

## **FINAL ORDER**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of Arbitration Between

Sarah A. Flick,

Claimant,

and

No. 95-02963

First of Michigan Corporation  
and Thomas C. Oakes,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimant Sarah A. Flick ("Claimant") did not appear at the hearing and was unrepresented. Claimant was previously represented by James A. Zitsman, Esq. of Columbus, Ohio, Robert Karoly of Securities Arbitration Specialists, Inc. located in Vero Beach, Florida, and Leann Kowalski, Esq. of Pittsburgh, Pennsylvania.

Respondents First of Michigan Corporation ("First of Michigan") and Thomas C. Oakes ("Oakes") (collectively referred to as "Respondents") were represented by Michael P. Coakley, Esq. of Miller, Canfield, Paddock and Stone located in Detroit, Michigan.

### **CASE INFORMATION**

The Statement of Claim was filed on or about June 16, 1995.

Claimant's Submission Agreement was signed on April 6, 1995.

The Joint Statement of Answer was filed on or about August 14, 1995.

Respondent First of Michigan's Submission Agreement was signed on November 20, 1995 by Conrad W. Koski, Executive Vice President & Treasurer of First of Michigan Corporation.

Respondent Oakes' Submission Agreement was signed on November 20, 1995.

### HEARING INFORMATION

A telephonic pre-hearing conference was held on January 8, 1996 for one (1) session.

The hearing was held on July 15, 1997 for one (1) session in Southfield, Michigan.

### CASE SUMMARY

Claimant brought this action to recover losses allegedly sustained in her securities account at First of Michigan which was serviced by Respondent Oakes, a registered representative of First of Michigan. In the pleadings filed, Claimant alleged that she indicated to Respondents that her investment objectives were conservative growth and that she did not want risky investments. Claimant asserted that over the course of 1991 and 1992 there were unauthorized trades made by Respondent Oakes in her account. Claimant contended that when she received the confirmations from these unauthorized trades and requested explanations Respondent Oakes would advise her: "Don't worry, we're making money." Claimant alleged that her account was transformed from a portfolio of blue chip companies designed for conservative growth, which included stocks such as Merck, General Electric, and Abbott Labs, to an aggressive account trading in speculative stocks. Claimant contended that her account generated high commissions for Respondents, exhibited a high degree of turnover and exhibited no evidence to support that the trading was done for Claimant's benefit. Claimant asserted that Respondent Oakes also misrepresented the nature of investments in her account, as well as her account value and margin balance. Accordingly, Claimant made the following legal claims, including: (1) violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; (2) violation of Michigan Securities Rules § 451.501; (3) churning; (4) unsuitable investments; (5) unauthorized trading; (6) failure to supervise; (7) breach of fiduciary duty; and (8) violation of NASD Rules of Fair Practice, Art. III, §§ 2 and 18.

Respondents denied all liability to Claimant in the Joint Statement of Answer. In the pleadings filed, Respondents contended that the Claimant received confirmations for each investment transaction, as well as monthly account statements, and that the Claimant knew or should have known of all transactions. Respondents asserted that the Claimant also received several prospectuses in connection with initial public offerings she invested in and on the mutual funds she purchased. Respondents alleged that Claimant confirmed that she was aware of all transactions in her account, that these transactions met her investment objectives, and that these transactions had been initiated with her full knowledge, understanding, and consent. Respondents contended that the Claimant was fully capable of and made the decisions for her account. Accordingly, Respondents asserted the following affirmative defenses, including: (1) the Statement of Claim fails to state a claim upon which relief can be granted; (2) the Statement of Claim is barred by reason of Claimant's negligence, comparative negligence and contributory negligence; (3) the Statement of Claim is barred by virtue of negligence, comparative negligence and contributory negligence of other third parties' acts and

actions who are not related to Respondents or whose acts or actions are not attributable to Respondents; (4) the Statement of Claim is barred by reason of Claimant's ratification of the actions complained of; (5) the Statement of Claim is barred by the doctrines of waiver, estoppel, laches, and release; (6) the Statement of Claim is barred for the reason that Claimant did not rely on any alleged acts, misrepresentations or omissions; (7) the Statement of Claim is barred for the reason that Claimant exercised active control over the account with First of Michigan and all investments related thereto; (8) the Statement of Claim is barred for the reason that the alleged actions of Respondents were not the proximate cause or cause in fact of any alleged injury; (9) the Statement of Claim is barred for the reason that Respondents exercised due care and acted in good faith with respect to Claimant and Claimant's accounts; and (10) the Statement of Claim is barred by reason of Claimant's failure to give notice of the acts complained of to Respondents.

### **RELIEF REQUESTED**

Claimant requested an award of compensatory damages in the amount of \$40,103; lost return on her investments; punitive damages; and attorney's fees.

Respondents requested that the claims be dismissed with prejudice and that they be awarded their costs and attorney fees.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The panel of arbitrators convened on July 15, 1997 at 9:00 in the morning at the American Arbitration Association offices in Southfield, Michigan for the purposes of hearing the subject case. Counsel for Respondents First of Michigan and Thomas Oakes, Michael Coakley, was also present, as was Respondent Oakes and their expert witness. All present awaited the appearance of the Claimant and her counsel, if any, until 10:00 in the morning and then concluded that in all likelihood she would not appear. Mr. Coakley advised the panel that he had tried to reach Ms. Flick by telephone twice with no success, and that he believes that she still resides in Grand Rapids at her last known address as annuity checks are mailed to this address and are not returned. The undersigned arbitrators have determined that the Claimant had received due notice of the hearing as required under §10315 of the NASD Code of Arbitration Procedure ("Code") and that arbitration of the matter would proceed pursuant to §10318 of the Code.

### **FINAL ORDER**

The undersigned arbitrators have unanimously decided:

1. The Statement of Claim is hereby dismissed without prejudice. This is not a decision on the merits, but rather a decision calculated to stop the tolling of the six year rule, § 10304 of the NASD Code of Arbitration Procedure. If Claimant wishes to reassert her claims, a Statement of Claim must be submitted and required fees paid; and
2. Other than forum fees, which are addressed below, all other claims and requests for relief not specifically enumerated are hereby denied without prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 and there was one (1) hearing sessions x \$500 = \$800 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (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 \$150 and shall retain as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant Sarah A. Flick.

Pursuant to § 10332(c) of the Code, Claimant Sarah A. Flick is liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution all forum fees incurred in this matter in the amount of \$300 (total forum fees of \$800 - \$500 hearing session deposit ).

Pursuant to § 10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$300 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent First of Michigan Corporation.

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

Concurring Arbitrators' Signatures

/s/ Richard G. Porter, Esq.  
Richard G. Porter, Esq.  
Chairperson  
Public Arbitrator

July 24, 1997  
Dated:

/s/ George H. Zinn, Jr., Esq.  
George H. Zinn, Jr., Esq.  
Panelist  
Public Arbitrator

July 24, 1997  
Dated:

/s/ Frank G. Bank  
Frank G. Bank  
Panelist  
Industry Arbitrator

July 24, 1997  
Dated:

For NASD use only:

Date Final Order was served on the parties: July 25, 1997