

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Josephine Panotes  
Josephine Madrid Panotes Physician, P.C.

93-01186

Name of Respondent(s)

Advest, Inc.  
William M. Spinner

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**REPRESENTATION**

For Claimant: Leonard Rodney, Esq. of Levy, Rodney & Schneps, P.C.

For Respondent: Cynthia A. Feigin, Esq. of Davis, Scott, Weber & Edwards,  
P.C.

**CASE INFORMATION**

Statement of Claim filed: March 25, 1993.

Claimant's Submission Agreement signed on: March 22, 1993.

Joint Statement of Answer filed by Respondents, William M. Spinner and Advest,  
Inc. on: June 1, 1993.

Respondent, William M. Spinner's Submission Agreement signed on: June 3,  
1993.

Respondent, Advest Inc.'s Submission Agreement signed on: May 7, 1993.

**HEARING INFORMATION**

Hearing Dates/Sessions: December 7, 1993/2 sessions  
December 8, 1993/2 sessions

December 20, 1993/2 sessions  
December 21, 1993/2 sessions  
January 4, 1994/2 sessions  
January 28, 1994/2 sessions

Hearing Location: NASD offices located in New York City.

### CASE SUMMARY

Claimant alleges that Respondent Spinner fraudulently completed new account forms when he transferred Claimant's personal and pension accounts over to Advest, overstating her income and net worth and indicating that her investment objectives were "appreciation with safety" and "speculative" when he should have known that her investment intent was best described as "income with safety," particularly in the pension account. Claimant further alleges that Respondent Spinner falsely indicated that she had traded in equity options for five years, was aware of the risks and that option trading was suitable for her objectives. With regard to Claimant's personal account, Claimant alleges that Respondent Spinner alone managed her account, making all of the investment decisions with the exception of two or three. Claimant further alleges that Respondent Spinner engaged in excessive trading activity, generating \$193,000 in commissions in a total of 969 transactions while the net profit amounted to \$113,000. As to Claimant's pension account, Claimant alleges that Respondents caused the account to engage in 231 completed transactions, 58% involved securities held for less than 60 days. Claimant further alleges that Respondent Spinner caused the pension account to trade in "naked" options, amounting to 50% of the pension account's transactions which are *per se* unsuitable for a pension account. Claimant alleges that this conduct constitutes common law fraud, violations of Rule 405 of the New York Stock Exchange, Article III, Section 2 of the Rules of Fair Practice of the NASD and a breach of Respondent's fiduciary duties under the "prudent man" standard of the Employee Retirement Income Security Act of 1974.

Respondents maintain that all of the information obtained by Respondent Spinner about Claimant's income, assets, net worth and investment objectives came directly from Claimant. Respondents further maintain that during the four years Claimant's accounts were at Shearson, Claimant engaged in the trading of stocks and options and therefore had four years of experience in option trading. Respondents further maintain that Claimant's education, professional background and prior investment experience suggest that by the time Claimant opened the accounts at Advest she was competent to comprehend the securities trading she engaged in. Respondents also maintain that every transaction in Claimant's account was authorized by her and in accordance with her investment objectives. Respondents further maintain that Respondent Spinner had numerous meetings with Claimant and that Claimant was aware of the transactions in her accounts

and was satisfied with the handling of her accounts. With respect to Claimant's personal account, Respondents maintain that in the year the losses were the greatest, the turn-over ratio was only 3:1. Respondents further maintain that Claimant's reliance on the breakdown of the number of days each transaction was held is misleading because it fails to distinguish between options trading and equity trading. Respondents further maintain that churning can only be established if the broker exercised control over the account, regardless of the turnover ratio, and that both of Claimant's accounts were non-discretionary. As to Claimant's pension account, Respondents maintain that only two transactions, less than 1% of the transactions were "naked" options and that these transactions resulted in a net profit. Respondents further maintain that the losses in Claimant's pension account attributable to purchases of Wang stock, which Claimant purchased against the Respondent Spinner's recommendation, caused Claimant to file this claim.

#### **RELIEF REQUESTED**

Claimant requests an award for actual damages in the amount of \$406,210.78, plus interest, punitive damages and legal fees.

Respondents request dismissal of all claims plus costs.

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

#### **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:

- A) Respondents are jointly and severally liable to Claimant in the amount of \$10,602.00.
- B) Claimant is entitled to interest at the rate of 9% per annum from August 31, 1992 until the date this award is paid.

#### **FORUM FEES**

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

12 sessions X \$750 = \$9,000 minus hearing session deposit of \$750 =  
net \$8,250 due.

Claimant is hereby liable and shall pay to the NASD forum fees in the amount

of \$3,750.

Respondents are jointly and severally liable and shall pay to the NASD forum fees in the amount of \$4,500.

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

Concurring Arbitrators' Signatures

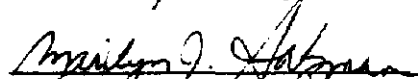
Name

Public/Industry



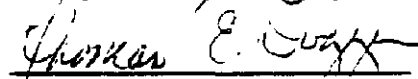
Allan J. Beydon, Esq.

F



Marilyn J. Salzman, Esq.

P



Thomas E. Duggan, Esq.

I

Date of Decision: March 21, 1994

Award #93-01186

STATE OF: *New York*

COUNTY OF: *New York*

SS:

On this *14<sup>th</sup>* day of *March*, 1994, before me personally appeared Allan J. Berdon, Esq. know and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

*Jacob M. Levine*  
*Allan J. Berdon*

JACOB M. LEVINE  
Notary Public, State of New York  
No. 02LE6021700  
Qualified in New York County  
Commission Expires Dec. 20, 1995

STATE OF: *New York*

COUNTY OF: *Nassau*

SS:

On this *17<sup>th</sup>* day of *March*, 1994, before me personally appeared Marilyn J. Salzman, Esq. known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

*Stanley P. Salzman*

STANLEY P. SALZMAN  
NOTARY PUBLIC, State of New York  
No. 8746425  
Qualified in Nassau County  
Commission Expires August 31, 1994

STATE OF:

COUNTY OF:

SS:

On this *10<sup>th</sup>* day of *March*, 1994, before me personally appeared Thomas E. Duggan, Esq. known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

*Maria Camacho*

MARIA CAMACHO  
Notary Public, State of New York  
No. 01CA5003151  
Qualified in Richmond County  
Commission Expires Oct. 19, 1994  
MAY 4