

N.A.S.D. AWARD

11/94

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NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Steve and Elsie Von Duerring

93-00563

Name of Respondents

Dunhill Equities, Inc.
Erwin A. Porges

REPRESENTATION

For Claimant: Dan A. Druz, Esq., Sea Girt, New Jersey.

For Respondent Dunhill Equities, Inc.: Joseph F. Keenan, Esq. of Bochat & Keenan, P.C., Garden City, New York.

For Respondent Erwin Porges: Charles M. O'Rourke, Esq., Hempstead, New York.

For Respondent Dean Witter Reynolds, Inc.: George D. Sullivan, Esq. of Dean Witter Reynolds, Inc., New York, New York.

For Respondent Gruntal & Co.: Eric S. Hunter, Esq. of Gruntal & Co., New York, New York.

CASE INFORMATION

Statement of Claim filed: February 12, 1993.

Claimant's Submission Agreement signed on: March 24, 1993.

Statement of Answer filed by Respondent Dunhill Equities, Inc. ("Dunhill") on: May 27, 1993.

Respondent Dunhill's Submission Agreement signed on: May 27, 1993.

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Claimants alleged that Respondents engaged in excessive trading in Claimants' accounts and that Respondents improperly opened a margin account for Claimants without grounds to expect such an account would achieve Claimants' investment objectives. Claimants next alleged that Respondents recommended unsuitable investments for Claimants given Claimants' lack of experience and knowledge in investing. Claimants alleged that Respondents failed to diversify Claimants' investments and executed trades in Claimants' account that were not authorized by Claimants. Claimants further alleged that such conduct by Respondents constituted a failure, contrary to industry customs, to comply with the applicable rules of the NASD, AMEX, and New York Stock Exchange. Claimants also alleged that Respondents violated the Securities and Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder by making false statements to Claimants, or omitting material facts, concerning securities recommended to Claimants by Respondents or by purchasing said securities without Claimants knowledge or authorization. Claimants further alleged that Respondents violated the Securities

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and Exchange Act of 1934 and Rule 10b-5 by making false statements to Claimants concerning the opening of Claimants' margin account. Claimants next alleged that Respondents breached their fiduciary and contractual duties owed to Claimants. Claimants alleged that Respondents failed to obtain proper documentation for the opening of discretionary, margin or option accounts and therefore failed to properly disclose to Claimants the risks associated with such accounts. Claimants further alleged that Respondent broker, Erwin Porges, recommended unsuitable investments, failed to make inquiry as to Claimants' financial status and to explain the risks of a margin account. Claimants also alleged that Porges churned Claimants' accounts. Lastly, Claimants alleged that Respondents Dunhill, Dean Witter and Gruntal failed to reasonably supervise the activities and transactions executed in Claimants' accounts by Respondent Porges.

Respondent Porges maintained that all trades in Claimants' account were suitable given Claimant Steven Von Duerring's age, income, net worth, stated investment objectives, and investment experience. Respondent Porges, maintained that Claimants had knowledge of and assumed the risks inherent in trading securities. Respondent maintained that Claimants authorized, consented to, or acquiesced in the execution of each and every transaction in Claimants' accounts. Further Respondent Porges maintained that Claimants received confirmations for each purchase and sale and monthly account statements and that no information was withheld from Claimants. Respondent Porges further maintained that no misstatements were made to Claimants.

Respondent, Dunhill, maintained that Claimant, Steve Von Duerring, had both business and investment sophistication and that he had full and complete knowledge of the risks involved in trading both options and securities. Respondent Dunhill further maintained that there were no unauthorized trades in Claimants' account at Dunhill nor was there any breach of fiduciary duty. Respondent Further maintained that it acted in good faith and at all times maintained and enforced an adequate system of supervision. Respondent Dunhill maintained as an affirmative defense that any losses sustained by Claimants were caused by and arose out of Claimants assumption of the risks associated with investing in securities and options and that Claimants were aware of those risks. Respondent Dunhill also maintained as an affirmative defense that the investments in Claimants' account were suitable for Claimants and that Claimant Steven Von Duerring authorized and directed the execution of all transactions in Claimants' account with Dunhill and as a result Claimants are estopped from bringing their claim. Respondent Dunhill further maintained as affirmative defenses; that Claimants promptly received written confirmation of all trades in their account, that Claimants failed to object in a timely manner, and that Claimants ratified and or authorized all trades in their account. Respondent Dunhill also maintained as an affirmative defense that Dunhill and its officers at all times acted in good faith

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and did not directly induce the alleged act or acts, if any, constituting alleged violations of the law. Lastly, Respondent Dunhill maintained that Claimants' Statement of Claim failed to allege any facts or circumstances sufficient to warrant the award of punitive damages and that punitive damages could not be awarded by an arbitration panel under the substantive law of the State of New York.

