

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between:

PUBLIC

DELORES ROSE, Estate of JAMES A.
ROSE, LAURA NOBLE, JANICE DUSTIN,
JAMES ROSE, JR., DAVID ROSE and
MARK ROSE,

Claimants,

NASD File No. 92-01148
AWARD

v.

DEAN WITTER REYNOLDS, INC. and
PETER J. CLARK,

Respondents.

REPRESENTATION

For Claimants: Anthony V. Trogan, of
Weisman, Trogan, Young & Schloss, P.C.

For Respondents: Curt H. Mueller, Dean Witter Reynolds, Inc.;
and
Mark R. Werder and Steven M. Ribiat of
Honigman Miller Schwartz and Cohn

CASE INFORMATION

Statement of Claim filed: April 1, 1992
Claimants' submission Agreement signed on: March 30, 1992

Joint Answer filed: June 22, 1992
Respondents' submission Agreement signed on: June 26, 1992

HEARING INFORMATION

Hearing Dates/sessions: July 12, 1993 - 2 sessions
 July 13, 1993 - 2 sessions
 July 19, 1993 - 3 sessions

Hearing location: Southfield, Michigan

CASE SUMMARY

Claimants are the Estate of James Rose, Deceased, the widow and children of the deceased as beneficiaries of the Estate. Pursuant to the will of the decedent, Louis G. Basso, Jr. (hereinafter referred to as "Basso") was appointed and qualified as the Independent Personal Representative of the Estate. Basso, as Independent Personal Representative, opened a cash account with Dean Witter Reynolds, Inc. (hereinafter referred to as "DWR") entitled "Estate of James E. Rose, Louis G. Basso, Jr., Personal Representative" on March 8, 1983. The account executive was Respondent Peter J. Clark (hereinafter referred to as "Clark"). A copy of Basso's Letters of Authority was delivered to Clark when the account was opened, but Clark received no other documents confirming the authority of Basso to trade in the account.

Claimants alleged Respondents engaged in excessive trading in speculative high-risk, non-dividend paying securities, and unsuitable transactions. Claimants alleged that Respondents violated the NASD Rules of Fair Practice, the NYSE "Know Your Customer Rule", defrauded claimants, violated the

Michigan securities laws, and breached the fiduciary duty they owed to Claimants regarding the investments made in the account.

Respondents alleged that Claimants' claims should be dismissed in their entirety, and in support thereof alleged that Respondents dealt in good faith with Basso, and cannot be held liable as a matter of law for any losses in the Estate's account. Respondents further alleged that the Estate account was a "non-discretionary" account, and that all investment decisions were made by Basso. Respondents further alleged that they were entitled to the protection of MCLA 700.349(1) which provides, in summary, that a person who in good faith deals with an independent personal representative for value is protected as if the independent personal representative properly exercised a power. Respondents deny the fraud claims, as well as the churning claim, breach of fiduciary duty and claims of Rico, and for exemplary and punitive damages and rescission.

RELIEF REQUESTED

Claimants requested: Actual damages in the amount of \$128,299.00 plus interest at 12% per annum, costs in the amount of \$950.00, attorneys fees in the amount of \$55,000.00, exemplary and punitive damages, RICO damages and rescission of the subject securities.

Respondents requested: Claimant's Statement of Claim be dismissed in its entirety and that they be awarded their costs and attorney fees.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents' Motion to Dismiss was considered and denied.

The parties have agreed that in order to expedite the delivery of the Panel's decision to the parties, each arbitrator may execute a counterpart of the Award, and a confirmed copy of the award will be forwarded to the parties.

AWARD

The undersigned arbitrators have considered the testimony of the witnesses, the documentary evidence, the arguments of counsel and other submissions, and hereby render the following decision:

The Panel finds that there were no material misrepresentations of fact, or omissions of fact, by the Respondents, and that the allegations of fraud by Claimants have not been proved. Accordingly, these claims are dismissed in their entirety. On Claimants' claims for exemplary, punitive, and RICO damages, and rescission, the Panel finds in favor of the Respondents and against Claimants.

Next, considering the purchases made for the Estate account, the Panel finds that a number of purchases were clearly unsuitable for this account. Pursuant to Section 15 of the NASD Code of Arbitration, any claims submitted for arbitration more than six years after the event are barred. In this case, the Claimants Statement of Claim was filed on April 1, 1992. Therefore, any claims for investments purchased prior to April 1,

1986 are barred, and are ineligible for arbitration. As to purchases made after April 1, 1986, the Panel finds that the following investments were unsuitable:

<u>No. of Shares</u>	<u>Issue</u>
2,000	Raytech Common
1,000	Amerita West Common
500	Toth Aluminum
8,000	Telesphere
90	Edisto Common
500	Koger
1,000	Todd Shipyards

Although MCLA 700.349 affords a certain degree of protection to Respondents, they cannot shirk all responsibility for improper investments made by Basso. MCLA 700.349(1) provides in pertinent part:

