
- 2) On or about March 10, 2006, the Arbitration Panel entered the following Order:
 - a) The claim against respondents Cooper and Meyer is dismissed without hearing insofar as there is no claim pertaining to the purchase or sale of a security arising out of the contact between them and the claimant.
 - b) The records of Cooper and Meyer shall have the claim asserted by Berger expunged.
- 3) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondents Neil R. Cooper and Douglas L. Meyer's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09, 99-54 and 04-16, Respondents Neil R. Cooper and Douglas L. Meyer must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4) Pursuant to Rule 2130, the arbitration panel has made the following affirmative findings of fact:
 - a) The registered persons were not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.
- 5) 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.
- 6) 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 = \$375.00

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 Wachovia Securities, LLC.

Member surcharge	\$	2,250.00
Pre-hearing process fee	\$	750.00
Hearing process fee	\$	4,000.00
Total Member Fees	\$	<u>7,000.00</u>

Adjournment Fees

Adjournments requested during these proceedings:

Hearing Date(s), June 19-22, 2006, adjournment requested jointly by the parties to mediate. Fee waived. = \$1,200.00

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:

2 Pre-hearing session(s) with Panel	x	1,200.00	\$	2,400.00
October 11, 2005	1	session		
December 19, 2005	1	session		
Total Forum Fees			\$	<u>2,400.00</u>

The Arbitration Panel has assessed \$1,200.00 of the forum fees to Harry Berger.

The Arbitration Panel has assessed \$1,200.00 of the forum fees jointly and severally to Wachovia Securities, LLC and Ronald W. Fox.

Fee Summary

07/25/2006 09:37 FAX

NASD

011/012

NASD Dispute Resolution
 Arbitration No. 05-02190
 Award Page 8 of 9

Fee Summary

Claimant, Harry Berger, is liable for:

Initial Filing Fee	= \$	375.00
<u>Forum Fees</u>	= \$	1,200.00
<u>Total Fees</u>	= \$	1,575.00
<u>Less payments</u>	= \$	-1,575.00
Balance Due NASD Dispute Resolution	= \$	0.00

Respondent, Wachovia Securities, LLC, is liable for:

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

Respondents, Wachovia Securities, LLC and Ronald W. Fox, are jointly and severally liable for:

<u>Forum Fees</u>	= \$	1,200.00
<u>Total Fees</u>	= \$	1,200.00
<u>Less payments</u>	= \$	-0.00
Balance Due NASD Dispute Resolution	= \$	1,200.00

All balances are due to NASD Dispute Resolution

ARBITRATION PANEL

David G. Duggan, Esq. - Public Arbitrator, Presiding Chair
 Steven F. Pflaum, Esq. - Public Arbitrator
 Mark C. Hutchinson, CFA - Non-Public Arbitrator

Concurring Arbitrators:

David G. Duggan, Esq.
 Public Arbitrator, Presiding Chair

Steven F. Pflaum, Esq.
 Public Arbitrator

Signature Date

7/25/06
 Signature Date

NASD Dispute Resolution
Arbitration No. 05-02190
Award Page 9 of 9



Mark C. Hutchinson, CFA
Non-Public Arbitrator

7/27/06
Signature Date

7/27/06
Date of Service (For NASD office use only)