

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Clara D. Albers

90-02448

Name of Respondent/Cross-Claimant

Eppler, Guerin & Turner, Inc.

Name of Respondent/Cross-Respondent

John Wayne Ezell

REPRESENTATION

For Claimant Clara D. Albers: Susan R. Schrag, Esq. and Roger Thais, Esq. of the Law Offices of Morris, Laing, Evans, Brock & Kennedy, Wichita, Kansas.

For Respondent Eppler, Guerin & Turner, Inc.: William D. Sims, Jr., Esq. and Stephen E. Fox, Esq. of Jenkins & Gilchrist, Dallas, Texas.

For Respondent John Wayne Ezell: David E. Thomas, Esq. of Thomas & Self, Dallas, Texas.

CASE INFORMATION

Statement of Claim filed: September 5, 1990

Claimant Clara D. Albers' Submission Agreement signed on: August 28, 1990

Statement of Answer and Alternative Crossclaim by Respondent, Eppler, Guerin & Turner, Inc., filed: November 13, 1990

Respondent, Eppler, Guerin & Turner, Inc.'s Submission Agreement signed by James W. Massie III on: October 31, 1990

Statement of Answer by Respondent John Wayne Ezell filed: November 20, 1990

Statement of Answer to Alternative Cross Claim of Eppler, Guerin & Turner, Inc. by Respondent John Wayne Ezell filed: January 15, 1991

Respondent John Wayne Ezell's Submission Agreement signed: November 16, 1990

HEARING INFORMATION

Pre-Hearing Dates/Sessions: April 9, 1991/One (1) session
May 20, 1991/One (1) session

Hearing Dates/Sessions: May 23, 1991/Three (3) sessions
May 24, 1991/Two (2) sessions

Hearing Location: Kansas City, Missouri

CASE SUMMARY

Claimant Clara D. Albers ("Albers") alleged that Respondent John Wayne Ezell ("Ezell"), while employed by or acting as an agent of Respondent Eppler Guerin & Turner, Inc. ("EGT"), invested most of Albers' life savings in speculative and unsuitable investments in spite of his knowledge of Albers' advanced age, poor physical and financial condition and her needs. Respondents placed Albers in the following investments: 1) VMS Real Estate Mortgage Investment Funds; 2) VMS Real Estate Limited Partnerships; 3) Liz Clairborne Common Stock; 4) L. A. Gear Common Stock; and 5) Covered Call Options. In addition, Albers alleged that Respondents misrepresented the status and risk of the investments made and that Respondents placed her in an unreasonable concentration of VMS products, increasing the risks to the account. Based upon the above allegations, Albers asserted: (1) violations of NASD rules, including suitability rules; (2) breach of fiduciary duty; (3) fraud; (4) breach of contract; (5) violations of state and federal securities laws, and (6) Kansas Consumer Protection Laws.

Eppler, Guerin & Turner, Inc. denied the allegations of the Statement of Claim, stating the following:

1. No discretionary or unauthorized transactions were made in client's account;
2. The VMS investments were a good recommendation and investment at the time made;
3. Covered call writing is a conservative transaction and Claimant herself selected the price for her call options based on the size of the premium;
4. Claimant would have made a profit on L. A. Gear if she had followed Respondents advice, but chose to hold and the stock declined in value;
5. Any losses complained of were the result of market conditions beyond Respondents control or the individual investment decisions of Claimant;
6. The claims are barred by the doctrines of waiver, ratification and estoppel; and

7. Claimant failed to mitigate damages.

Respondent Eppler, Guerin & Turner, Inc. filed on alternative Cross-Claim against Respondent John Wayne Ezell alleging that if the panel concludes that Ezell made false or misleading verbal representations or engaged in unauthorized or discretionary trading, then EGT is entitled to indemnification from Ezell because he would have exceeded the course and scope of his authority and would have violated EGT's policies and procedures.