"(1) A person who, in good faith, assists an independent personal representative or deals with an independent personal representative for value is protected as if the independent personal representative properly exercised a power. The fact that a person knowingly deals with an independent personal representative does not alone require the person to inquire into the existence of a power or the propriety of the exercise of the power. . . . " (Emphasis supplied)

The question becomes one of good faith. Was Clark assisting or dealing with Basso, in good faith, and did Clark have any other knowledge which would have required him to inquire into the existence of a power, or the propriety of the exercise of the power. Although this was a non-discretionary account, and all final decisions were made by Basso, Respondents knew from the

title of the account, that this was an Estate account, and as such, the type of business which may be conducted is regulated by state laws. DWR's MAPPS Branch Managers Manual 2.8, dated November 15, 1990, regarding fiduciary accounts states, at page 7:

"Prudent Man Rule. The type of business which fiduciaries may conduct is regulated by state laws. A commonly used guideline relating to the exercise of fiduciary responsibility is the "prudent man rule". This allows fiduciaries to make purchases which a "reasonably prudent man" might make for his own account, with a view toward income and preservation of capital. While the "prudent man rule" can extend to the transaction of covered options, aggressive income strategies and speculation are not considered appropriate for fiduciary accounts."

Further, the account opening form states the investment objectives in the following order: (1) long term growth, (2) income, (3) safety of principal, and (4) trading profits. None of the transactions deemed by this Panel to be unsuitable met any of these criteria. The fact that Basso was investing in these securities should have alerted Clark that Basso's stated investment objectives were not being fulfilled, that at the very least, he should have advised Basso against making such investments or require evidence of Basso's authority to make such investments.

Moreover, a broker has an affirmative obligation and is expected to advise his customer accordingly when he believes a specific investment is not in his customer's best interest.

Respondents did nothing to advise Basso against making imprudent and unsuitable investments, or to obtain evidence of Basso's authority, other than the Letters of Authority, to make such investments. Having failed to do so, Respondents still had the option to refuse to execute the trades, yet they did nothing to disturb their long standing relationship with Basso. They executed the buy orders blindly and without question.

The Panel finds that Respondents had a fiduciary duty to the Claimants, and that they breached that duty to the Claimants. The Panel further finds that Respondents were not alone responsible for Claimant's losses, and therefore they should bear only a part of Claimants' losses, with Basso being responsible for a greater portion. Therefore, the Panel will assess two-thirds of the losses against Basso (who is not a party to this arbitration), and one-third thereof against the Respondents, calculated as follows:

Total losses:	\$62,694.00
Plus: Loss of income	<u>23,149.00</u>
@ 7% per annum	
 TOTAL	 \$85,843.00
 One-third apportioned to Respondents	 <u>\$28,586.00</u>

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, as well as the post-hearing

brief submitted by the Respondents, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents are liable, jointly and severally, to the Claimants, and shall pay to Claimants the sum of \$28,586.00, interest specifically excluded from the date of filing of the Statement of Claim to the date of this Award.

OTHER COSTS

1. Respondents are liable, jointly and severally, to Claimants for attorney fees, and shall pay to Claimants the sum of \$9,519.00. Attorney fees are awarded in reliance on Prince v Heritage, 109 Mich App 139 (1981).

FORUM FEES

Pursuant to section 43(C) of the NASD Code of Arbitration Procedure, the NASD shall retain the \$200.00 non-refundable filing fee previously deposited, and the following Forum Fees are assessed:


7 sessions x \$750.00 = \$5,250.00 minus hearing session deposit of \$750.00 = net Forum Fees Assessed Against:

1. Respondents, jointly and severally, in the amount of \$4,500.00. Respondents, jointly and severally, shall also reimburse Claimants the sum of \$950.00 which represents the non-refundable filing fee and hearing session fee previously deposited by Claimants with the NASD.

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

Concurring Arbitrators

Harry A. Carson
Public Arbitrator, Chairman



Thomas C. Giradot
Industry Arbitrator

Gordon F. Knight
Public Arbitrator

Execution
Date of ~~XXXXXX~~: August 4, 1993

Date of Decision: August 13, 1993

Concurring Arbitrators

Harry A. Carson
Public Arbitrator, Chairman

Thomas C. Giradot
Industry Arbitrator

Gordon F. Knight
Public Arbitrator

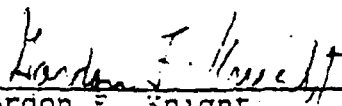
Execution
Date of ~~Decision~~: August 4, 1993

Date of Decision: August 23, 1993

Concurring Arbitrators

Harry A. Carson
Public Arbitrator, Chairman

Thomas C. Girardot
Industry Arbitrator



Gordon F. Knight
Public Arbitrator

Execution
Date of ~~Decision~~: August 4, 1993

Date of Decision: August 13, 1993