

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between**

**Name of Claimant**

**Marilyn Johnson**

**93-04267**

**Name of Respondents**

**Dean Witter Reynolds Inc.  
Roney & Co.  
Mark Flash**

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**REPRESENTATION**

**For claimant Marilyn Johnson ("claimant") appeared George L. McGaughey, Esq. of McDonald, Hopkins, Burke & Haber Co., Cleveland, Ohio.**

**For respondent Dean Witter Reynolds Inc. ("Dean Witter") appeared Michael N. Ungar, Esq. of Ulmer & Berne, Cleveland, Ohio.**

**For respondents Roney & Co. ("Roney") and Mark Flash ("Flash") appeared Robert N. Rapp, Esq. of Calfee, Halter & Griswold, Cleveland, Ohio.**

**CASE INFORMATION**

**Statement of Claim filed: October 14, 1993.**

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

**Statement of Answer filed by Dean Witter on: April 5, 1994.**

**Dean Witter's Submission Agreement signed on: April 5, 1994.**

**Joint Statement of Answer filed by Roney and Flash on: March 14, 1994.**

**Roney's Submission Agreement signed on: March 10, 1994.**

**Flash's Submission Agreement signed on: March 10, 1994.**

**Produced Pursuant to Court Order  
dated 12/11/93**

**ARBITRATION**

### **HEARING INFORMATION**

Hearing Dates/Sessions:	December 4, 1994	-	Two Sessions
	December 14, 1994	-	Two Sessions
	January 29, 1996	-	Two Sessions
	February 21, 1996	-	Three Sessions

The hearings were held at the offices of the National Association of Securities Dealers, Inc. located in Cleveland, Ohio.

### **CASE SUMMARY**

Claimant alleged that Flash intentionally defrauded and deceived her through material misrepresentations and omissions during the period from 1985 to 1992 regarding her accounts that he managed. Claimant also alleged that Flash intentionally failed to disclose to her that he was actively and excessively trading her account, causing her to sustain very substantial losses.

Claimant alleged that Flash's excessive trading in her account constituted churning and that the trading was not in accordance with her investment objectives and financial circumstances. Further, claimant alleged that Flash's excessive trading was intentional and in violation of his duties to serve the interests of his client and not his own financial interests.

Claimant alleged that as her broker, Flash owed a fiduciary duty to her to act in her best interests, to manage her account and make investments designed to achieve her financial objectives of capital preservation and income without risk of loss. Claimant asserted that Dean Witter and Roney had an independent duty to adequately supervise and monitor Flash' handling of her accounts and that they should have ensured that the accounts were being managed properly in her best interest.

Claimant alleged that Flash breached his express and implied promises to her that his management of her monies, investments and account would achieve her financial objective of preserving principal. Further, claimant asserted that through Flash's breach of his contractual duties to her, her principal was severely depleted through excessive trading and improper handling of her account.

Dean Witter maintained that claimant opened an account in November of 1984 seeking to obtain a higher yield on her principal than was available in some government securities. Dean Witter also maintained that Flash devised a well diversified portfolio for Claimant to reduce her risk of loss and that the recommended investments were designed to meet her investment objectives.

Dean Witter also maintained that Flash did not exercise discretion over the accounts and that he talked to claimant about each transaction. Further, Dean Witter maintained that claimant did not always follow Flash's investment advice and that claimant made all final decisions to buy or sell in the accounts. Dean Witter also maintained that the activity in the accounts cannot be

described as excessive.

Roney and Flash maintained that during the period of 1989 to 1992, the portfolio adjustments recommended by Flash led to a total of twelve purchases among both accounts and, therefore, claimant's claim of churning is entirely insupportable. Roney and Flash also maintained that each recommendation was the product of a good-faith, reasonably-based objective of maintaining a portfolio that would produce the highest total return and that each matched the claimant's investment objective, financial profile and risk preferences.

Roney and Flash maintained that Flash and claimant talked frequently to review her account and its performance and that no transaction was ever undertaken in or for the claimant's account that was not specifically authorized by her. Roney and Flash further maintained that Flash never misstated any fact or induced claimant to believe anything. In addition, Roney and Flash acknowledged that Flash told claimant that her portfolio was comprised of assets that would produce income and grow over time.

