

PUBLIC

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Hope E. Phipard

93-02761

Name of Respondent(s)

Fidelity Brokerage Services, Inc.

REPRESENTATION

For Claimant Hope Elizabeth Phipard (Claimant): Louis F. Burke with the law firm of Townley & Updike located in New York City, New York.

For Respondent Fidelity Brokerage Services, Inc. (Respondent): Kenneth J. McDonald Esq. legal counsel for FMR Corp. located in Boston, MA.

CASE INFORMATION

Statement of Claim filed on: July 12, 1993.

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

Statement of Answer filed by Respondent on: September 30, 1993.

Respondent's Submission Agreement signed on: October 1, 1993.

HEARING INFORMATION

Hearing Date/Sessions: May 5, 1994 - Two Sessions

Hearing Location: The hearing was conducted at National Association of Securities Dealers, Inc.'s offices located in New York City, New York.

CASE SUMMARY

Claimant alleged that on or about December 31, 1986, after Respondent assured her that she could transfer funds from one account to another without being charged loads, Respondent incorrectly charged her for converting her mutual fund positions to a USA unified account. Claimant alleged that between January and March of 1987, Respondent erroneously charged her \$14,674.00 in loads for five transactions. Claimant further alleged that she contacted Respondent regarding the incorrect charges, but that only \$7,922 of the loads were reversed.

Claimant alleged that had \$14,674.00 in erroneous loads not been charged, the 5.5% interest being earned on her money market account would have generated \$271.72 in interest for six months for the restored loads of \$7,922.00 and \$2,557.94 in interest for six years for the unrestored loads of \$6,752.00.

Claimant further alleged that in April of 1987 she instructed Barry Wyman, a representative for Respondent, to liquidate all shares in all mutual funds, close all accounts, and invest the proceeds in a cash reserve fund. Claimant further alleged that Respondent confirmed that the accounts had been closed.

Claimant alleged that in October of 1987, after returning from a four month excursion in Europe, she discovered that Respondent had not closed her accounts and that Respondent had continued to make unauthorized purchases. Claimant alleged that between May and August of 1987, Respondent used \$10,895.00 of her funds to purchase shares of Magellan. Claimant further alleged that by October 19, 1987, the Magellan fund lost \$2,973.00.

Claimant alleged that Respondent's negligent supervision of her accounts caused her to incur \$6,752.00 in erroneous load charges and to lose interest and capital gains of \$2,829.66. Claimant further alleged that she lost an additional \$2,973.00 from unauthorized trading. Claimant alleged total damages in the amount of \$12,555.

Respondent maintained that prior to 1987, Claimant held positions in several mutual funds which were underwritten by affiliates of FBSI. Respondent further maintained that when Claimant established a cash management account with FBSI, she was advised that fund shares purchased through the brokerage account, rather than directly from the funds, would incur load charges which would then be manually adjusted to provide for any sales charge credits. Respondent maintained that Claimant fully understood this limitation when she deposited her previously purchased Fidelity mutual funds into her brokerage account.

Respondent maintained that while Claimant held positions in several Fidelity mutual funds, the five transactions cited by the Claimant relate to purchases of Fidelity Magellan Fund, a fund which carried a 3% sales load and which the Claimant had not maintained a previous position in. Respondent further maintained that each of the five transactions in question were adjusted to provide credit for the 3% sales charge and that appropriate fund distribution adjustments were also made. Respondent maintained that the total load adjustments made in 1987 for the five transactions at issue totaled \$14,205.27. Respondent also maintained that the sales load adjustments, which the Claimant had characterized as "unauthorized trades", were requested by the Claimant.

Respondent raised five affirmative defenses: (1) Section 15 of the NASD's Code of Arbitration Procedure bars submission of the claim since the statutory time frame for filing the claim has expired; (2) Claimant has already been fully compensated for any alleged loss; (3) Claimant failed to attempt to mitigate purported damages incurred due to the decline in the market in October of 1987; (4) Claimant perpetrated a fraud upon the arbitration panel by claiming that the load waiver adjustments were not made in 1987; and (5) Claimant's purported damages are speculative and without foundation.

RELIEF REQUESTED

Claimant requested the following damages against Respondent: (1) Compensatory damages totaling \$12,555.00; and (2) Costs, including attorney fees.

Respondent requested that: (1) The claim be dismissed; (2) Cost of suit and attorneys fees be assessed against Claimant; (3) Sanctions be awarded against Claimant for misuse of the arbitration process; and (4) Any other relief the panel deems just and proper.

OTHER ISSUES CONSIDERED & DECIDED

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 remains on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. All Claims against the Respondent be and hereby are dismissed.
2. Each party shall bear their respective costs including attorneys fees.
3. Respondent shall reimburse the Claimant \$400.00, representing the hearing session deposit previously paid by the Claimant to the NASD.

FORUM FEES


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

2 Sessions X \$400.00 = \$800.00 minus hearing session deposit of \$400.00 = \$400.00 due.

1. Respondent Fidelity Brokerage Services, Inc. be and hereby is liable and shall pay to the NASD the sum of \$400.00 representing forum fees.

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

ARBITRATOR SIGNATURE


John Edward McCracken, Esq.
Public Arbitrator

of Execution

Date: 30 June 1994

Date of Decision: July 1, 1994

STATE OF

SS:

COUNTY OF

On this 1 day of July, 1994, before me personally appeared **John Edward McCracken, 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.

Deborah A. De Jesus

DEBORAH A. DEJESUS
Notary Public, State of New York
No. 020E5022979
Qualified in New York County 96
Commission Expires January 24, 1996

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