

**FINAL ORDER**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Joseph G. Asher

Claimant,

v.

No. 95-00073

Dean Witter Reynolds, Inc., and  
Douglas B. Misantoni

Respondents.

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**REPRESENTATION OF PARTIES**

Claimant Joseph G. Asher ("Claimant") was represented by Steven E. Stern, Esq. of Stern & Devitt located in Chicago, Illinois.

Respondents Dean Witter Reynolds, Inc. ("Dean Witter") and Douglas B. Misantoni ("Misantoni") (collectively referred to as "Respondents") were represented by Michelle Bryan Oroschakoff, Esq. of Dean Witter Reynolds, Inc. located in San Francisco, California.

**CASE INFORMATION**

The Statement of Claim was filed on or about January 5, 1995.

Claimant's Submission was signed on December 27, 1994.

Respondents' Joint Statement of Answer was filed on or about March 1, 1995.

Respondent Dean Witter's Submission Agreement was signed on March 1, 1995.

NASD Regulation, Inc. has no record that Respondent Misantoni filed a properly executed Submission Agreement.

Respondents' Motion to Dismiss was filed on or about June 28, 1996.

Claimant's Response was filed on or about July 15, 1996.

Respondents' Renewed Motion to Dismiss was filed on or about September 11, 1996.

NASD Regulation, Inc. has no record that Claimant filed a Response to the Renewed Motion to Dismiss.

### **HEARING INFORMATION**

The in-person pre-hearing conference was held on October 7, 1996 for one (1) session in Southfield, Michigan.

### **CASE SUMMARY**

Claimant Joseph G. Asher alleged that he had very limited securities experience before opening an investment account with Respondent Dean Witter, through one of its brokers, Respondent Misantoni. Claimant maintained that he was not sophisticated when it came to investment accounts or financial instruments. Claimant asserted that, in a matter of four months, the initial \$95,000 Claimant deposited in the account had lost 79% of its value or \$75,391.29 through losses in inappropriate unsuitable transactions in highly speculative stocks and options and through the use and expense of margin. Claimant contended that, during the first four months the account was opened, the amount of securities purchased totaled \$269,075, which was almost nine times the amount deposited on an annualized basis. Claimant alleged that Respondent Misantoni made several trades without Claimant's consent or permission. Claimant made various claims, including: fraud through churning, unsuitability, fraudulent misstatements and omissions, and breach of fiduciary duty.

Respondents denied all liability to Claimant in the Joint Statement of Answer. Respondents alleged that the Claimant was a wealthy, knowledgeable businessman who used a minuscule portion of his net worth to trade options and who now has buyer's remorse. Respondents asserted that all churning, unsuitability, and fraudulent misrepresentation claims were time barred. Respondents contended that all trades in the account were authorized, that the Claimant has waived his right to object to Respondents' actions, and that the Claimant is estopped from objecting to Respondents' actions. Respondents maintained that Claimant's account was not churned. Respondents alleged that they disclosed all material information, made no fraudulent statements, and that Respondents did not violate any suitability requirements. Respondents contended that Respondent Dean Witter did not breach any fiduciary duties and that Claimant's damage calculations are erroneous. Respondents

asserted the following affirmative defenses, including: failure to mitigate, laches, lack of causation, assumption of risk, and contributory and comparative negligence.

### **RELIEF REQUESTED**

Claimant requested an award of compensatory damages in the approximate amount of \$75,391, punitive damages in the amount of \$226,173, interest for three years at 12% annually of \$27,140.76, expenses in the amount of approximately \$3,000, and attorney fees.

Respondents requested that the Complaint be dismissed in its entirety and that Respondents be awarded the costs, including attorneys' fees, incurred in defending this action.

### **OTHER ISSUES CONSIDERED & DECIDED**

On August 29, 1996, in response to Respondents' Motion to Dismiss for Claimant's alleged continued refusal to produce documents, Chairman Goldman ruled that the Claimant shall answer Respondents' Request for Documents and Information dated March 31, 1995 no later than September 9, 1996. Chairman Goldman further ruled that, in the event that the Claimant fails to comply with this Order, the panel shall reconsider Respondents' Motion to Dismiss. On September 11, 1996, Respondents filed a renewed Motion to Dismiss asserting that the Claimant had failed to comply with Chairman Goldman's Order dated September 9, 1996. On September 16, 1996, the panel scheduled an in-person pre-hearing conference for October 7, 1996 to address Respondents' Renewed Motion to Dismiss.

Respondent Douglas B. Misantoni did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim is bound by the determination of the arbitration panel on all issues submitted.

**ORDER**

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

- (1) That Claimant Joseph G. Asher has not complied with Chairman Goldman's Order dated August 29, 1996;
- (2) That Respondents' Motion to Dismiss is granted and that the Statement of Claim is dismissed in its entirety without prejudice to Claimant's right to refile the Statement of Claim with NASD Regulation, Inc. Office of Dispute Resolution;
- (3) That Claimant Joseph G. Asher is liable for, and shall pay to Respondent Dean Witter Reynolds, Inc. its costs incurred in this proceeding in the amount of Five Thousand Dollars and No Cents (\$5,000.00); and
- (4) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby dismissed without prejudice.

**FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) hearing session x \$750 = \$750 in forum fees. Pursuant to §10332(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant. Pursuant to §10319(b) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$750 adjournment fee previously deposited by Respondents. Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$350 member surcharge previously deposited by Respondent Dean Witter Reynolds, Inc.

NASD Regulation, Inc. Office of Dispute Resolution  
Arbitration No. 95-00073  
Order Page 5 of 5

Pursuant to §10319(b) of the Code, Claimant Joseph G. Asher is liable for, and shall pay the \$750 adjournment fee.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

/s/ Barry Goldman, Esq.  
Barry Goldman, Esq.  
Chairperson  
Public Arbitrator

November 4, 1996  
Dated:

/s/ Michael J. Meeusen  
Michael J. Meeusen  
Panelist  
Public Arbitrator

November 5, 1996  
Dated:

/s/ Norman A. Samson  
Norman A. Samson  
Panelist  
Industry Arbitrator

November 4, 1996  
Dated:

For NASD use only:  
Date order served on the parties: November 15, 1996