

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Anthony Gagliano and
A. Gagliano Co., Inc.,

Claimants

v.

No.94-00007

Lawrence J. Friedlander,
Bear Stearns & Co., Inc.
and Dean Witter Reynolds, Inc.,

Respondents

REPRESENTATION OF PARTIES

Claimants, Anthony Gagliano and A. Gagliano Co., Inc., were represented by Terrence Buehler, Esq. of Susman, Saunders & Buehler, Chicago, IL.

Respondents, Bear Stearns & Company, Inc., Lawrence J. Friedlander and Dean Witter Reynolds, Inc., were represented by Lawrence A. Rosen, Esq. of Lawrence, Kamin, Saunders & Uhlenhop, Chicago, IL.

CASE INFORMATION

Claimant, Anthony Gagliano filed a Uniform Submission Agreement which was signed on December 3, 1993. Claimant, A. Gagliano Co., Inc. filed a Uniform Submission Agreement signed by Anthony Gagliano, President, on December 3, 1993. The Statement of Claim was filed on or about December 13, 1993.

Respondent, Bear, Stearns & Co., Inc. submitted a Uniform Submission Agreement executed by Mark E. Lehman, Senior Managing Director, on March 3, 1994. Respondents, Bear Stearns & Co., Inc. and Lawrence J. Friedlander, filed a Joint Statement of Answer on or about March 3, 1994.

Respondent, Dean Witter Reynolds, Inc., submitted a Uniform Submission Agreement signed by Richard J. Sheehan, First Vice President, on March 15, 1994. Respondent, Dean Witter Reynolds, Inc., submitted a Statement of Answer on or about March 15, 1994.

HEARING INFORMATION

The Hearing was held on January 10, 1995 for two sessions before three arbitrators and on January 11, 1995 for two sessions before three arbitrators. The Hearing was held in Milwaukee, Wisconsin.

CASE SUMMARY

In the Claim, Claimants, Anthony Gagliano and A. Gagliano Co., Inc. ("Gagliano") alleged that the Respondents, Bear Stearns & Co., Inc. ("Bear Stearns"), Lawrence J. Friedlander, an authorized agent of Bear Stearns ("Friedlander"), and Dean Witter Reynolds, Inc. ("Dean Witter") improperly traded and churned the Claimants' account. According to the Claimant, Friedlander established an account for A. Gagliano Co., Inc. on December 3, 1987 with Bear Stearns for the purposes of investing in stocks, bonds and other securities. Claimant contends that he informed Friedlander that he wanted Friedlander and Bear Stearns to employ a conservative investment strategy to preserve principal. Friedlander, who exercised complete discretion relating to the trading and made all trading decisions for the account, allegedly agreed to employ such a conservative strategy. Relying on this agreement, Claimant had invested \$918,671.11 by February 9, 1988. Claimant alleged that Friedlander did not employ a conservative investment strategy, but made numerous risky, highly leveraged day trades of millions of dollars of U.S. government securities and municipal bonds resulting in large commissions and churning. As alleged, Friedlander and Bear Stearns further increased their commissions by purchasing excessive amounts of risky, when-issued and new-issue securities and securities in which Bear Stearns made a market. Claimant contends that a letter dated February 11, 1988, which was sent to him by Bear Stearns' managing director seeking confirmation that the trading strategy being employed was in accordance with the Claimants' wishes, was false and misleading and an attempt to shift responsibility for the unauthorized and improper trading strategy to the Claimant. As alleged, after Claimant discussed the February 11, 1988 letter with Bear Stearns' officials and reiterated his goal of preservation of the original investment plus a fair return, Bear Stearns misled Gagliano by concealing that the trading was not consistent with his investment goals. Claimant allegedly received a similar letter dated June 9, 1988. After about one year of trading at Bear Stearns, the account lost over \$240,000. In December, 1988, Friedlander left Bear Stearns and began employment at Dean Witter where Claimant opened an account and signed a customer's agreement in December, 1988. Friedlander allegedly without authorization from the Claimant purchased government securities, municipal bonds, when-issued and new-issue securities and securities in which Dean Witter made a market. Gagliano contends that, \$678,000 invested and about three years of trading, the account lost over \$315,000. Specifically, Claimants alleged that acts set forth in the Claim constitute breach of fiduciary duty, negligence, breach of contract and fraud. Claimants further alleged the Respondents performed violations of, including, but, not limited to, the National Association of Securities Dealers, Inc. Rules of Fair Practice Sections 1, 2, 15 and 18 and violations

of the Rules of the New York Stock Exchange, Inc. Rule 405.

In their separate Statements of Answer, Respondents denied all the allegations set forth in the Claim asserting that Gagliano was a sophisticated investor and had control of the account. Respondents alleged that the investments were suitable for Gagliano who had a net worth in excess of \$10,000,000. Respondents asserted the following affirmative defenses: failure to state a claim, statutes of limitations, laches, ratification, waiver, estoppel, failure to mitigate damages, full performance of duties, intervening and superseding causes, claimants caused their own losses, adequate supervision and contributory negligence.

RELIEF REQUESTED

Claimant requested the following award against the Respondents in an amount in excess of \$500,000.00 established by the evidence plus interest, costs and attorneys' fees.

Respondents asked that the claim be dismissed in its entirety and for reimbursement for costs, expenses, attorneys' fees and NASD forum fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondents, Dean Witter Reynolds, Inc. and Lawrence J. Friedlander, settled with the Claimants prior to the start of the hearing on January 10, 1995. The parties confirmed the settlement on the record and the Claimants proceeded against the sole remaining Respondent, Bear Stearns & Company, Inc.

The parties have agreed that the Award in this matter may be executed by counterpart copies. 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. All claims in the Statement of Claim are hereby denied and dismissed in its entirety.
2. Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully below.

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FORUM FEES

Pursuant to Section 43(c) of the Code, forum fees in the amount of \$2,000.00 are assessed to the Respondent, Bear Stearns & Co., Inc. Forum fees are assessed in the amount of \$2,000.00 to the Claimants, Anthony Gagliano and A. Gagliano Co., Inc.

Pursuant to Section 43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$250.00, and shall retain the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimant.

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

CONCURRING ARBITRATORS

Name:

Herbert Neuer, Esq.
Herbert Neuer, Esq.
Presiding Chair
Public Arbitrator

Rose Marie Baron
Rose Marie Baron
Public Arbitrator

Ramona V. Larson
Ramona V. Larson
Industry Arbitrator

Date of Service by the NASD: February 16, 1995