

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

---

In the Matter of the Arbitration Between

Name of Claimants

John Olenick  
Richard D. Nikolaev

92-01618

Name of Respondents

Dean Witter Reynolds, Inc.  
Andrew J. Johnson

---

REPRESENTATION

For Claimants at the hearing: Mark Maddox, Esq. of Coons & Saint, Indianapolis, Indiana.

For Respondent Dean Witter Reynolds, Inc. at the hearing: Jay M. Cutler, Esq. of Dean Witter Reynolds, Inc., San Francisco, California. For Respondent Andrew J. Johnson at the hearing: Daniel B. Altman, Esq. of Katzman Katzman & Pylitt, Indianapolis, Indiana.

CASE INFORMATION

Statement of Claim filed: May 12, 1992. Claimant John Olenick's Submission Agreement signed on: April 20, 1992. Claimant Richard D. Nikolaev's Submission Agreement signed on: April 16, 1992.

Statement of Answer filed by Respondent, Dean Witter Reynolds, Inc. on: July 27, 1992. Statement of Answer filed by Respondent, Andrew J. Johnson on: August 3, 1992. Respondent, Dean Witter Reynolds, Inc.'s Submission Agreement signed on: July 23, 1992. Respondent, Andrew J. Johnson's Submission Agreement signed on: July 30, 1992.

HEARING INFORMATION

Hearing Dates/Sessions: March 9, 1993 for three (3) sessions;  
March 10, 1993 for two (2) sessions;  
April 27, 1993 for three (3) sessions.

Hearing Location: Indianapolis, Indiana.

### CASE SUMMARY

Claimants John Olenick and Richard Nikolaev ("Claimants") alleged that Respondent Andrew Johnson ("Johnson") "sold away" Spaghetti All-Ready, Inc. stock offering which was not previously approved by Respondent Dean Witter Reynolds, Inc. ("Dean Witter"). Claimants further alleged that Dean Witter failed to properly train and supervise Johnson to prevent these events from occurring. Claimants also alleged that Johnson misrepresented and omitted material information to the Claimants which they relied upon to make their respective investments in Spaghetti All-Ready, Inc.

Respondent Dean Witter alleged that there was no failure to supervise because Johnson did all he could do to prevent his supervisor from learning of the transactions which Johnson clearly knew was prohibited by Dean Witter. Dean Witter also alleged that they are not in breach of any respondeat superior because Johnson acted without actual or apparent authority. Dean Witter alleged that the Claimant's claim is barred by the Doctrines of Estoppel, Ratification and Waiver; that Claimant's are barred by their own negligence; and that the Federal Securities Claim is barred by the applicable statute of limitations. Dean Witter also request that the request for punitive damages be struck.

Respondent Johnson generally denied he engaged in any fraudulent or deceitful practices or any other type of conduct. Johnson specifically denied that he misrepresented to Claimants that he had full consent and authority from Dean Witter to sell Spaghetti All-Ready shares; that he deliberately omitted to state to Claimants that Dean Witter had never approved the offering, and that he had been given authority to sell Spaghetti All-Ready shares by Dean Witter; that he was involved in misrepresenting information regarding the ability to franchise; and that he had a duty to disclose to Claimants that Spaghetti All-Ready had never made any filings with the Indiana Securities Divisions.

### RELIEF REQUESTED

Claimants EACH requested actual damages in the amount of Fifty Thousand Dollars ("\$50,000.00"), interest at the statutory rate of Eight percent (8%) per year as provided in I.C. 23-2-1-19(a) from May 10, 1990 the date of purchase, and for all of his costs, expenses and disbursements including reasonable attorneys' fees, for pursuing this arbitration proceeding as also provided in I. C. 23-2-1-19(a), and for punitive damages.

Respondent Dean Witter Reynolds, Inc. requested that the Statement of Claim be dismissed and all appropriate costs assessed against the Claimants.

Respondent Andrew Johnson requested that the Statement of Claim be dismissed and that Claimants not be awarded their request for punitive damages. Johnson also requested reimbursement of costs and reasonable attorney's fees.

### OTHER ISSUES CONSIDERED & DECIDED

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.

Respondents filed a Motion To Dismiss for failure to comply with discovery, and for failure to state a claim for which relief may be granted by the Panel. The Panel denied both motions.

Respondent Andrew Johnson filed a Motion To Dismiss the Statement of Claim pursuant to Section 16 of the NASD Code of Arbitration Procedure and the Respondents filed responses thereto. The panel denied the motion.

### 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. The Statement of Claim filed against Respondent Dean Witter Reynolds, Inc. is denied and dismissed. However, although it did not bear on the ultimate liability, the Panel strongly suggests Dean Witter Reynolds, Inc. review this branch offices compliance with internal company procedure. This should be done with particular attention to its response to inquiry regarding this matter upon receipt of correspondence from the Indiana State Securities Commissioners Office.
2. Respondent Andrew J. Johnson shall be and hereby is liable for and shall pay to the Claimant, John Olenick, compensatory damages in the sum of Fifty Thousand Dollars and No Cents (\$50,000.00);
3. Respondent Andrew J. Johnson shall be and hereby is liable for and shall pay to the Claimant, Richard Nikolaev, compensatory damages in the sum of Fifty Thousand Dollars and No Cents (\$50,000.00);
4. Respondent Andrew J. Johnson shall be and hereby is liable for and shall pay to the Claimant, John Olenick, interest at eight percent (8%) on the sum of Fifty Thousand Dollars (\$50,000.00) as stated above in number 2, accrued from May 10, 1990 until the date the Award is paid;

5. Respondent Andrew J. Johnson shall be and hereby is liable for and shall pay to the Claimant, Richard Nikolaev, interest at eight percent (8%) on the sum of Fifty Thousand Dollars (\$50,000.00) as stated above in number 3, accrued from May 10, 1990 until the date the Award is paid:

6. Respondent Andrew J. Johnson shall be and hereby liable for and shall pay to the Claimants, jointly, attorney's fees in the sum of Twenty Five Thousand Dollars and no Cents (\$25,000.00). Attorney's fees are awarded pursuant to the authority outlined in the parties' brief and Indiana Statute:

7. Claimants request for punitive damages is denied:

8. Respondent Andrew Johnson's request for attorney's fees is denied:

9. Each of the parties shall bear their own costs and expenses incurred than those specifically enumerated herein.

#### FORUM FEES

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

8 sessions X \$500 = \$4000 minus hearing session deposit of \$500 = net \$3500 due.

The NASD shall retain the non-refundable filing fee in the sum of \$500 which was previously deposited with the NASD. Additional forum fees are assessed against Respondent Andrew J. Johnson only, in the sum of \$3500.00.

Respondent Andrew Johnson shall also reimburse the Claimants the sum of \$500 for the hearing session deposit which was previously deposited with the NASD.

Additional Forum Fees Assessed by the panel are payable to the National Association of Securities Dealers, Inc.

**By The Arbitrators, Concurring and Dissenting in Part:**

Dated:

June 15, 1993

s/ Joseph L. Claypool, Esq.  
Joseph L. Claypool, Esq.  
Presiding, Public Arbitrator

June 21, 1993

s/ George Harding  
George Harding (1)  
Public Arbitrator

June 15, 1993

s/ Beth Schmidt  
Beth Schmidt  
Industry Arbitrator

Date Award Served By The NASD: June 21, 1993.

(1) Arbitrator George Harding dissents on liability of Johnson but concurs on all other issues.