

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Bernard Fink  
Barney Fink Container Co., Inc.  
Bernard and Margaret Fink Foundation

No. 91-01398

Name of Respondents

Dean Witter Reynolds, Inc.  
Susan McNamara

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**REPRESENTATION OF PARTIES**

For Claimants: William M. Larson, Jr., Esq., of Kennedy, Holland, DeLacy & Svoboda, Omaha, Nebraska.

For Respondents: Michael T. Milan, Esq., of Popham Haik, Minneapolis, Minnesota.

**CASE INFORMATION**

Statement of Claim filed: May 1, 1991.

Claimants' Submission Agreements signed on: May 1, 1991, and July 11, 1991.

Joint Statement of Answer filed by Respondents on:

Respondent Dean Witter Reynolds, Inc.'s Submission Agreement signed on: October 9, 1991.

Respondent Susan McNamara Submission Agreement signed on: November 14, 1991.

**HEARING INFORMATION**

Hearing dates: April 21, 1993. Two (2) sessions.  
April 22, 1993. Two (2) sessions.  
April 23, 1993. One (1) session.

Hearing Location: Omaha, Nebraska.

### **CASE SUMMARY**

Claimants, Bernard Fink, Barney Fink Container Co., Inc. and the Margaret and Bernard Fink Foundation ("Claimants") alleged: Breach of fiduciary duty; failure to supervise; fraud; misrepresentations and omissions; negligence; breach of contract; violation of the Racketeer Influenced and Corrupt Organizations Act- 18 U.S.C. Section 1962; violation of Section 10(b) of the Securities and Exchange Act of 1934 and Securities Exchange Commission Rule 10b-5; violation of Section 17(a) of the Securities Exchange Act of 1933; and violation of Neb. Rev. Stat. Section 1118 [Reissue 1987] by Respondents, Dean Witter Reynolds, Inc. and Susan McNamara ("Respondents"). The allegations arose out of transactions in the following securities (the names of which were more fully brought forth at the hearing): Limited partnerships formed to lease aircraft and real estate limited partnerships; Dean Witter high yield funds; Dean Witter junk bond funds; other Dean Witter proprietary issues; Sears investment trusts; and a municipal bond fund operated by Dean Witter.

For their joint Answer, Respondents denied each and every material allegation contained in the Statement of Claim. In addition, Respondents set forth the following affirmative defenses:

1. The claim is barred because Claimants failed to mitigate damages.
2. The claim is barred due to Claimants' contributory and comparative negligence.
3. The claim is barred by waiver.
4. The claim is barred by Claimants' ratification of all purportedly unauthorized acts.
5. The claim is barred by the doctrines of estoppel and laches.
6. The claim is barred by the statutes of limitations.

### **RELIEF REQUESTED**

Claimant requested an award of compensatory damages in excess of \$300,000.00 plus return of commissions, fair yield, costs and attorneys' fees. In addition, Claimants requested an award of exemplary damages/ punitive damages as follows: McNamara in the amount determined by the arbitrators; and Dean Witter in the amount of 5 times Claimant's losses as set forth in his

Statement of Claim.

Respondents requested that the Statement of Claim be dismissed in its entirety and Respondents be awarded their costs and attorneys fees.

**OTHER ISSUES CONSIDERED & DECIDED**

During the hearings conducted on April 21, 22, and 23, 1993, Claimants withdrew their RICO claim against the Respondents.

The parties have agreed that the Award in this matter may be executed by 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 originals remain on file with the NASD.

**AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants, Bernard Fink's, Barney Fink Container Co., Inc.'s, and the Margaret and Bernard Fink Foundation's claims are hereby denied and dismissed with prejudice.

**OTHER COSTS**

Each party shall bear its own costs, including attorneys' fees, except as set forth more fully below.

**FORUM FEES**

Pursuant to Section 43 (c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

6 hearing sessions X \$1,000.00 = \$6,000.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00, and shall retain the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimant.

Additional forum fees in the amount of \$2,000.00 are assessed against the Claimants.

Additional forum fees in the amount of \$3,000.00 are assessed against the Respondents.

Pursuant to Sections 30(b) and 43(c) of the Code, the NASD shall retain the \$750.00 postponement fee previously paid by the Claimant.

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

#### CONCURRING ARBITRATORS

Dated:

June 3, 1993

/s/John P. Miller  
John P. Miller  
Presiding Chair  
Public Arbitrator

June 2, 1993

/s/Donald Terlip  
Donald Terlip  
Industry Arbitrator

May 28, 1993

/s/John C. Burke  
John C. Burke  
Public Arbitrator

Date of Service by the NASD:

6-8-93