

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Barbara Harris Polome',

Claimant,

and

No. 93-00287

**Delta First Financial, Inc.,
J.W. Dicks, and Nick Andrews,**

Respondents.

REPRESENTATION OF PARTIES

Claimant, Barbara Harris Polome' was represented by Edward P. Watt, Esquire of Watt & Associates, P.C., located in Austin, Texas.

Respondents, Delta First Financial, Inc. and Nick Andrews were represented by Thomas A. Hargett, Esquire of Maddox Koeller Hargett & Caruso located in Indianapolis, Indiana.

Respondent, J.W. Dicks, Esquire of Longwood, Florida was represented himself.

CASE INFORMATION

Claimant, Barbara Harris Polome''s Statement of Claim was filed on or about February 2, 1993. Claimant, Polome''s Submission Agreement was signed on January 19, 1993.

Respondents, Delta First Financial, Inc. and J.W. Dick's, joint Statement of Answer was filed on or about March 26, 1993.

Respondent, Nick Andrews' Statement of Answer was filed on or about February 10, 1993 and his Submission Agreement was signed on February 10, 1993. Respondent Andrews' Supplemental Answer and Motion to Dismiss was filed on November 16, 1993.

HEARING INFORMATION

A pre-hearing conference was held on: December 10, 1993 for one (1) session before one arbitrator.

The hearing was held on: November 10, 1997 for two (2) sessions; and
November 11, 1997 for two (2) sessions.

The hearing was held in Houston, Texas.

CASE SUMMARY

Barbara Harris Polome', ("Claimant.") alleged that Respondents Delta First Financial, Inc., J.W. Dicks and Nick Andrews (together, "Respondents.") caused her to lose a good part of her "nest egg" when they induced her to inappropriately invest the funds in Delta First accounts. Claimant asserted that after hearing an advertisement in April of 1991, she attended a seminar sponsored by the Charles J. Givens Organization ("CJGO.") at which she was guaranteed at least a fifteen to twenty percent (15-20%) growth in funds with complete safety. Claimant said that she called the toll free CJGO number in November of 1991 and reached Delta First. Claimant stated that as of the time of the telephone call she had already filled out the "Personal and Financial Profile," where she listed her goal of safety as foremost and listed her annual income as less than \$30,000.00. As alleged, Claimant had approximately \$350,000.00 in investments remaining with Merrill Lynch Pierce Fenner & Smith, Inc. producing income of approximately \$1,800.00 per month and that this money along with Social Security and interest she had enough money to support her children after her first husband died in 1975 and to support herself after her marriage failed in 1990. Claimant contended that after contacting Delta First, she was encouraged to sell everything and soon thereafter closed her Merrill Lynch account and opened account # 304726 Delta First and other accounts. Claimant alleged that Respondents actions with respect to her account were aimed solely to produce fees and generate funds for Respondents without respect to Claimant's objectives. Claimant further alleged that Respondents bought non-income producing products with great volatility, entirely unsuitable to her need for a safe, reliable income stream.

Claimant asserted that Respondents actions with respect to her account constituted: unsuitability; negligence; a breach of contract; misrepresentations as to the investment product; violations of NASD Rules of Fair Practice; a failure to follow client instructions; a breach of fiduciary duty; a failure to supervise; and actions which resulted in excessive commissions and margin interest or churning.

Respondents, Delta First and J.W. Dicks, denied all material allegations of Claimant's statement of claim. Furthermore, Respondents Delta First and J.W. Dicks asserted the defenses of: Statute of Limitations; failure to assert a causal connection; due diligence; good faith and reasonableness; full

disclosure by Respondents and Claimant's misrepresentations; lack of agreement to insure investments; estoppel; assumption of the risk, and Claimant's failure to exercise due care, economic loss rule; failure to state a cause of action; no violation of NASD Rules; and scienter.

Respondent, Nick Andrews, asserted that he, as a financial advisor for Delta First, fielded a telephone call from Claimant in October of 1991, when she told him that she was unhappy with the performance of her current investments and that she would like him to offer her specific investment advice. Nick Andrews stated that he instructed Claimant fill out the necessary documentation immediately, which he received completed sometime in mid-October. Respondent, Nick Andrews contended that he fully informed the Claimant and that she understood the risks involved in the investments. According to Nick Andrews, Claimant had an account at that time at Charles Schwab & Company. A few days after his hour long introductory conversation where they discussed goals and risks, Claimant informed him she had liquidated her account and so thereafter he diversified her assets pursuant to her stated objectives. Respondent, Nick Andrews pointed to the Claimant's \$28,000 gains in her Delta First account. Furthermore, Nick Andrews referred to the losses Claimant suffered as occurring after he turned over Claimant's account to the handling of Delta First account manager, J.W. Dicks in December, 1992. Respondent, Nick Andrews asserted the defenses of failure to state a cause of action; failure to specify her alleged damages; the Claimant's approval and ratification of the transactions; failure to specify claims of misrepresentation, churning as well as the other claims in her Statement of Claim; and her failure to show gains in her account; the fact that her overall account did not show a loss; failure to mitigate damages; and failure to state a claim for punitive damages.

