

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Charles W. Flume, D.D.S., S.C., Defined Benefit Plan;
Charles W. Flume, D.D.S., S.C., a Wisconsin
professional corporation;
Dr. Charles W. Flume;
Nancy Flume.

93-02415

Name of Respondents

Hayne, Miller & Farni, Inc.;
James D. Peterson

REPRESENTATION

For Claimants: Charles W. Flume, D.D.S., S.C., Defined Benefit Plan; Charles W. Flume, D.D.S., S.C., a Wisconsin professional corporation; Dr. Charles W. Flume; and Nancy Flume were represented by Mark J. Briol, Esq. and Gregory L. Wilmes, Esq. of Briol & Wilmes, located in Minneapolis, Minnesota.

For Respondent: Hayne, Miller & Farni, Inc. ("Hayne Miller") was represented by Gregory J. Stenmoe, Esq. of Briggs and Morgan, P.A., located in Minneapolis, Minnesota.

CASE INFORMATION

Statement of Claim filed: June 21, 1993.

Claimants' Submission Agreement signed on: June 15, 1993.

Statement of Answer and Counterclaim filed by Respondent Hayne Miller on: August 11, 1993.
Respondent Hayne Miller's Submission Agreement signed on: August 11, 1993 by Wesley C. Hayne, President, Hayne Miller & Farni, Inc.

Respondent Peterson's Statement of Answer filed on: August 10, 1993.

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

HEARING INFORMATION

Pre-Hearing Conference: None Held.
Hearing Dates/Sessions: January 12, 1994 for Two (2) sessions;
January 13, 1994 for Two (2) sessions;
February 9, 1994 for Two (2) sessions;
February 10, 1994 for Two (2) sessions; and
February 11, 1994 for Two (2) sessions.

Hearing Location: Milwaukee, Wisconsin.

CASE SUMMARY

Claimants alleged that Respondent Peterson, while employed by or acting as an agent for Respondent Hayne Miller, recommended and encouraged Dr. Flume and the Plan to invest only in speculative securities which were unsuitable for this account. The Claimants specifically alleged that:

1. Dr. Flume had a limited knowledge of securities and sought professional assistance to invest his retirement savings in late 1986 or early 1987;
2. In February of 1988, Dr. Flume's account was transferred to Respondent Peterson after the broker then handling the account had left the now defunct firm of Heiner & Stock. After assuming control of Dr. Flume's account, Peterson embarked upon a pattern of trading that was unsuitable for a pension plan and contained inappropriate concentrations of securities. In December of 1989, Peterson induced Dr. Flume to allow him to engage in short-term trading in order to make quick profits. Peterson never again called Dr. Flume to seek authorization to buy or sell securities;
3. Peterson made numerous misrepresentations to Dr. Flume regarding the merits of the investments in the account;
4. In or about May of 1990, Peterson transferred his customers' accounts and his license to sell securities to Hayne Miller. Hayne Miller did nothing to warn Dr. Flume of the unsuitability of the securities or the inappropriate concentrations in the account upon its arrival; and
5. In May of 1990, Peterson caused an overdraft to the bank account of the Plan by purchasing shares of United Systems Technology when the Plan did not have the money to pay for the stock. The agent of the trustee of the plan demanded that the stock be sold to pay the overdraft, resulting in losses on the forced sales

and lost interest on the funds expended to cover the purchase of the stock.

Based upon the above allegations, Claimants asserted causes of action for breach of fiduciary duty to the Plan pursuant to ERISA, 29 U.S.C. §1001, et seq.; common law breach of fiduciary duty; negligence and violation of the NASD suitability rules; violation of the Federal Securities laws; violation of Minnesota and Wisconsin securities statutes; and common law fraud. In addition, the Claimants asserted as additional bases for Hayne Miller's liability the common law doctrines of agency and respondeat superior; negligent supervision pursuant to the NASD Rules of Fair Practice, N.Y.S.E. Rule 405, and Minnesota statute; and Federal control person liability.

