

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Frank G. Culkar, Jr.

92-02746

Name of Respondents

Dean Witter Reynolds Inc.
Robert Brennan

REPRESENTATION

Claimant Frank G. Culkar, Jr. ("Claimant") represented himself.

For Respondents Dean Witter Reynolds Inc. ("DWR") and Robert Brennan ("Brennan"): David P. Restaino, Esq. of DWR.

CASE INFORMATION

Statement of Claim filed: August 14, 1992.

Reply to Respondents' Statement of Answer filed: November 20, 1992.

Reply to Respondents' Joint Reply to Claimant's Reply to Respondents' Statement of Answer filed: June 21, 1993.

Claimant's Submission Agreement signed on: August 7, 1992.

Joint Statement of Answer filed by Respondents on: November 3, 1992.

Joint Reply to Claimant's Reply to Respondents' Statement of Answer filed: December 14, 1992.

Respondent DWR's Submission Agreement signed on: October 29, 1992.

Respondent Brennan's Submission Agreement signed on: October 29, 1992.

HEARING INFORMATION

Pre-Hearing Conference: June 29, 1993/1 session/1 arbitrator

Hearing Date/Session: July 1, 1993/1 session/3 arbitrators

Hearing Location: NASD, Cleveland, OH.

CASE SUMMARY

Claimant alleged he was a general contractor who had little prior experience in the stock market. He alleged he bought a Keogh plan in the late 1970's and early 1980's whereby Brennan assured him a DWR Individual Retirement Account would be a better investment. Claimant alleged he was busy with his business and thought it would be good for someone to do his investing, therefore, he left everything to Brennan. Claimant alleged he trusted Brennan and has records to show his trust was misused. Claimant alleged Brennan churned his account and/or provided poor or unprofessional advice and did not look out for his, Claimant's, interests.

Claimant alleged he became aware in 1988 that his money was not growing but as he was still busy with his business and Brennan assured him he was doing well and would be in good shape with he retired, he took Brennan's word until the last couple of years when he had time to explore his situation. Claimant alleged he realized he would be 59 1/2 and only had principal in his accounts which was also disappearing. Claimant alleged he and Brennan went over his accounts during the Spring of 1992 but that only he, and not Brennan had records of the investments. Claimant alleged this occurred after Brennan called to advise Claimant he was going sell Claimant's High Advantage Income III, High Income Advantage SBI and Public Storage IX to get "more conservative." Claimant alleged that when Brennan sold these stocks they were paying 13% or better. Claimant alleged he had not had the time nor felt the need to check things pertaining to his investments before. Also, Claimant alleged Brennan placed him into Dean Witter Select Futures and Dean Witter Dividend Growth and that Brennan stated Claimant could live off his dividend growth. Claimant alleged he did not agree and switched to another DWR office in March of 1992. Claimant further alleged he spoke with the district supervisor John Egan ("Egan") and his new account representative and both expressed dismay over his portfolio. Claimant alleged Egan worked out an agreement to reimburse him for the difference he would have made keeping High Advantage Income III and what had been invested in Dividend Growth and to credit him for commissions paid. However, Claimant alleged Egan could not rectify the trades regarding futures.

Claimant alleged Brennan was negative about any investments that were not his own products and did not have Claimant's interests at heart. Further, Claimant alleged he did not receive all the commission statements; and was told by Brennan that he would "get back to him when I confronted him with these facts."

Claimant indicated that the Aero Limited Partnership ("Aero") and Paco Limited Partners ("Paco") investments were not to be included in his Statement of Claim.

Respondents alleged Claimant's investments were diverse and included various bond funds and limited partnerships. Brennan asserted he conferred with Claimant twice annually to review his portfolio and additional consultations occurred between Brennan, Claimant and Claimant's

accountant. Brennan asserted he solicited Claimant's express financial objectives; sought to confirm every investment recommendation thereto; and that no investment was made without a full explanation to, and approval by, Claimant.

Respondents maintained the Dean Witter Select Futures fund was explained to Claimant as a hedge investment that was never intended to be a high income investment, yet has been profitable for Claimant.