RELIEF REQUESTED

Claimant, Barbara Harris Polome, requested an award for compensatory damages to be determined by the arbitrators, interest at ten percent (10%) or at the legal Texas rate, reversal of all account transaction related fees and commissions and margin interest charged beginning October, 1991, and punitive damages as deemed appropriate by the panel.

Respondents, Delta First Financial, Inc. and J.W. Dicks requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorneys' fees.

Respondent, Nick Andrews requested that the Statement of Claim be dismissed in its entirety and that he be awarded costs and attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitration Panel granted Respondent, Charles J. Givens Organization's Motion to Dismiss, under the Special and Limited Appearance filed by Respondent's counsel, based upon the NASD

Regulation Inc., Office of Dispute Resolution's lack of jurisdiction over them on or about August 25, 1993..

After reviewing all relevant submissions, the Arbitration Panel denied Respondents, Delta First Financial, Inc. and J.W. Dicks' motion to dismiss or, in the alternative, motion to strike and motion for sanctions on or about January 5, 1994.

The Arbitration Panel considered and denied Respondent, Delta First Financial, Inc.'s motion to change the hearing situs on or about January 12, 1996.

The Claimant named Greg Galloway as a Respondent in the claim yet Claimant filed her notice of dismissal with prejudice of her claims against the Respondent, Greg Galloway on November 12, 1996.

Upon review of the file and the representations made by/on behalf of Claimant, Barbara Harris Polome', the undersigned Arbitrators have determined that Respondents, Delta First Financial, Inc., Nick Andrews, and J.W. Dicks, have been properly served with the Statement of Claim pursuant to Rules 10302 and 10314 of the NASD Code of Arbitration Procedure ("the Code.") The undersigned Arbitrators have also determined that Respondents, Delta First Financial, Inc., Nick Andrews, and J.W. Dicks, did receive due notice of the hearing as required under Section 10318 of the Code.

Respondents, Delta First Financial, Inc. and J.W. Dicks, did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration, but are required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.

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 original(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned Arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, Delta First Financial, Inc., J.W. Dicks and Nick Andrews are jointly and severally liable for and shall pay to Claimant, Barbara Harris Polome' the sum of \$45,395.00 in actual damages;

2. Respondents, Delta First Financial, Inc., J.W. Dicks and Nick Andrews are jointly and severally liable for and shall pay to Claimant, Barbara Harris Polome' the sum of \$34,885.00 in attorneys' fees. In deciding to award attorneys' fees, the arbitrators also considered the legal authority provided by the Claimant which included the provisions contained in § 27.01 of the Texas Business and Commerce Code, § 38.001 of the Texas Civil Practice and Remedies Code and the Texas Securities Act;
3. Respondents, Delta First Financial, Inc., J.W. Dicks and Nick Andrews are jointly and severally liable for and shall pay to Claimant, Barbara Harris Polome' post-judgement simple interest at a rate of 18% on the total amount awarded, \$80,280.00, beginning thirty (30) days after receipt of the award until paid;
4. With the exception of forum fees addressed below, any claims or relief not specifically granted herein are hereby denied in their entirety and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There was one (1) pre-hearing conference and there were four (4) hearing sessions x \$600.00 = \$2,700.00 in forum fees. Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure (the "Code.") a hearing session is any meeting between the parties and the Arbitrator(s), including a pre-hearing conference with an Arbitrator, which lasts four (4) hours or less.

Pursuant to § 10332(c) of the Code, the NASD Regulation, Inc., Office of Dispute Resolution shall retain the non-refundable filing fee of \$250.00 and shall retain as forum fees the hearing session deposit of \$600.00 previously deposited with the NASD Regulation, Inc., Office of Dispute Resolution by Claimant, Barbara Harris Polome'. Respondents, Delta First Financial, Inc., J.W. Dicks and Nick Andrews are jointly and severally liable for and shall pay to Claimant, Barbara Harris Polome' the sum of \$850.00 as reimbursement of the claim filing fee and hearing session deposit.

Pursuant to § 10332© of the Code, Respondents, Delta First Financial, Inc., J.W. Dicks and Nick Andrews are jointly and severally liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution the sum of \$2,100.00 in forum fees.

Fees are payable to the NASD Regulation, Inc., Office of Dispute Resolution.

Concurring Arbitrators' Signatures:

Charles D. Powell, Esquire
Charles D. Powell, Esquire
Chairperson
Public Arbitrator

March 12, 1998

Dated:

Wayne J. Baxmann
Wayne J. Baxmann
Panelist
Public Arbitrator

March 10, 1998

Dated:

Jeffrey M. Aboloff
Jeffrey M. Aboloff
Panelist
Industry Arbitrator

March 17, 1998

Dated:

For NASD use only:

Date Award was served on the parties: March 17, 1998