

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

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Name of Claimant**

Pueblo of Jemez

92-02810

**Name of Respondents**

Dean Witter Reynolds, Inc.;  
Scott R. Grady

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**REPRESENTATION**

For Claimant: Pueblo of Jemez was represented by Luis Stelzner, Esq. and Timothy M. Sheehan, Esq. of Sheehan, Sheehan & Stelzner, P.A., located in Albuquerque, New Mexico, and David R. Yepa, Esq. of Albuquerque, New Mexico.

For Respondents: Dean Witter Reynolds, Inc. was represented by John G. Baugh, Esq. of Eaves, Bardacke & Baugh, P.A., located in Albuquerque, New Mexico, and Mary Curran, Esq. of Dean Witter Reynolds, Inc.

Scott R. Grady was represented by Spencer Reid, Esq. and M. Gloria Tristani, Esq. of Keleher & McLeod, P.A., located in Albuquerque, New Mexico.

**CASE INFORMATION**

Statement of Claim filed: August 20, 1992.

Claimant's Submission Agreement signed on: July 8, 1992 by Joe Cajero, Pueblo of Jemez.

Statement of Answer filed by Respondent Dean Witter Reynolds, Inc. on: October 2, 1992.

Respondent Dean Witter Reynolds, Inc. did not file an executed Submission Agreement.

Statement of Answer filed by Respondent Scott R. Grady on: September 29, 1992.

Respondent Scott R. Grady's Submission Agreement signed on: September 28, 1993.

### **HEARING INFORMATION**

**Pre-Hearing Conference:** February 8, 1993 for One (1) session before Arbitrator Marshall G. Martin, Esq.

**Hearing Dates/Sessions:** April 19, 1993 for Two (2) sessions;  
April 20, 1993 for Two (2) sessions;  
April 21, 1993 for Two (2) sessions;  
April 22, 1993 for Two (2) sessions;  
April 23, 1993 for Two (2) sessions;  
April 24, 1993 for Two (2) sessions.

**Hearing Location:** Albuquerque, New Mexico.

### **CASE SUMMARY**

Claimant Pueblo of Jemez, a federally recognized Indian tribe, alleged that Respondent Scott R. Grady ("Grady"), while employed by or acting as an agent for Respondent Dean Witter Reynolds, Inc. ("Dean Witter"), recommended and purchased unsuitable investments for the Jemez, given the Jemez's conservative investment objectives and financial needs of regular income and protection of principal; churned the Jemez account for the sole purpose of generating high commissions; and traded the "Jemez account on margin, which was inappropriate given the nature of the Jemez account and its investment objectives. In addition, many trades were done without authority and without full disclosure. The Jemez specifically alleged that:

1. In late 1985, while Grady was employed by E.F. Hutton, he solicited the Jemez account by promising a higher rate of income than the Bureau of Indian Affairs while securing their principal;
2. Once securing the Jemez's trust, Grady began investing in unsuitable, high-risk mutual funds, which were often initial offerings which generated higher commissions. In addition, Grady began switching the Jemez in and out of different funds. This pattern was well established when Grady transferred to Dean Witter in January of 1988;
3. After the transfer, Grady's began trading more aggressively, purchasing initial offerings and some limited partnerships. Many Funds were held for a short period of time and then sold to purchase similar Fund;
4. Grady continually assured the Jemez that the account was doing fine, knowing that the Jemez representative was an unsophisticated investor who did not

understand the monthly account statements or prospectuses received from Dean Witter;

5. The Jemez sold all its securities with Dean Witter in the fall of 1990 after an independent consultant hired by the Jemez discovered that the account was being mishandled.

Based upon the above allegations, Pueblo of Jemez asserted claims for violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder; violations of the New Mexico Securities Act of 1986, N.M. Stat. Ann. Sections 58-13B-1 et seq.; fraud in the inducement; fraud and deceit; constructive fraud; negligent misrepresentation; and breach of fiduciary duty.

Respondent Dean Witter denied the material allegations of the Statement of Claim, alleging that:

1. Antonia Fragua ("Fragua"), a Jemez Indian and tribal treasurer, was in frequent communication with Grady and received timely statements and reports which fully explained and disclosed the important investment facts. Fragua gave prior approval to every investment made, security sold and money disbursed through the Jemez account;
2. The account objective was to generate income for the operation of the tribal government and accomplished what it was supposed to do. However, the income demands conveyed by Fragua were greater than the ability of the account to generate income, no matter what reasonable strategy Grady attempted to use;
3. The tribe has not suffered any loss which is attributable to anything other than foreseeable risks in the market, knowingly assumed by the tribe in its investment decisions and the tribe's excessive income demands. The tribal government rejected many sound recommendations made by Dean Witter and failed to exercise control over its spending and borrowing; and
4. Dean Witter and Grady met their duties to the Jemez, and did not charge unreasonable prices, make unreasonable recommendations, churn the account or make unsuitable recommendations.

