

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Rafael Perez Garcia

91-03177

Name of Respondents

Dean Witter Reynolds, Inc.:

Ben Moses

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**REPRESENTATION**

For Claimant: Rafael Perez Garcia was represented by Walter T. Weathers, Esq. of Houston, Texas.

For Respondents: Dean Witter Reynolds, Inc. and Ben Moses were represented by Wendy R. Robinson, Esq. of Dean Witter Reynolds, Inc., located in San Francisco, California.

**CASE INFORMATION**

Statement of Claim filed: October 10, 1991.

Claimant's Submission Agreement signed on: January 15, 1992.

Joint Statement of Answer filed by Respondent Dean Witter Reynolds, Inc. and Ben Moses on: March 9, 1992.

Respondent Dean Witter Reynold, Inc.'s Submission Agreement signed on: March 9, 1992 by Wendy R. Robinson, Vice President & Senior Attorney, Dean Witter Reynolds, Inc.

Respondent Ben Moses' Submission Agreement signed on: March 10, 1992.

Claimant's Motion for Leave to Amend filed: February 4, 1993

Respondent's Response to the Motion for Leave to Amend filed: February 4, 1993.

### HEARING INFORMATION

Pre-Hearing Conference:	None Held.
Hearing Dates/Sessions:	February 16, 1993 for Two (2) sessions; February 17, 1993 for Two (2) sessions
Hearing Location:	Houston, Texas.

### CASE SUMMARY

Claimant Rafael Perez Garcia ("Garcia") alleged that Respondent Ben Moses ("Moses"), while employed by or acting as an agent for Respondent Dean Witter Reynolds, Inc. ("Dean Witter"), failed to place a stop loss order on an option of Fannie Maes, even though he represented to Garcia that he would do so. Garcia specifically alleged as follows:

1. Garcia opened an account with Dean Witter on or about August 21, 1989, with Moses as the "Account Executive" in charge;
2. Garcia specifically instructed Moses prior to engaging in any transactions that because of his frequent travel, all trades must be conducted with a stop loss order in place at 95 % of the trade price. Four trades were conducted prior to October of 1989 and it is Garcia's understanding that each trade was conducted on such basis;
3. Early on October 3, 1989, Moses telephoned Garcia and asked if he wanted to make \$50,000 to \$60,000 trading options on Fannie Maes with an investment of \$50,000. Garcia agreed to make the trade specifically conditioned upon the usual stop loss order of 95 %, and Moses responded, "Don't worry, I'll protect you;"
4. Garcia discovered approximately two weeks later that Moses failed to place the stop loss order and confronted Moses, stating that he intended to take the matter to his boss; and
5. In response, Moses told Garcia that the Fannie Maes were about to split and that would enhance the value of the options. In addition, Moses misrepresented that the value of Garcia's account was about \$203,000, a slight increase from the original balance, when, in fact, due to the Respondent's misconduct, the account was valued at approximately \$146,000.

Based upon the above allegations, Garcia asserted claims for breach of contract; for violation

of Rule 10b-5, 17 C.F.R. 240 10(b)-5, promulgated by the Securities and Exchange Commission under the Securities and Exchange Act of 1934, as amended; for violation of the Texas Rev. Civil Statutes, Art. 581-33(B); and Article III., par. 1 and 18 of the NASD Rules of Fair Practice.

Respondents Dean Witter and Moses denied the material allegations of the Statement of Claim, alleging that:

1. Garcia became a Dean Witter customer in August of 1989, at which time he signed a variety of documents, including the active assets account application, a customer agreement and an option client information form. The information revealed that Garcia was a lawyer with approximate annual income of \$150,000 and a net worth of 3.5 million, and had traded in commodities since 1972er options since 1980 and stocks since 1981;
2. The branch manager followed a special practice at the time for clients who wished to open an options account which was a letter prepared based upon statements made by Garcia regarding his investment strategy. In the letter, Garcia indicated he wanted to engage in options strategy which included the purchase of call options with \$50,000 of his money and that he was a sophisticated investor with experience in options trading and knowledge of the risk;
3. On October 4, 1989, Garcia called Moses and asked to purchase 50 of FNMA November 130 calls at the opening and the transaction was effected at a price of \$9 3/4 per contract for a total cost of \$49,549.94. As Moses was inexperienced with the procedure for verbally executing a specific options trade, he contacted his branch manager who confirmed with Garcia that the order was unsolicited and that Garcia had adequate cash in the account to cover the trade. However, Garcia never mentioned a stop loss order on the trade;
4. Even if Garcia had asked for a stop loss order, it would not have changed the result because good until canceled stop loss orders cannot be entered on option positions, only day stop loss orders. In addition, on October 18, the FNMA options split 3-for-1, resulting in a position of 150 FNMA November 43 3/8ths calls;
5. All information was set forth in the October monthly statement sent to Garcia and his accountant, including that the calls had declined in value by month-end to \$13,125. No complaint was received at the time. Furthermore, Moses attempted to reach Garcia by telephone when the value began to decline, but was