Respondent Dean Witter maintained that all transactions Claimants effected in their Dean Witter account were suitable for their investment objectives and financial status. Respondent Dean Witter further maintained that Claimants were fully advised of the risks inherent in their investments and that Claimants chose to accept those risks. Respondent Dean Witter maintained that Claimants received trade confirmations, statements and other information appraising Claimants of the status of their Dean Witter account commencing in 1988 and that Claimants made no complaint to Dean Witter until the initiation of this complaint in 1993. Respondent Dean Witter further maintained that Claimants authorized, ratified and approved all trades in their account. Respondent Dean Witter also maintained that no misrepresentations or omissions of material facts had ever been made by Dean Witter concerning Claimants' investments and that there was no intent by Dean Witter to defraud Claimants nor was there any reckless disregard of the financial consequences to Claimants in connection with the transactions at issue. Respondent Dean Witter maintained that Claimants failed to state a claim upon which relief could be granted and that Claimants' claims were barred by applicable statutes of limitation. Respondent Dean Witter also maintained that Claimants were precluded from recovery of punitive damages in this proceeding under the laws of the State of New York and that the account documents executed by Claimants and Dean Witter specifically stated that any disputes concerning Claimants' accounts would be decided under the laws of the State of New York.

Respondent Gruntal maintained that Claimants' investments in their account with Gruntal were suitable in light of Claimants' financial status and objectives and that Claimants were made aware of the risks and rewards associated with each investment that was recommended. In addition, Respondent Gruntal maintained that there was no excessive trading in Claimants' account with Gruntal. Respondent Gruntal further maintained that during the time period Claimants maintained an account with Gruntal, the Claimants' account was profitable, achieving a realized gain of \$14,000. Respondent Gruntal maintained that Claimants failed to adequately substantiate their claim of lack of supervision against Gruntal and that Gruntal employed a rigorous system to monitor the nature and level of activity in each client's account and that Steven Von Duerring was sent a letter, as part of the review process, asking him to confirm that he was aware of the activity in his account and the associated risks. Respondent Gruntal maintained that Steven Von Duerring made no complaint in response to that

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letter. Respondent Gruntal further maintained that Claimants failed to state a claim for which relief could be granted, that claimants claims were barred under the doctrine of laches and pursuant to applicable statutes of limitation. Respondent also maintained that Claimants failed to mitigate their damages.

RELIEF REQUESTED

Claimants requested:

1. Damages in an amount no less than \$100,000.00.
2. All costs, expenses and disbursements, including reasonable attorneys' fees
3. Punitive damages.
4. Any other relief as the arbitration panel deems just and proper.

Respondent Porges requested:

1. Dismissal of Claimant's Statement of Claim
2. That costs, forum fees and reasonable attorneys' fees be assessed against the Claimants.

Respondent Dunhill requested:

1. Dismissal of Claimants' Statement of Claim and such other and further relief deemed appropriate.

Respondent Dean Witter requested:

1. All claims asserted by Claimants be dismissed in there entirety.

Respondent Gruntal requested:

1. That Claimants' Statement of Claim be dismissed in its entirety as against Gruntal.
2. An award of all costs and disbursements of this action including reasonable attorneys' fees.
3. Any other relief deemed just and equitable.

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OTHER ISSUES CONSIDERED & DECIDED

Claimants dismissed all claims against Dean Witter and Gruntal with prejudice prior to the hearings in this matter.

AWARD

After considering the pleadings, 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. Claimants' claims against Porges and Dunhill are denied.
2. Each party shall bear its own respective costs including attorneys' fees.
3. Claimants' claim for punitive damages is denied.

FORUM FEES

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

4 sessions X \$500 = \$2,000 minus hearing session deposit of \$500 = net \$1,500 due.

Forum fees Assessed Against:

1. Respondent Porges is assessed the sum of \$1,000 which represents 50% of the total forum fees due. Respondent Porges is liable and shall pay to the NASD the sum of \$1,000.
2. Respondent Dunhill is assessed the sum of \$500 which represents 25% of the total forum fees due. Respondent Dunhill is liable and shall pay to the NASD the sum of \$500.
3. Claimant is assessed the sum of \$500, which represents 25% of the total forum fees due, less \$500 hearing session deposit paid by Claimant leaving \$0 due.

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

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Concurring Arbitrators' Signatures

Name

Public Chairman

Michael G. Shannon
Michael G. Shannon, Esq.

Name

Industry Panelist

C. Anthony Bell

Name

Public Panelist

Marilyn J. Salzman, Esq.

Date of Decision: November 29, 1994

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