

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Terry L. Winters

93-01435

Name of Respondents

F.N. Wolf & Co., Inc.;
Tillman Douglas

REPRESENTATION

For Claimant: Terry L. Winters ("Winters") was represented by Hugh L. McKenney, Esq. of McKenney & Jesse, P.C., located in Houston, Texas.

For Respondents: F.N. Wolf & Co., Inc. ("F.N. Wolf") and Tillman Douglas ("Douglas") were represented by John R. Erickson, Esq. of Reed Smith Shaw & McClay, located in Washington, D.C.

CASE INFORMATION

Statement of Claim filed: April 12, 1993.

Claimant's Submission Agreement signed on: May 13, 1993.

Statement of Answer filed by Respondents F.N. Wolf and Douglas on: August 12, 1993.

Respondent F.N. Wolf's Submission Agreement signed on: August 10, 1993 by Richard T. Sullivan, Vice President and Compliance Director, F.N. Wolf & Co., Inc.

Respondent Douglas' Submission Agreement signed on: August 10, 1993.

Motion to Dismiss the claim against Tillman Douglas and to Dismiss in part the claim against F.N. Wolf & Co., Inc. filed by Respondents on: October 12, 1993.

Claimant's Response to Motion to Dismiss filed: December 13, 1993.

Motion to Extend Time to File Third-Party Claim filed by Respondent F.N. Wolf on: October

6, 1993.

Response to Motion to Extend Time filed by Claimant on: November 24, 1993.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: January 25, 1994 for Two (2) sessions;
February 16, 1994 for One (1) session.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant Winters alleged that Respondent Douglas, while employed by or acting as an agent for Respondent F.N. Wolf, misrepresented and induced him to purchase an unsuitable investment in the common stock of Site Based Media, Inc. Winters alleged in his claim that:

1. In 1992, Winters purchased 5,000 shares of stock in Site Based Media through a broker at F.N. Wolf. When the broker left F.N. Wolf, Winter transferred his account to the broker's new firm;
2. Several weeks later, Douglas contacted Winters in order to persuade him to return his account to F.N. Wolf. Douglas stated that he could better service Winters' account and obtain a better return on his investments. In addition, Douglas encouraged Winters to purchase additional shares of Site Based Media, guarantying that it was a "no lose" proposition and that Winters would make \$5.00 to \$6.00 per share in 90 days. Based upon these representations, Winters purchased an additional 5,000 shares; and
3. Winters noticed that the value of the stock began to drop dramatically and began his own investigation of the company. He discovered there was no basis for the investment and was later forced to liquidate his holdings in Site Based Media.

Based upon these allegations, Winters asserted claims for Respondents' failure to provide competent professional services as required by industry rules, regulations and practice; breach of fiduciary duty; unsuitability; and for F.N. Wolf's failure to supervise.

Respondents denied the material allegations of the Statement of Claim, alleging that:

1. When Winters opened his account with F.N. Wolf in October 1990, he represented that he had an annual income of \$100,00.00 per year with a substantial net worth, 20 years experience in trading stocks and bonds, and that his trading objectives were "long term growth" and "speculation." Between October 1990 and January 1992, Winters made 17 investments in 11 companies, closing out five of these investments with one loss of 38% and profits on the remaining four of 56%, 35%, 61% and 8%;
2. In November 1991, Winters purchased 3,000 shares of Site Based Media through broker John McGuire. An additional 1,000 shares were purchased through McGuire in January 1992. Winters does not complain of these transactions;
3. McGuire left F.N. Wolf in January 1992, taking a position with PaineWebber, and began soliciting F.N. Wolf's customers, at times misrepresenting F.N. Wolf and its principals in connection with these solicitations. Winters was solicited and decided to move his account to PaineWebber. Douglas was assigned to Winter's F.N. Wolf account prior to the transfer;
4. On March 11, 1992, Douglas learned that Site Based Media had announced an agreement with SilentRadio, Inc. to merge its assets into a new entity called On-Site Media, Inc. It was further announced that a separate agreement in principle had been reached for a subsidiary of National Broadcasting Company and the Fleming Companies to provide services to and to have an equity or other interest in On-Site Media, Inc.;
5. Douglas called Winters to advise him of this information, recommending that Winters increase his position in the company in anticipation of the possible appreciation and to lower Winters' average cost per share of the stock. Douglas did not guaranty the stock would appreciate or suggest that this was a "no Lose" proposition, but did express the opinion that there was an opportunity for significant upside potential and that it could occur in a short period of time;
6. Winters placed limit orders on March 11, 1992 and March 16, 1992 for 2,000 shares and 4,000 shares, respectively. The two orders were executed on March 16, 1992 at \$5 5/8 per share. The price of the stock increased after the *Wall Street Journal* reported the deal on March 17, 1992, with the stock closing at \$6 1/2 on March 30, 1992;

