

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Louise F. Barnes

Claimant(s)

vs.

First Affiliated Securities, Inc.
Elly Fischbach

Respondent(s)

CASE #88-00846

AWARD

Heard Before the Arbitration Panel:

Harry E. Jennings Jr.
Willard Skeel
Martin O. Nelson Jr.

CASE SUMMARY

The claim in this matter was filed March 17, 1988.

Claimant alleged that she was unsophisticated and lacked expertise in general regarding securities investments, including investing on margin. Claimant alleged that Claimant had a fund of approximately \$150,000.00 which was her sole capital and potential source of income to support her family. Claimant alleged 1) that Respondents breached their fiduciary duties by a) investing Claimant's funds in an unsuitable, speculative, highly leveraged margin trading investment strategy, b) failing to disclose and intentionally misrepresenting the risks involved, c) failing to invest Claimant's funds in a manner consistent with Claimant's stated investment objectives and consistent with her degree of sophistication and d) failing to close out Claimant's account when requested to do so, and instead, through misrepresentations and falsehoods, convincing Claimant that the account should not be closed; 2) that Respondents were negligent, 3) that Respondents engaged in fraud and intentional and negligent misrepresentation which deceived Claimant and caused her funds to be invested in an unsuitable investment strategy in light of her investment abilities and objectives; 3) that Respondents violated the federal securities laws; 4) that Respondents violated the Washington Securities Act; 5) that Respondent's violated the Washington Unfair Business Practices Act. Claimant alleged damages as a result of the actions and omissions of Respondents.

Respondent First Affiliated Securities, Inc. alleged that they did not breach any duty, that they did not omit or misrepresent any material facts and denied that the investment strategy initiated by Respondent Fischbach was unsuitable. Respondent alleged that Claimant failed to plead the requisite elements of the Washington Unfair Business Practices Act. Respondents alleged that Claimant failed to state any causes of action and

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should recover nothing. Respondent First Affiliated Securities, Inc. alleged that Claimant's requests for punitive damages, attorney's fees and damages are without merit and exaggerated. Respondent Fischbach alleged that he never "intentionally endeavored" nor was he aware that he had developed a "relationship of close trust and special confidence" with Claimant, that Claimant had prior investing experience, that he in no way represented or implied anything but his best efforts in fulfilling Claimant's expectations, that there were no repeated assurances regarding the "low risk" nature in which the funds were to be invested, that risks were discussed fully, that specific purchases and amounts were discussed and agreed upon, that Claimant was aware of margin usage in her account, that Claimant did not strongly indicate that she did not wish to pursue an investment strategy that would expose her to risks of fluctuation and that no preference to close the account was made, that he represented only that he would follow the historical model he advanced and that he would do for clients what he did for himself and his family, and that there was no concealment of risk, no denying of risk, and no disparagement of risk.

RELIEF REQUESTED

Claimant requested:

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|--|---------------------|
| 1. Losses incurred from the sale of stock during the four months she maintained an account with FAS. | \$100,230.56 |
| 2. Commissions paid to respondents. | \$ 8,985.07 |
| 3. Margin interest expense paid to respondents. | \$ 3,528.67 |
| 4. Prejudgment interest on items Nos. 1, 2, and 3 since November 20, 1987, calculated through 6/30/89 (\$37.06/day x 554 days) | \$ 11,364.68 |
| 5. Consumer Protection Act exemplary damages | \$ 10,000.00 |
| 6. Severe emotional distress | \$ 20,000.00 |
| 7. Attorneys' fees | \$ <u>21,000.00</u> |
| TOTAL | <u>\$175,108.98</u> |

Respondent First Affiliated Securities, Inc. asked that Claimant recover nothing and alternatively, that Respondent be awarded its costs and fees in defending this dispute.

AWARD

On June 29 and 30, 1989 in Seattle, Washington, the arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on March 9, 1988, by Respondent First Affiliated Securities on June 30, 1988, and by Respondent Elly Fischbach on June 29, 1988. There were a total of five hearing sessions. The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has determined in full and final resolution of the issues submitted for determination as follows: -

1. Respondents are liable for and shall pay to Claimant the sum of One Hundred Twenty Four Thousand Seven Hundred Thirty Six Dollars and No Cents (\$124,736), inclusive of interest. Said liability is joint and several.
2. Pursuant to RCW 21/20.430, Respondents are liable for and shall pay to Claimant attorney's fees in the amount of Twenty One Thousand Dollars and No Cents (\$21,000.00). Said liability is joint and several.
3. The parties shall each bear their respective costs.
4. Pursuant to Section 43 of the National Association of Securities Dealers, Inc. (NASD) Code of Arbitration Procedure, the NASD shall retain the \$750.00 filing fee previously deposited by the Claimant. Further, pursuant to Section 43 of the Code of Arbitration Procedure, Respondents are assessed forum fees in the sum of Three Thousand Dollars (\$3,000.00), to be paid directly to the National Association of Securities Dealers, Inc. Said liability is joint and several.