Respondent Grady denied the material allegations of the Statement of Claim, alleging that:

1. The Jemez were kept advised and informed of all trades and he would proceed only with the client's approval. In addition, no federal policies or laws restricted the investment activity of the Pueblo and there was no Pueblo policy which limited the Pueblo's investment activity;

2. There was no fiduciary relationship between Grady and the Pueblo of Jemez because Grady never assumed the role of the Bureau of Indian Affairs in the investment of the tribal funds;
3. The tribe was not an unsophisticated investor, for the people in the relevant responsible positions had substantial education and/or experience that would enable them to understand the tribe's investment activity. In addition, the pueblo for a number of years had been in charge of administering sums of federal monies for such programs as housing, health care, tribal administration and self-governance. Furthermore, the Pueblo had its finances audited on a yearly basis which addressed the investments;
4. The Pueblo's investment objectives changed to "income", "aggressive income", "capital appreciation" and "speculation" by the time the account was transferred to Dean Witter. The change was the result of the Pueblo's need for money from the investment account as evidenced by the growing number of Cash withdrawals in and after 1988. This increased need for income resulted in the investment in funds which were not backed by U.S. government obligations, but were not inconsistent with the Pueblo's objectives;
5. The account was not traded excessively, nor were investments made to boost Grady's commissions and earnings. Fragua was aware of the trading in the account;
6. Grady did not induce the Pueblo to trade on margin, but the agreement was executed to formalize the pueblo's already existing borrowing practices.

Furthermore, Grady asserted that the claims are barred by the defenses of ratification, waiver, estoppel, laches, unjustifiable reliance, and failure to mitigate damages.

#### **RELIEF REQUESTED**

Claimant Pueblo of Jemez requested entry of an award against the Respondents, jointly and severally, in the form of a determination that the investment contracts entered into between the Pueblo and Dean Witter were procured by false and material misrepresentations, should be rescinded and restitution awarded. In addition, or in the alternative, the Pueblo requested an award of all damages that are the natural and proximate consequence of the Respondents' breach of fiduciary duty in an amount to be determined at arbitration and for such further relief as the arbitrators deem proper.

Respondent Dean Witter requested that the arbitration panel deny each and every claim of the

Pueblo of Jemez, and grant Dean Witter such relief as it deemed appropriate under the circumstances.

Respondent Grady requested that the arbitrators find that he was not liable under any theory offered by the Claimant.

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

Respondent Dean Witter Reynolds, Inc. did not file an executed submission agreement, but appeared, testified and presented evidence at the hearing and as a NASD member firm, is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

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 pleading, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Dean Witter Reynolds, Inc. and Scott R. Grady are jointly and severally liable for and shall pay to Claimant Pueblo of Jemez the sum of \$496,000.00;
2. In addition, Respondents Dean Witter Reynolds, Inc. and Scott R. Grady are jointly and severally liable for and shall pay to Claimant Pueblo of Jemez the sum of \$200.00 as reimbursement of the non-refundable filing fee;
3. All other costs of arbitration shall be borne by the party incurring the cost, including attorneys' fees, except for those specifically enumerated herein.

#### **OTHER COSTS**

All postponement fees incurred shall be waived. The NASD shall refund the \$1,000.00 adjournment fee paid by Respondent Dean Witter Reynolds, Inc.

**FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) Pre-hearing conference session with one arbitrator x \$300.00 per session = \$300.00; Twelve (12) Hearing sessions x \$750.00 per session = \$9,000.00; Total Forum Fees = \$9,300.00.

The National Association of Securities dealers, Inc. shall retain the \$200.00 claim filing fee and refund the \$750.00 hearing session deposit previously deposited by the Claimant, Pueblo of Jemez. Respondents Dean Witter Reynolds, Inc. and Scott R. Grady are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$9,300.00.

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

**Concurring Arbitrators' Signatures**

**Name**

**Date**

Marshall G. Martin, Esq.  
Marshall G. Martin, Esq.  
Public Arbitrator  
Chairperson

August 3, 1993

Sanford C. Cox, Jr., Esq.  
Sanford C. Cox, Jr., Esq.  
Public Arbitrator

August 3, 1993

Thomas A. Thornhill, Jr.  
Thomas A. Thornhill, Jr.  
Industry Arbitrator

August 5, 1993

**For NASD Use Only**

**Date of Service of Award:** 8-9-93