

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

IN THE MATTER OF THE ARBITRATION BETWEEN

Janet K. Toenjes

Claimant

Swartwood Hesse, Inc. and
Richard Moyer

Respondents

AWARD
90-01036

CASE SUMMARY

Claimant, Janet K. Toenjes ("Toenjes"), alleged that Respondents, Swartwood Hesse, Inc. ("SWI") and Richard Moyer ("Moyer"), traded Claimant's account on a discretionary basis and placed her monies in unsuitable investments. Claimant further contended SWI does not allow discretionary accounts. Claimant averred Moyer breached his fiduciary duty, SWI and Moyer were negligent in their handling of her account, violated the Michigan Uniform Securities Act, made material misstatements regarding the securities purchased for Claimant and that SWI failed to supervise Moyer properly. Respondent, SWI, maintained that unbeknownst to SWI, Moyer and Toenjes entered into a discretionary account agreement. SWI averred Moyer paid Claimant \$29,000.00; therefore, Claimant was paid more than her account was worth. Respondent averred SWI does not permit any broker to open or handle discretionary accounts, nor does it permit brokers to settle customer claims without permission of a manager. SWI stated it did not trade any securities in Claimant's account nor did it misrepresent the nature of the securities Claimant bought or sold. Finally, SWI maintained it exercised more than reasonable care in supervising Moyer.

RELIEF REQUESTED

Claimant, Janet K. Toenjes, requested actual damages in the amount of \$34,362.20, plus interest from April 21, 1986 to November 6, 1990 at the rate of 8% per annum, costs and attorney's fees. Respondent, Swartwood Hesse, Inc., requested the claim be dismissed in its entirety. Respondent, Richard Moyer, requested the claim be dismissed in its entirety and the panel deny Claimant's request for costs and attorney's fees.

AWARD

On November 6, 1990, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by the Claimant, Janet K. Toenjes, on June 28, 1990, and by the Respondent, Swartwood Hesse, Inc., on November 6, 1990 and by Respondent, Richard Moyer, on May 17, 1990. Respondent, Swartwood Hesse, Inc., did not execute a corporate acknowledgement nor was its submission agreement notarized. However, it did appear voluntarily. The hearing was held in Southfield, MI at the Hampton Inn. 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. Under the by-laws of the NASD's Code of Arbitration Procedure, the Respondent, Swartwood Hesse, Inc., is bound by this panel's rulings and determinations;
2. Respondents, Swartwood Hesse, Inc. and Richard Moyer, hereby are liable to Claimant, jointly and severally, in the amount of \$34,539.52 including interest from June 24, 1983 until November 6, 1990 at the rate of 5% per annum;
3. The parties shall each bear their respective costs including attorney's fees;
4. Pursuant to Section 43 of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$400.00 filing fee previously deposited by the Claimant.
5. Forum fees are assessed in the amount of \$800.00 payable to the National Association of Securities Dealers, Inc. through its staff counsel in accordance with Section 43, 44 or 45 of the Code of Arbitration Procedure. Claimant may use the \$400.00 previously deposited to offset the forum fee. Respondents, jointly and severally, are assessed forum fees in the amount of \$400.00.

ARBITRATORS CONCURRING

/s/

Harry Carson

/s/

Levi T. Gardener

/s/

David Jarvis

DATED: November 13, 1990