Roney and Flash maintained that claimant was at all times a competent, independent individual, fully capable of managing her affairs and making her own investment decisions, which she did, and denied that they had a duty to manage claimant's account.

#### **RELIEF REQUESTED**

Claimant requested that an award be entered in her favor against respondent Flash, Dean Witter and Roney, jointly and severally, in the amount of \$460,000.00, computed as follows:

- (a) \$135,000.00 in damages against Flash and Dean Witter, jointly and severally, for loss of principal sustained through wrongful incurring of commission costs, expenses and other fees caused by respondents' fraud, churning, breach of fiduciary duty and breach of contract, and failure to adequately and carefully manage and supervise her account;
- (b) \$125,000.00 in damages against Flash and Roney, jointly and severally, for loss of principal sustained through wrongful incurring of commission costs, fees, and other expenses caused by respondents' fraud, churning, breach of fiduciary duty and breach of contract, and failure to adequately and carefully manage and supervise her account;
- (c) \$200,000.00 in punitive damages, jointly and severally against respondents;
- (d) an amount for reasonable attorneys' fees and related expenses and costs, as deemed appropriate by the arbitration panel;
- (e) all other costs, expenses, and other relief which the arbitrators deem appropriate in this case.

Dean Witter requested that all claims be dismissed in their entirety. Dean Witter further requested that it be awarded attorneys' fees and costs.

Roney and Flash requested an award in their favor as follows:

- (a) dismissing the claims against them, in their entirety;
- (b) on a finding of bad faith in making improvident and abusive assertions of "fraud" and "dishonesty", an award of attorneys fees;
- (c) assessing all forum costs against claimant;
- (d) for such other and further recovery or affirmative relief as may become appropriate during the further course of proceedings, or as shown at hearing to be necessary or appropriate.

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

- 1. All claims against respondents Dean Witter, Roney and Flash be and hereby are dismissed in their entirety.
- 2. Claimant's request for punitive damages be and hereby is denied.
- 3. Each party shall bear their respective costs, including attorneys' fees.
- 4. All other claims are hereby denied.

#### **FORUM FEES**

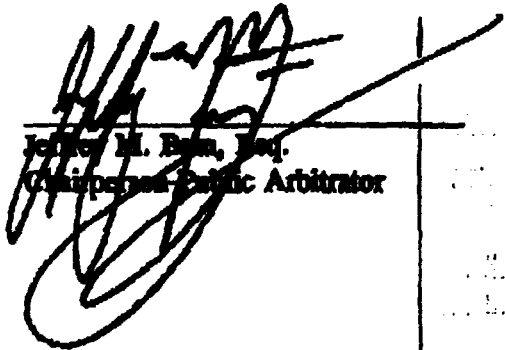
Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$200.00 non-refundable filing fee submitted by claimant and have assessed the following forum fees:

9 hearing sessions x \$750.00 = \$6,750.00

1. Claimant be and hereby is liable for the sum of \$3,375.00, representing one-half of the amount of forum fees assessed. Claimant previously deposited \$750.00 with the NASD and, therefore, claimant is liable and shall pay to the NASD the sum of \$2,625.00.
2. Dean Witter be and hereby is liable and shall pay to the NASD the sum of \$1,687.50, representing one-fourth of the total amount of forum fees assessed.
3. Roney be and hereby is liable and shall pay to the NASD the sum of \$1,687.50, representing one-fourth of the total amount of forum fees assessed.

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

**ARBITRATORS' SIGNATURES**

  
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Jeffrey M. Ryan, Esq.  
Chairperson - Public Arbitrator

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Lawrence M. Oberdank, Esq.  
Public Arbitrator

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John N. Stamatis, Esq.  
Industry Arbitrator

Date of Decision: May 14, 1996

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Award #93-04267

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Jeffrey M. Bain, Esq.  
Chairperson-Public Arbitrator

  
Lawrence M. Oberdunk, Esq.  
Public Arbitrator

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John N. Stamatis, Esq.  
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