Respondents contended there was not excessive trading in Claimant's account; Brennan did not exercise control over the account; and that Claimant passed judgment on each investment. Finally, Respondents alleged Claimant's claim regarding the Aero investment was ineligible for arbitration due to the fact that Claimant commenced this arbitration more than six years following the event giving rise thereto and that Claimant's claim regarding Paco was and is the subject of class action lawsuits and that Claimant did not suggest he removed himself from the Plaintiff class.

Respondents alleged Claimant's reply to their Statement of Answer was not in response to any counterclaim or motion made by them and that it was an attempt for Claimant to reiterate what he contended were the merits of his claim. Respondents alleged the rules of the NASD did not allow for additional ex parte argument and as Claimant failed to serve Respondents with the reply, it should be disregarded.

Claimant alleged that his reply to Respondents' Statement of Answer should be shown to the arbitrators as he responded to Respondents' allegations regarding their counterclaim asking for his claim to be dismissed and sent the reply to Respondents via telecopier.

Claimant responded to Respondents' joint Statement of Answer by alleging that most of his consultations with Brennan were of little substance. Claimant alleged when he began to question Brennan more, Brennan had no records and Claimant suggested they look at his records. Claimant alleged Brennan stated "what can I say, things just went bad all over." Claimant alleged he then moved his account to another DWR office and was told by Egan he would receive \$960.00; however, he did not.

Claimant alleged his accountant did no consulting with Brennan about the welfare of his account except once or twice regarding tax information. Claimant alleged his accountant advised him against buying Aero and Paco; however, he told his account that Brennan was very informed about those investments and that he trusted him. Claimant alleged he discussed Aero and Paco in his complaint to emphasize that he was told he would receive 5 to 10 times his money back and royalties for 10 to 12 years. Claimant alleged he had no hope of getting his money back for these investments.

Claimant alleged Brennan knew he did not need tax breaks concerning his long term desires. Claimant alleged Brennan knew he wanted him to build up the monies given to him so Claimant would be able to receive 9 or 10% on these monies at age 60 to supplement his rents and mortgages and at age 62, his social security. Claimant further alleged he made less than 3% for one year in the Select Futures Fund and was stripped of most of his dividends when Brennan sold his PBST IX, High Income ADV TR III and High Income ADV TRSBI, as Brennan had "talked me into" selling these to get the more conservative Select Futures Fund.

Claimant admitted there could not have been much churning because his accounts were not liquid enough and that Brennan technically did not have control of his accounts, but he cannot remember when he did not do what Brennan said. Claimant alleged Brennan was "untechnically" in control of his accounts.

RELIEF REQUESTED

Claimant requested: actual damages in the amount of \$50,000.00.

Respondents requested: Claimant's claims be denied in their entirety; attorneys' fees and costs.

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.

The arbitration panel determined it would accept all pleadings filing in this matter.

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. Claimant's claims against Respondents are hereby dismissed;
2. All other claims are dismissed;
3. Each party shall bear its own expenses, including attorneys' fees, except that Respondents are hereby liable and shall pay to Claimant the sum of \$50.00; said amount to partially reimburse to Claimant the hearing session deposit retained by the NASD.

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FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the NASD shall retain the \$120.00 non-refundable filing fee previously paid by Claimant and the following Forum Fees are assessed.

- 1 pre-hearing conference session = \$300.00 = net \$300.00 due.
1 sessions X \$400.00 = \$400.00 minus hearing session deposit of \$400.00 = net \$0.00 due.

Forum fees Assessed Against:

1. Claimant is hereby liable and shall pay to the NASD the sum of \$350.00; however, in lieu of further payment, the NASD shall retain \$350.00 of Claimant's \$400.00 hearing session deposit, \$50.00 of which is to be reimbursed by Respondents as noted above;
2. Respondents are hereby liable, jointly and severally, and shall pay to the NASD the sum of \$300.00.

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

Arbitrator Signatures



Charles J. Clinton/Public Arbitrator

Date of Decision: July 27, 1993

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Kenneth Miller/Industry Arbitrator

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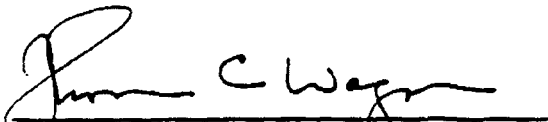
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Thomas C. Wagner/Public Arbitrator

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