

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Simon Strum

95-01417

Names of Respondents

Dean Witter Reynolds, Inc.
Phil Rosensweig

REPRESENTATION

For Claimant/Counterrespondent Simon Strum ("Strum"): Jeffrey Tew, of Jeffrey Tew, P.A., Miami, Florida.

For Respondent, Dean Witter Reynolds, Inc. ("Dean Witter"): Peter J. Aldrich, Esq., of Kelley, Aldrich & Warren, P.A., of West Palm Beach, Florida.

Respondent/Counterclaimant Phil Rosensweig ("Rosensweig") appeared pro se.

CASE INFORMATION

Statement of Claim filed on: March 21, 1995.

Claimant/Counterrespondent Strum's Submission Agreement signed on: March 14, 1995.

Joint Answer filed by Respondent, Dean Witter and Respondent/Counterclaimant Rosensweig on: July 14, 1995.

Respondent, Dean Witter and Respondent/Counterclaimant did not sign Submission Agreements as required by Section 12 of the Code of Arbitration Procedure (the "Code").

HEARING INFORMATION

On April 10, 11, 20, 26, and 27, 1996, in Fort Lauderdale, Florida, a hearing lasting ten (10) sessions was conducted.

CASE SUMMARY

Claimant/Counterrespondent, Strum, alleged that Respondent, Rosensweig churned his account, recommended unsuitable common stocks to him, and did not disclose to him material information concerning those stocks and about the trading of the account. Strum further alleged that Rosensweig recommended that he engage in options trading which was unsuitable. Strum argued that Rosensweig's conduct violated his fiduciary duty and was fraudulent. Further, Strum maintained that Respondent Dean Witter negligently supervised Rosensweig's handling of Claimant's account.

Respondents, Dean Witter and Rosensweig, denied all allegations of wrongdoing contained in the Statement of Claim and maintained that Strum's investment objective was speculation and that Strum was fully aware of the risks inherent in the investment strategy he employed with Dean Witter and Rosensweig. Respondents further maintained that each recommendation made to Strum was consistent with his objectives and were suitable; that the trading activity in the case was caused by Strum's desire to buy and sell securities regularly and that the activity in the account was consistent with Strum's trading objective.

Respondent, Rosensweig, further asserted, by way of a Counterclaim, that Strum illegally recorded telephone conversations in violation of Chapter 934, Florida Statutes. Rosensweig asserted that numerous telephone conversations between Rosensweig and Strum were recorded by Strum within the State of Florida and without Rosensweig's knowledge or consent.

With respect to the Counterclaim, Strum conceded that he recorded telephone calls without Rosensweig's consent but submits that only the statutory minimum damages should be awarded.

RELIEF REQUESTED

Claimant/Counterrespondent, Strum requested compensatory damages, punitive damages, prejudgment interest, costs, and attorneys' fees, and that only the statutory minimum damages should be considered for the Counterclaim and that Counterclaimant Rosensweig's request for punitive damages and attorneys' fees be denied.

Respondents, Dean Witter and Rosensweig, requested that all claims asserted by Claimant Strum be denied and that the issue of attorneys' fees be referred to a court of competent jurisdiction. Dean Witter and Rosensweig further requested that the Panel direct that the NASD expunge Rosensweig's record in this matter.

With respect to the Counterclaim, Respondent/Counterclaimant, Rosensweig requested statutory damages of \$1,000.00 and additional punitive damages, as provided by Section 934.10 of the Florida Statutes, and that attorneys' fees should be referred to a court of competent jurisdiction.

OTHER ISSUES CONSIDERED & DECIDED

1. Chairperson, Stein, was unable to attend the two sessions scheduled for April 26, 1996. During the second session held on April 20, 1996, the parties agreed on the record to proceed without the Chairperson's participation on April 26, 1996 with the understanding that the Chairperson would review the transcripts of the proceedings before the Panel rendered a final Award.
2. Upon motion of Respondents, the Arbitrators were provided with a tape recording (approximately 120 minutes in length) of conversations between Strum and Rosensweig and listened to this tape individually prior to the final hearing on April 27, 1996.
3. 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. Respondents, Dean Witter and Rosensweig, are found liable, jointly and severally, and shall pay to Claimant, Strum, the total amount of \$52,881.02, inclusive of prejudgment interest but excluding attorneys' fees and costs, calculated as follows:
 - a. The claim for churning is denied as Strum failed to prove the requisite element of control;
 - b. The claim for unsuitability of trading in options and the lack of supervision is granted, and the amount of damages sought, \$28,867.00 plus prejudgment interest of \$6,735.00 totaling \$35,602.00, is awarded to Strum; and
 - c. The claim for unsuitability of trading in certain stocks other than options and the lack of supervision thereof is granted, and actual damages of \$14,009.00 plus prejudgment interest of \$3,270.02 is awarded to Strum. (The Panel excluded Claimant's alleged damage claim of \$6,485.00 and prejudgment interest of \$1,511.98 for trading of the Cestco stock because the Panel determined that Strum failed to carry his burden of proof as to the unsuitability of that trade).

2. Claimant's request for punitive damages is denied.
3. Claimant's request for attorneys' fees is granted, and pursuant to a stipulation of the respective parties, the amount of attorneys' fees is to be determined by a court of competent jurisdiction.
4.
 - a. Claimant/Counterrespondent Strum is found liable on the Counterclaim and shall pay to Respondent/Counterclaimant Rosensweig the amount of \$1,000.00.
 - b. Respondent/Counterclaimant's claim for punitive damages is denied.
 - c. Respondent/Counterclaimant's claim for attorneys' fees is granted, but only as to those fees related to pursuing the Counterclaim and not for defense of the Statement of Claim. Pursuant to a stipulation by the respective parties, the amount of attorneys' fees is to be determined by a court of competent jurisdiction.
5. Respondent, Rosensweig's request that the Panel direct that the NASD expunge Rosensweig's records with respect to this matter is denied.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed Forum Fees in the amount of \$7,500.00 (ten (10) hearing sessions x \$750.00).
2. Respondents, Dean Witter and Rosensweig, are hereby assessed \$7,500.00, jointly and severally, \$750.00 of which shall be paid directly to Claimant, Strum, and \$6,750.00 of which shall be paid to the National Association of Securities Dealers, Inc.
3. Respondents, Dean Witter and Rosensweig, shall reimburse Claimant, Strum, \$250.00 for the non-refundable filing fee, for a total amount of \$950.00 in fees due to Claimant.
4. Respondent, Dean Witter, shall pay to the NASD the outstanding member surcharge of \$350.00 pursuant to Section 45 of the Code.
5. Claimant, Strum, shall pay to the NASD the outstanding filing fee for Respondent's Counterclaim of \$500.00.
6. The NASD shall retain the non-refundable filing fee of \$250.00 and \$750.00 hearing session deposit paid by Claimant.

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

ARBITRATORS

Concurring Arbitrators' Signatures

/s/

Craig Edward Stein, Esq.

Chairperson/Public

/s/

John Darling

Panelist/Industry

/s/

Camille Besold

Panelist/Public

Date of Decision: June 10, 1996