unable to reach him and Garcia never returned his messages; and

6. Moses never told Garcia that a stop loss order would be placed on the options. Dean Witter's practice is to send a copy of any stop loss order to the customer and show the same on the monthly statement. This practice was followed by Dean Witter on Garcia's previous orders, but not for this order.

Dean Witter and Moses asserted additional defenses, alleging that:

1. Any 10b-5 action is barred by Claimant's delay, as held in Lampf V. Gibertson, 111 Supreme Court 2773 (1991). In addition, Claimant failed to meet the other requirements for any 10b-5 action;
2. Garcia failed to repudiate the allegedly improper acts of the Respondents within a reasonable time of receiving his confirmations and monthly statements. Therefore, Garcia ratified Respondents' actions;
3. The alleged improper action of Dean Witter and Moses has been waived and Garcia is estopped from complaining because of his own inaction and failure to complain in a timely manner;
4. In addition, Garcia's failure to take reasonable action to notify Respondents of the lack of a stop loss order proximately caused the losses alleged and constitutes contributory negligence on his part.

#### **RELIEF REQUESTED**

Claimant Garcia requested that the panel enter an award for actual damages in the sum of \$47,072.44; attorneys' fees, which at the time of filing were \$500.00; costs; interest at the maximum rate permitted by law; exemplary damages as Claimant may show himself entitled; and all other relief which is just and to which Claimant is entitled under the evidence.

Respondents Dean Witter and Moses requested that the Claimant take nothing by way of his claim and that the Respondents be awarded their cost and other further relief that the arbitrators deem just and proper.

#### **OTHER ISSUES CONSIDERED & DECIDED**

On February 4, 1993, the Claimant filed a Motion for Leave to File and Amended Statement

of Claim. Upon receiving a Response, the pleadings were forwarded to the panel for decision. On February 11, 1993, the panel determined that the Motion would be denied.

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 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. Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to Claimant Rafael Perez Garcia the sum of \$47,072.44, plus 10% simple interest per annum, accruing from October 4, 1989 until said amount is paid in full;
2. In addition, Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to Claimant Rafael Perez Garcia the sum of \$94,144.88 as exemplary damages. In determining to award exemplary damages, the panel considered the evidence, the arguments of the parties, and the evidence of common law fraud, and determined that authority existed for an award of exemplary damages to the Claimant, Rafael Perez Garcia;
3. Furthermore, Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to the Claimant, Rafael Perez Garcia, the sum of \$120.00 as reimbursement of the nonrefundable claim filing fee previously deposited by the Claimant, Rafael Perez Garcia; and
4. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

### **OTHER COSTS**

The NASD shall retain the postponement fee of \$400.00 previously paid by Claimant Rafael Perez Garcia.

**FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Four (4) sessions x \$400.00 per hearing session = \$1,600.00.

The National Association of Securities Dealers, Inc. shall retain the nonrefundable claim filing fee and refund the \$400.00 hearing session deposit previously deposited by the Claimant, Rafael Perez Garcia. Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$1,600.00.

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

Concurring Arbitrators' Signatures  
Name

Dated:

Michael E. McGown, Esq.  
Michael E. McGown, Esq.  
Public Arbitrator  
Chairperson

April 8, 1993

Theodore Davis  
Theodore Davis  
Public Arbitrator

April 9, 1993

Charles V. Dwyer, Jr.  
Charles V. Dwyer, Jr.  
Industry Arbitrator

April 11, 1993

Date of Service on Parties: 4-16-93