Respondent John Wayne Ezell denied the material allegations of the Statement of Claim alleging that: 1) Ezell did not violate NASD rules, suitability rules, fraud, breach of fiduciary duty, breach of contract, state and federal securities laws or the Kansas Consumer Protection laws; 2) Ezell faithfully carried out his duties as a broker, did not have discretionary authority of Claimant's account, and Albers was thoroughly informed of all investments, made all decisions and received confirmations in connection with each purchase; 3) Ezell acted within the scope of his duties and authority granted to him by EGT, following all rules and procedures set forth by EGT; 4) based on the available information at the time, VMS investments were a highly regarded security suitable for Albers given her investment objectives and recommended by the EGT due diligence staff; 5) the percentage of the VMS investment in Albers' portfolio was not unreasonable; 6) the small common stock purchases recommended by Ezell were suitable for Albers given her investment goals and criteria, and any losses resulted from market conditions; and 7) the purchase of covered call options was a conservative strategy compatible with Albers' investment goals and criteria. Losses resulted from market conditions and Albers' refusal to follow Ezell's advice as to the options strike price.

Ezell further denied owing EGT any indemnification and/or contribution alleged in EGT's crossclaim brought against him.

RELIEF REQUESTED

Claimant Clara D. Albers requested entry of an award against Respondents Eppler, Guerin & Turner, Inc. and John Wayne Ezell in the Amount of \$120,000.00 plus pre-judgment interest, the amount of loss of a reasonable rate of return, punitive damages of between \$300,000.00 and \$500,000.00, an accounting of all activity in Claimant's account, attorneys' fees and costs.

Respondent Eppler, Guerin & Turner, Inc. requested that the Statement of Claim be dismissed and denied in its entirety, or in the alternative, if the panel finds false or misleading representations or unauthorized trading, that the panel award Eppler, Guerin & Turner, Inc. an amount for indemnification and contribution from Respondent John Wayne Ezell.

Respondent John Wayne Ezell requested that the Statement of Claim and Eppler, Guerin & Turner's Crossclaim be dismissed and denied in their entirety.

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have

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

1. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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;
2. Respondent John Wayne Ezell is liable for and shall pay to Claimant Clara D. Albers the sum of \$5,000.00;
3. Respondent Eppler, Guerin & Turner, Inc. is liable for and shall pay to Claimant Clara D. Albers the sum of \$16,000.00;
4. In addition, Respondents John Wayne Ezell and Eppler, Guerin & Turner, Inc. are jointly and severally liable for and shall pay to Claimant Clara D. Albers the sum of \$45,000.00;
5. Furthermore, Respondents John Wayne Ezell and Eppler, Guerin & Turner, Inc. are jointly and severally liable for and shall pay to Claimant Clara D. Albers the sum of \$44,000.00 as attorneys' fees and costs. In determining to award attorneys' fees and costs to Claimant Clara D. Albers, the panel considered the authorities cited and the arguments set forth in the parties post-hearing briefs, as well as the Kansas Securities Act (K.S.A. 17-1268) and determined that authority existed for an award of attorneys' fees and costs;
6. The claim for punitive damages is hereby dismissed and denied in its entirety;
7. The crossclaim of Respondent Eppler, Guerin & Turner, Inc. against Respondent John Wayne Ezell is hereby dismissed and denied in its entirety;
8. Parties are responsible for their own costs and attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee of \$250.00 and the hearing session deposit of \$1,000.00 previously deposited with the NASD by the Claimant Clara D. Albers. Claimant Clara D. Albers is liable for and shall pay to the NASD additional forum fees in the amount of \$866.66.

The NASD shall retain the non-refundable filing fee of \$500.00 and the hearing session deposit of \$1,000.00 previously deposited by

the Respondent Eppler, Guerin & Turner, Inc. Respondent Eppler, Guerin & Turner, Inc. is liable for and shall pay to the NASD additional forum fees in the amount of \$866.67.

Respondent John Wayne Ezell is liable for and shall pay to the NASD additional forum fees in the sum of \$1,866.66.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

Name:

Dated:

Murray S. Levin, Esq.
Murray S. Levin, Esq.
Public Arbitrator
Chairperson

August 2, 1991

Arthur F. Dewsberry
Arthur F. Dewsberry
Public Arbitrator

August 15, 1991

Concurring in the damage award but dissenting from
the award of attorneys' fees:

James D. Swope
James D. Swope
Industry Arbitrator

August 5, 1991

Date Served: August 19, 1991