

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

LeRoy A. Smith, M.D., P.A. Pension Plan
LeRoy A. Smith

95-03969

Names of Respondents

Evensky & Brown Investments Inc.
Marc H. Singer

REPRESENTATION

For Claimants, LeRoy A. Smith, M.D., P.A. Pension Plan and LeRoy A. Smith ("Smith");
Frank R. Brady, P.A., Boca Raton, Florida.

For Respondent, Mark H. Singer ("Singer"): Theodore F. Brill, P.A., Plantation, Florida.

The Respondent Evensky & Brown Investments, Inc. did not appear (see "Other Issues").

CASE INFORMATION

Statement of Claim filed: August 14, 1995.

Claimants' Submission Agreements signed on: August 9 and 21, 1995.

Statement of Answer filed by Respondent, Singer on: February 5, 1996.

Respondent, Singer's Submission Agreement signed on: February 5, 1996.

The Respondent Evensky & Brown Investments, Inc. did not execute a submission agreement or submit a Statement of Answer as required pursuant to Section 10314 of the Code of Arbitration Procedure (see "Other Issues").

HEARING INFORMATION

Four hearing sessions were conducted in this matter on August 29, 1996 and September 12, 1996 in Fort Lauderdale, Florida.

CASE SUMMARY

Claimants alleged that they presented testimonial and documentary evidence of continuing misrepresentations and omissions on the part of Respondents with respect to written account statements furnished to Claimants by Respondents each quarter during the period January 1, 1988 through March 31, 1995. Claimants further alleged that each quarterly statement of account furnished by Respondents to Claimants failed to accurately and properly disclose the value of three limited partnerships maintained in the Pension Plan, and that Respondents used the account statements to mislead Claimants as to the actual value and performance of their investment portfolio which was being managed by Respondents.

Respondent, Singer, maintained that at all times the Claimant, LeRoy A. Smith, was a very experienced investor and that his get rich quick investment experience included various tax shelters and other high risk investments; that Respondent, Marc Singer, recommended diversified investments including mutual funds, annuities, energy and real estate limited partnerships; that specifically, the recommendations included investing the bulk of money in mutual funds seeking long term growth through low volatility, low risk growth stocks; that Respondent, Marc Singer, attempted to recommend a balanced portfolio; that it is inherent in a diversified portfolio that there will always be investments that underperform in hindsight; that Claimant was completely involved in all of the discussions and decisions and was continuously advised by Marc Singer during the time the investments were made; that the partnerships complained of, especially when taken in conjunction with the other recommendations made by Mr. Singer, were totally appropriate and suitable for the Claimants and that Marc Singer had more than a reasonable and adequate basis for making all of the representations and statements to the Claimant. Respondent, Marc Singer further denied each allegation of the claim where it is alleged that the sales of the partnerships constituted a violation of the Florida Deceptive and Unfair Trade Practices Act, breach of fiduciary duty, negligent misrepresentation and a breach of prudent investor standards.

RELIEF REQUESTED

Claimants requested an award of compensatory damages in the amount of \$60,000.00, punitive damages, reasonable attorneys' fees and costs incurred in prosecuting the claim, pre-award interest and such other relief as may be just and proper.

Respondent Marc H. Singer requested a dismissal of the claims against him, or, alternatively, that an award be entered in his favor and that he be awarded his attorney's fees and costs in defending the action.

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 originals remain on file with the NASD.

Pursuant to Section 10101 of the Code of Arbitration Procedure ("Code"), the arbitration panel found subject matter jurisdiction over this entire controversy.

The arbitration panel further found that the Respondent Evensky & Brown Investments, Inc. was a member of the NASD at the time the controversy arose. Consequently, the arbitration panel found personal jurisdiction over the Respondent Evensky & Brown Investments, Inc., pursuant to Section 10301 of the Code.

In view of the above, the arbitration panel found that the Respondent Evensky & Brown Investments, Inc. was required to file with the NASD a Statement of Answer and a properly executed Submission Agreement pursuant to Section 10314(b) of the Code. In this regard the arbitration panel found that the Statement of Claim was properly served upon the Respondent Evensky & Brown Investments, Inc., pursuant to Section 10314(a) of the Code.

In addition, in accordance with Sections 10310, 10315 and 10318 of the Code, the arbitration panel found that the NASD provided Respondent Evensky & Brown Investments, Inc. with "due notice" of the hearing conducted in this matter by regular and certified mail. The arbitration panel, therefore, determined to proceed with the hearing without Respondent Evensky & Brown Investments, Inc., whose absence was unexcused.

At the conclusion of the Claimants' case, the Respondent, Singer made a motion for directed verdict, or, alternatively, a motion to dismiss the Claimants' claims plus a request for attorneys' fees and costs. The Claimants objected to the motion and offered a counter motion for directed verdict in Claimants' favor and objected to Respondent, Singer's request for attorneys' fees. (See decision below).

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Respondent Marc Singer's motion for a directed verdict, or, alternatively, motion to dismiss the Claimants' claims is granted.
2. Each party shall bear their respective costs including attorneys' fees.

FORUM FEES

Pursuant to Section 10332 of the Code of Arbitration Procedure, the panel has assessed Forum Fees in the amount of \$2,000.00 (\$500.00 x 4 sessions).

1. Claimants are hereby assessed Forum Fees in the amount of \$2,000.00 for which the NASD shall retain the \$500.00 previously deposited in partial satisfaction thereof leaving a balance due to the NASD, by Claimants, in the amount of \$1,500.00.

2. The NASD shall retain the \$150.00 nonrefundable filing fee previously paid by the Claimants to the NASD.
3. Respondent, Evensky & Brown Investments, Inc., is assessed the sum of \$300.00 representing the member surcharge pursuant to Section 10333 of the Code of Arbitration Procedure.

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

ARBITRATION PANEL

Concurring Arbitrators' Signatures

Name

Public/Industry

/s/

Stan West

Public/Chairman

/s/

John J. Hearn

Public/Panelist

/s/

Darryll R. Bauchert, Sr.

Industry/Panelist

Date of Decision: November 11, 1996