

## **N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

**In the Matter of the Arbitration Between**

**Name of Claimants**

Thomas F. Miller, Trustee for the Bankruptcy  
Estate of Dale E. Barlage  
and Dale E. Barlage

and

92-02554

**Name of Respondent**

Dean Witter Reynolds, Inc.

### **REPRESENTATION OF PARTIES**

Claimant, Thomas F. Miller, Trustee for the Bankruptcy Estate of Dale E. Barlage ("Miller") was represented at the hearing by Kevin W. Rouse, Esq., Minneapolis, Minnesota.

Claimant, Dale E. Barlage ("Barlage") was represented at the hearing by H. Thomas Fehn, Esq. of Fields, Fehn & Sherwin, Los Angeles, California and Anthony U. Wacker, Esq., Minneapolis, Minnesota.

Respondent, Dean Witter Reynolds, Inc. ("Dean Witter") was represented at the hearing by G. Marc Whitehead, Esq. and Scott E. Richter, Esq. of Popham Haik, Schnobrich & Kaufman, Ltd., Minneapolis, Minnesota.

### **CASE INFORMATION**

Joint Statement of Claim was filed on July 31, 1992 by Claimants Miller and Barlage. A joint Submission Agreement by Claimants, Miller and Barlage was signed on July 14, 1992.

Statement of Answer was filed by Respondent on October 13, 1992. Submission Agreement by Respondent was signed on August 26, 1992.

### **HEARING INFORMATION**

A pre-hearing conference was held on October 11, 1993 for one session, on February 21, 1994 for one session, on April 4, 1994 for one session, and on April 20, 1994 for one session, for a total of four prehearing conference sessions.

The hearing was held on November 5, 1993 for two sessions, June 20, 1994 for two sessions, June 21, 1994 for two sessions, June 22, 1994 for two sessions, June 23, 1994 for two sessions, June 24, 1994 for two sessions, June 27, 1994 for two sessions, June 28, 1994 for two sessions, and June 29, 1994 for two sessions, in Minneapolis, Minnesota for a total of 18 sessions.

### **CASE SUMMARY**

Claimants Barlage, individually, and Miller, as trustee of the Estate of Barlage, alleged that Respondent Dean Witter is liable to Miller and Barlage for the wrongful termination of Barlage as a broker for Dean Witter, and Miller's claims against Dean Witter for Dean Witter's failure to supervise Barlage in 1989 that led to Barlage's loss of approximately 2 million in unsuitable high-risk options trading. Claimants alleged that the employment termination claims of Miller and Barlage against Dean Witter include claims for defamation, interference with prospective business advantage, breach of contract, fraud, promissory estoppel, unjust enrichment, and violation of public policy. Claimants alleged that the unsuitable investment claims of Barlage against Dean Witter include claims for Rule 10b-5 violations, negligent supervision, general negligence, state securities laws violations, breach of fiduciary duty, common law fraud, and RICO.

Respondent Dean Witter stated in its Answer that they terminated Barlage for cause because he failed to pay for more than \$500,000.00 of options trades that he placed in his wife's account, particularly 3000 USX September 35 call options. Dean Witter stated that Barlage was having financial difficulties and made false representations to Dean Witter regarding payment for the options. Dean Witter stated that when they terminated Barlage, they carefully refrained from making any statements that could be interpreted as defamatory. Dean Witter further stated that Barlage had agreed to use the proceeds of his 401(K) plan to pay off the debit balance with Dean Witter and a release was subsequently signed, and therefore Miller and Barlage have no right to recover. Dean Witter also stated that there could be no claim for unsuitable trading, or for violations of federal or state securities laws, or for RICO.

### **RELIEF REQUESTED**

Claimants Miller and Barlage requested total employment damages of \$40,032,867.00 calculated as follows: \$4,472,496.00 for lost wages 1989-1990, \$1,318,075.00 for lost wages May 1990 to June 1992, \$15,078,778.00 for projected future lost wages to age 70, \$1,200,000.00 for lost sign-on bonus, \$357,934.00 for lost productivity bonuses, \$305,583.00 for lost 401(K), \$300,000.00 for unjust enrichment, \$1,000,000.00 for emotional distress, \$5,000,000.00 for loss of reputation, \$15,000,001.00 for punitive damages. Claimant Miller requested damages for the securities claims of \$11,053,926.00 calculated as follows: \$1,703,070 for trading losses (Barlage account), \$294,026.00 for trading losses (Barlage wife's account) \$459,332 for interest on lost use of money through June 1992, \$1,228,214.00 for attorney's fees, and \$7,369,284.00 for treble damages (RICO) or punitive damages.

Dean Witter requested that the claim should be dismissed in all respects.

**OTHER ISSUES CONSIDERED & DECIDED**

Respondent Dean Witter filed a Motion to Dismiss pursuant to Section 16 of the N.A.S.D. Code of Arbitration Procedure for the dismissal of all claims in the case on the basis that the claims are barred by the Settlement Agreement and the Release signed by Barlage in October of 1989. Claimants filed a response. The panel subsequently denied the motion.

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 N.A.S.D.

**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 did not defame Claimant Dale E. Barlage;
2. Respondent did not wrongfully interfere with a prospective business advantage of Claimant Barlage;
3. Respondent did not breach employment and compensation agreements by the termination of Claimant Barlage;
4. Respondent did not breach an alleged agreement with Claimant Barlage to hold the check of \$550,000.00;
5. Respondent did not falsely represent to Claimant Barlage that it would not deposit a check of \$550,000.00;
6. Respondent is not liable to Claimant Barlage on the claim of promissory estoppel;
7. Respondent is not liable to Claimant Barlage on the claim of unjust enrichment;
8. Respondent is liable to Claimant Thomas F. Miller, Trustee for the Estate of Dale E. Barlage, for the sum of Thirty Four Thousand, Two Hundred Twelve Dollars (\$34,212.00), one-half of the calculated loss for the options transaction of August 16, 1989;

9. Respondent is not liable to Claimants Miller or Barlage for any other securities transaction claim or employment related claim;
10. Respondent is not liable to Claimant Miller for interest, attorney's fees, punitive damages or RICO damages.

#### **FORUM FEES**

Pursuant to §43(c) of the N.A.S.D. Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("N.A.S.D.") shall retain the non-refundable filing fee in the amount of \$500.00 and shall retain as forum fees the hearing session deposit in the amount of \$1500.00 previously deposited with the N.A.S.D. by the Claimants.

Forum fees are calculated at the rate of \$1500.00 per hearing session (18 sessions) minus the hearing session deposit of \$1500 and \$300.00 for each prehearing conference (4 sessions).

**Total Fees Due To The N.A.S.D.: \$26,700.00.** The panel has ordered that the fees be paid to the N.A.S.D. as follows: \$6300 from Claimant Thomas Miller, Trustee for the Bankruptcy Estate of Dale Barlage; \$6300 from the Claimant Dale Barlage; and \$14,100 from Respondent Dean Witter.

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

**By The Arbitration Panel:**

**Dated:**

James B. Vessey, Esq. s/s  
James B. Vessey, Esq.  
Presiding, Industry Arbitrator

7-14-94

James Kaiser s/s  
James Kaiser  
Industry Arbitrator

7-14-94

Edward C. Oliver s/s  
Edward C. Oliver  
Industry Arbitrator

7-14-94

**Date Award Served By The NASD: 7-15-94**