

AWARD
NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Rafael Healy and Patricio Healy,

Claimants.

and

No. 95-04073

D.E. Frey & Company, Incorporated,
Peter Sperling, and
Kenneth Sperling,

Respondents.

REPRESENTATION OF PARTIES

Claimants, Rafael and Patricio Healy, were represented by Stuart J. Dow, Esquire and Franci Crane, Esquire of Susman Godfrey L.L.P., located in Houston, Texas.

Respondent, D.E. Frey & Co., Inc., was represented by Wesley B. Howard, Esq. Of Brega & Winters, located in Denver, Colorado.

Respondents, Peter and Kenneth Sperling, were represented by J. Eugene Clements, Esquire of Clements, O'Neill, Pierce & Nickens, located in Houston, Texas.

CASE INFORMATION

Claimants, Rafael and Patricio Healy's Statement of Claim was filed on or about August 21, 1995.

Claimants, Rafael and Patricio Healy's Submission Agreement was signed on August 8, 1995.

Respondent, D.E. Frey & Co., Inc.'s Statement of Answer was filed on or about October 2, 1995.

Respondent, D.E. Frey & Co., Inc.'s Submission Agreement was signed by Mark Appleton, Senior

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Vice President, on October 12, 1995.

Respondents, Peter and Kenneth Sperling's joint Statement of Answer was filed on or about October 2, 1995.

Respondents, Peter and Kenneth Sperling's joint Amended Statement of Answer was filed on or about March 11, 1996.

Respondents, Peter and Kenneth Sperling's Submissions Agreements were signed on September 29, 1995.

HEARING INFORMATION

The hearing was held on:

- September 4, 1997 for two (2) sessions,
- September 5, 1997 for two (2) sessions,
- December 16, 1997 for two (2) sessions,
- December 17, 1997 for two (2) sessions,
- December 18, 1997 for two (2) sessions, and
- December 19, 1997 for two (2) sessions.

The hearing was held in Houston, Texas.

CASE SUMMARY

Rafael Healy and his son, Patricio Healy, (hereafter, collectively referred to as "Claimants") brought this action against brokers Kenneth Sperling and Peter Sperling, and the brokerage houses who employed them, Smith Barney, Inc. ("Smith Barney") and D.E. Frey & Co., Inc. ("D.E. Frey"), (hereafter, collectively referred to as "Respondents") in order to recover monies lost in their joint account.

Specifically, Claimants alleged that (1) the Sperlings failed to invest the Claimants' money with their stated investment objectives; moreover, the Sperlings misrepresented the risky nature of the investments the Sperlings undertook with Claimants' money; (2) the Sperlings failed to either consult with or inform the Claimants prior to making various trades; (3) the Sperlings ignored oral and written requests from Rafael Healy to stop purchasing bonds by leveraging on high margins; and (4) the Sperlings disregarded Rafael Healy's instructions in December of 1993 to liquidate the

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Claimants position in bonds.

Claimants alleged that they were inexperienced investors when they opened their account with Smith Barney in July of 1989. According to Claimants, they repeatedly informed the Sperlings of their primary objective which was safety. Claimants contended that although they were led to believe their money was safely invested in U.S. government bonds, they were not informed of the serious risks associated with trading long-term treasuries every few months, gambling on fluctuating interest rates and leveraging on high margins.

In December of 1993, after the Sperlings told Claimants they were leaving Smith Barney to begin employment with D.E. Frey, Claimants allegedly agreed to allow the Sperlings to transfer their account to D.E. Frey but only on the explicit condition that the Sperlings liquidate the bond portfolio immediately and place the funds in a money market account. Although Peter Sperling allegedly agreed to the condition, Claimants discovered that not only had the Sperlings failed to liquidate the existing bonds, they had also purchased additional bonds.

In its Answer, D.E. Frey denied all allegations of wrongdoing asserting that the meeting in December of 1993 took place prior to the Claimants' account opening at D.E. Frey. D.E. Frey maintained that the limited transactions which occurred at D.E. Frey were consistent with the Claimants' financial condition and investment objectives. D.E. Frey requested that the claim be dismissed.

Peter and Kenneth Sperling denied the allegations contained in the claim alleging that the claim was meritless since Rafael was a sophisticated investor and that the purchases were proper and authorized. The Sperlings blamed the losses on the bond market correction of 1994. The Sperlings also asserted that the Claimants misstated their damage calculations.

RELIEF REQUESTED

Claimants, Rafael and Patricio Healy, requested an award for \$624,452 in actual damages and lost profits; attorneys' fees; and punitive damages in an undisclosed amount.

Respondent, D.E. Frey & Co., Inc., requested that the claims asserted against it be dismissed in their entirety and that it be awarded its costs and attorneys' fees.

Respondents, Peter and Kenneth Sperling, requested that the Statement of Claim be dismissed in its entirety and all costs assessed against the Claimants.

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OTHER ISSUES CONSIDERED AND DECIDED

Claimants named Smith Barney, Inc. as a Respondent in the claim. On or about September 3, 1997, the NASD Regulation, Inc. Office of Dispute Resolution was notified that Claimants settled their claims with Smith Barney, Inc.

The parties have agreed that the Award in this matter may be executed in counterpart copies and agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. Respondent, Peter Sperling, is liable for and shall pay to Claimants, Rafael and Patricio Healy, the sum of \$138,863 in compensatory damages;
2. Respondent, Peter Sperling, is liable for and shall pay to Claimants, Rafael and Patricio, the sum of \$75,000 in attorneys' fees. In deciding to award attorneys' fees, the arbitrators also considered the stipulation between the parties;
3. Other than forum fees addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied in their entirety and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were twelve (12) hearing sessions \times \$1,000 = \$12,000 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 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee of \$250 and shall retain as forum fees the hearing session deposit of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants, Rafael and Patricio Healy.

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Pursuant to § 10333 of the Code, Respondent, D.E. Frey & Co., Inc., is liable for and shall pay the sum of \$500 to the NASD Regulation, Inc. Office of Dispute Resolution for the member surcharge. The NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$500 member surcharge previously paid by Respondent, Smith Barney, Inc.

Pursuant to § 10332 of the Code, Respondent, Peter Sperling, is liable for and shall pay the sum of \$11,000 to the NASD Regulation, Inc. Office of Dispute Resolution for forum fees. Respondent, Peter Sperling, is also liable for and shall pay to Claimants, Rafael and Patricio Healy, the sum of \$1,000 as reimbursement of the hearing session deposit.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain postponement fee of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants, Rafael and Patricio Healy.

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

Concurring Arbitrators' Signatures

Russell E. Rains, Esquire
Russell E. Rains, Esquire
Chairperson
Public Arbitrator

February 25, 1998
Dated:

Jack W. Raines, Esquire
Jack W. Raines, Esquire
Panelist
Public Arbitrator

February 25, 1998
Dated:

Nick Sacaris
Nick Sacaris
Panelist
Industry Arbitrator

February 26, 1998
Dated:

For NASD use only:
Date Award was served on the parties: March 5, 1998