Respondent Hayne Miller denied the material allegations of the Statement of Claim, asserting that:

1. Dr. Flume was a well educated, sophisticated and experienced investor with accounts at other brokerage houses, other investments and a successful dental practice. Claimants' investment objectives were speculation and Dr. Flume had a history of investing in speculative securities;
2. In the pension plan account, none of the securities purchased were held at Hayne Miller, but were delivered to the First Bank Milwaukee which was the authorized agent and depository for all securities purchased for the Flume account. Confirmation statements were sent to the bank, who in turn sent the confirmation to Dr. Flume as Trustee and Administrator, who was required to sign an authorization for the trade. After the securities were delivered to the bank, Dr. Flume was the only person who had the authority to sell or retain the securities;
3. Hayne Miller and Peterson were not fiduciaries under ERISA, the common law or any other statutory provision. Any losses or improprieties in the account were the responsibility of Dr. Flume;
4. Peterson was carrying out the instructions that were given, authorized and approved by Dr. Flume and the First Bank Milwaukee when the overdraft occurred; and
5. Flume and Peterson entered into a verbal settlement agreement in 1991 that extinguished all claims arising prior to that date.

In addition, Hayne Miller asserted several additional defenses, including the following:

1. The Claimants have failed to state a claim upon which relief can be granted;

2. Claimants' claims are barred by the statute of limitations, and the doctrines of ratification, estoppel, waiver, settlement and release, and contributory negligence; and

3. Claimants failed to mitigate damages.

Hayne Miller alleged a counterclaim against Claimants for bringing the claim in bad faith and without justification, and that any breach of duty was that of Dr. Flume individually and as Trustee and Administrator.

Respondent Peterson denied the material allegations of the Statement of Claim, asserting that:

1. All disputes were resolved with Dr. Flume by verbal agreement in early 1991;
2. Peterson was not a fiduciary to the account and Dr. Flume refused to disclose the assets of the plan; and
3. The arrangement with the First Bank Milwaukee would have made it impossible to exercise de facto or total discretion of the account, or the engage in daily, in-house short term or unauthorized training.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents for compensatory damages in excess of \$300,00.00; unspecified punitive damages pursuant to Minn. Stat. §549.20; reasonable attorneys' fees as required by the Minnesota Securities Laws and ERISA; interest on all damages awarded; costs, disbursements and expenses incurred; and for such other relief as the arbitrators deemed appropriate.

Respondent Hayne Miller requested that the claim be dismissed and that Dr. Flume pay contribution and indemnity for damages, if any, assessed against Hayne Miller, as well as attorneys' fees and costs for defending this claim.

Respondent Peterson requested that claims be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

Prior to the first hearing date, the NASD was informed that Respondent Peterson had filed a petition for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code on December 30, 1993. Pursuant to Sec. 362 of the U.S. Bankruptcy Code, all actions against Respondent James D. Peterson were stayed.

During hearing, Respondent Hayne Miller presented a Motion to Dismiss. Upon review of the Motion and the arguments of the parties, the Panel has determined that the Motion is denied.

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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Hayne, Miller & Farni, Inc. is liable for and shall pay to Claimants Charles W. Flume, D.D.S., S.C., Defined Benefit Plan; Charles W. Flume, D.D.S., S.C.; Dr. Charles W. Flume; and Nancy Flume the sum of \$150,000.00 as compensatory damages;
2. In addition, Respondent Hayne, Miller & Farni, Inc. is liable for and shall pay to Claimants Charles W. Flume, D.D.S., S.C., Defined Benefit Plan; Charles W. Flume, D.D.S., S.C.; Dr. Charles W. Flume; and Nancy Flume the sum of \$28,034.40 as costs;
3. All other costs of arbitration, including attorneys' fees, shall be borne by the party incurring the cost, except for those specifically enumerated herein;
4. The claims for punitive damages are hereby dismissed and denied in their entirety;
5. Respondent Hayne, Miller & Farni, Inc.'s counterclaim is hereby dismissed and denied in its entirety;
6. 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: Ten (10) hearing sessions x \$750.00 per session = \$7,500.00.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the \$200.00 claim filing and refund the \$750.00 hearing session deposit previously deposited by the Claimants. In addition, the NASD shall retain the \$500.00 claim filing fee and the \$750.00 hearing session

deposit previously deposited by Respondent Hayne, Miller & Farni, Inc. Respondent Hayne, Miller & Farni, Inc. is liable for and shall pay to the NASD additional forum fees in the sum of \$6,750.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Arthur J. Vlasak
Arthur J. Vlasak
Public Arbitrator
Chairperson

3/9/94

/s/ Rose Marie Baron
Rose Marie Baron
Public Arbitrator

3/14/94

/s/ James R. Schoenike
James R. Schoenike
Industry Arbitrator

3/11/94

For NASD Use Only

Date of Decision: 3/15/94