7. Douglas met with Winters on April 10, 1992 and attempted to convince Winters to leave his account with F.N. Wolf. Douglas was unsuccessful and the 6,000 shares of Site were swept to his account at PaineWebber; and

8. Douglas conducted proper due diligence before recommending the purchase of the shares and determined that the investment was suitable. In addition, the orders and Winters' New Account Record were reviewed by the Regional Vice President for suitability prior to the orders being placed.

In addition, the Respondents asserted several affirmative defenses, including the following:

1. The Statement of Claim failed to state a claim upon which relief can be granted;
2. The claims are barred by the doctrines of waiver, estoppel and ratification, by the applicable statutes of limitations, by the assumption of risk and contributory negligence, and by the statute of frauds;
3. Any claims based upon the rules of the New York Stock Exchange are inapplicable because the securities are not traded on that Exchange and F.N. Wolf is not a member of that Exchange;
4. There is no private right of action under the NASD Rules of Fair Practice and the rules of the New York Stock Exchange; and
5. The Claimant failed to mitigate damages and cannot be awarded punitive damages pursuant to the facts of this case.

RELIEF REQUESTED

Claimant requested entry of an award against Respondents for the amount of at least \$32,793.00, together with interest computed from April 1, 1992 to the date of the award; a monetary award in the amount of the commissions taken by Respondents, representing a return of commissions and margin interest, if any; punitive damages in the sum of \$50,000.00; pre-judgment interest; reasonable attorneys' fees; reimbursement of costs; assessment of the costs of the hearing session fees against Respondents; possible investigation by the Securities and Exchange Commission; and for such other relief as the arbitrators saw fit to award.

Respondents requested that the Claimant's demands for relief be denied.

OTHER ISSUES CONSIDERED & DECIDED

On January 21, 1994, the Panel unanimously denied Respondents' Motion to Dismiss Tillman Douglas and to Dismiss in Part F.N. Wolf & Co., Inc., after review of the Motion and all responses. On the same date, the Panel unanimously denied Respondent F.N. Wolf's Motion to Extend the Time to File a Third-Party Claim upon review of the pleadings filed regarding the Motion.

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 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. Respondent F.N. Wolf & Co., Inc. is liable for and shall pay to the Claimant, Terry L. Winters, the sum of \$5,000.00;
2. All claims against Respondent Tillman Douglas are hereby dismissed with prejudice and denied in their entirety;
3. The claim for punitive damages is hereby dismissed with prejudice and denied in its entirety;
4. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
5. Any relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Three (3) Hearing sessions x \$500.00 per session = \$1,500.00.

The National Association of Securities Dealers, Inc. shall retain the \$150.00 claim filing fee and refund the \$500.00 hearing session deposit previously deposited by the Claimant, Terry L.

Winters. Respondent F.N. Wolf & Co., Inc. is liable for and shall pay to the NASD the forum fees in the amount of \$1,500.00. Therefore, the NASD shall retain the \$1,100.00 previously deposited by the Respondent, F.N. Wolf & Co., Inc., and Respondent F.N. Wolf & Co., Inc. shall pay an additional \$400.00 to the NASD.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Patrick Lanier, Esq.

July 20, 1994

Patrick Lanier, Esq.

Public Arbitrator

Chairperson

/s/ James W. Hargrove

July 15, 1994

James W. Hargrove

Public Arbitrator

/s/ William J. Hawkins, Esq.

July 11, 1994

William J. Hawkins, Esq.

Industry Arbitrator

For NASD Use Only

Date of Decision:

7-26-94