

AWARD  
NASD Regulation, Inc.

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In the Matter of the Arbitration Between

Name of Claimant

Devon Reiff

95-05270

Name of Respondents

Alex Brown & Sons Incorporated  
Mark Branigan  
Robert Oram

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**REPRESENTATION**

Claimant Devon Reiff ("Claimant") was represented by Kevin P. Conway, Esq., Conway & Conway, New York, NY.

Respondent Alex Brown & Sons, Inc. ("Alex Brown") and Robert Oram ("Oram") were represented by Daniel J. Donovan, Esq., Alex Brown & Sons, Incorporated, Baltimore, MD.

Respondent Mark Branigan ("Branigan") was represented by Stephen Ratner, Esq., Rosenman & Colin, New York, NY.

**CASE INFORMATION**

The Statement of Claim was filed November 11, 1995.

Claimant's Uniform Submission Agreement was signed August 2, 1995.

The Joint Statement of Answer of Respondents Alex Brown and Oram was filed January 31, 1996.

Alex Brown did not file an executed agreement to arbitrate.

Respondent Oram's Uniform Submission Agreement was signed January 10, 1996.

Branigan's Statement of Answer was filed January 31, 1996.

Branigan's Uniform Submission Agreement was signed January 29, 1996.

**HEARING INFORMATION**

Prehearing Dates/Sessions: March 14, 1997/one session  
May 12, 1998/one session

Hearing Dates/Sessions: March 26, 1997/two sessions  
March 27, 1997/two sessions

June 19, 1997/two sessions  
June 20, 1997/two sessions  
June 23, 1997/two sessions  
June 24, 1997/two sessions  
July 30, 1997/two sessions  
July 31, 1997/two sessions  
September 11, 1997/two sessions  
September 12, 1997/two sessions  
October 24, 1997/two sessions  
December 15, 1997/two sessions  
December 16, 1997/two sessions  
December 17, 1997/two sessions  
October 21, 1998/two sessions  
October 22, 1998/two sessions  
November 30, 1998/two sessions

Hearing Location: NASD Regulation Office of Dispute Resolution  
New York, NY

### CASE SUMMARY

Claimant alleged that he opened a discretionary account with Alex Brown in February 1991. Claimant further alleged that his account executive from 1991 through March 1994 was Branigan, who was supervised by Oram. Claimant alleged that Branigan fraudulently induced Claimant to open the account with Alex Brown and to eventually close his account with Shearson Lehman Brothers, by making a number of representations to the effect that Branigan was a sophisticated partner at Alex Brown, a money manager with superior ability to manage risk and that Branigan himself consistently achieved an average return of 48% percent on his clients' portfolios through a specially managed and supervised program. Claimant asserted that through these misrepresentations and knowingly false statements, Branigan gained the trust and confidence of Claimant and succeeded in giving Claimant the impression that he would be looking after Claimant's welfare. In addition, Claimant contended that following consolidation of the two accounts at Alex Brown, Branigan effectively exercised complete control over Claimant's account, except for that portion which contained municipal bonds.

Claimant alleged that through repeated pleas and pressure tactics, Branigan convinced Claimant to allow him to have control of Claimant's account by reassuring Claimant that he would be sensitive to Claimant's objectives of capital preservation and growth. Claimant further alleged that Branigan falsely stated that he always worked with a 15% stop loss technique, and that Branigan knew the statement was false when he made it. Claimant asserted that Branigan had been informed that Claimant had restructured his law firm and was getting married, and for those reasons Claimant needed to preserve his capital. Claimant alleged that although this material change in his personal circumstances should have required Alex Brown to revise Claimant's "risk profile", Alex Brown failed to do so. In fact, Claimant alleged that at Branigan's insistence, Claimant executed a blank Discretionary Trading Approval Form, an Option Account Agreement, a Trading Authorization Limited to Purchases and Sales of

Securities and Commodities, as well as a Full Trading Authorization with Privilege to withdraw Money and/or Securities; all the while stating that this was routine procedure for each new customer. Claimant contended that without his knowledge, Branigan listed "speculation" as one of Claimant's investment objectives.

Claimant alleged that upon Branigan's advice and with Alex Brown's knowledge, in February 1992, Claimant was induced to transfer \$755,000.00 in cash, stocks and municipal bonds out of the Shearson account into his account with Alex Brown, which brought the net value of Claimant's account at Alex Brown to \$975,000.00. Claimant asserted that when Claimant liquidated his account in March 1994, the net value of his account was \$476,000.00, of which at least \$447,000.00 in loss was directly attributable to the reckless, speculative and inappropriate trading carried on by Branigan.

Claimant alleged that Branigan consistently failed to manage Claimant's account in a logical manner and recklessly traded Claimant's securities making haphazard investments. Claimant contended that the investments followed no logical pattern but were indicative of brutal speculation. In addition, Claimant alleged that Branigan churned Claimant's account, knowingly and recklessly engaging in excessive trading, which was grossly unsuitable to Claimant's circumstances and financial condition, and which had as its primary purpose, to earn commissions, fees and commission credits to all of the Respondents. Claimant further alleged that the extent of the risk and the extent of the commissions generated was fraudulently kept from him. Claimant contended that Alex Brown and Oram failed to adequately supervise Branigan and to confirm that Claimant understood and was satisfied with the management of his account. Overall, Claimant alleged that the activities and actions of Respondents Alex Brown, Branigan and Oram violated federal and state securities laws as well as the rules and regulations of the securities industry.

Respondents Alex Brown and Oram denied the allegations of wrong-doing asserted in the statement of claim. Alex Brown and Oram maintained that Claimant is now married to Branigan's former wife and was in an attorney-client relationship with Branigan prior to Claimant opening his account with Alex Brown. Respondents Alex Brown and Oram asserted that Claimant came to Branigan and informed him that he had watched the performance of the investment recommendations Branigan made to his former wife, and Claimant was impressed by the results. Furthermore, Alex Brown and Oram maintained that although Claimant's account was originally opened as a discretionary account, Branigan declined to exercise discretion on Claimant's behalf, and the account was transferred to a non-discretionary account and that Claimant controlled that account.

Respondents Alex Brown and Oram maintained that Claimant informed Respondents that he had an account for ten years with another broker, had extensive experience in the securities markets, was the managing partner of his law firm and that he owned properties in New York, New Jersey and the Caribbean Islands -- in other words, Claimant insisted he was a well educated, experienced and wealthy investor. In addition, Respondents Alex Brown and Oram maintained that Claimant's stated investment objective, consistent with the representations he made about himself, was to increase the value of his account through a combination of investments,

including the purchase of speculative equity and option securities. Respondents Alex Brown and Oram contended that although Branigan often recommended the purchase of particular securities (usually on the basis of Alex Brown research analysts), it was Claimant's practice to dictate the size of each position and the amount of his investment in any particular security. In addition, Respondents Alex Brown and Oram stated that occasionally Claimant bought and sold securities without any input from Branigan.

Respondents Alex Brown and Oram maintained that Claimant controlled his account at all time and any intense trading was done at Claimant's direction. In addition, Respondents Alex Brown and Oram asserted that the commission rate charged to Claimant was discounted and such discounts suggest a lack of intent to churn an account. Respondents Alex Brown and Oram maintained that Branigan was adequately supervised at all times and that Oram properly discharged his supervisory responsibilities. In fact, Oram maintained that he spoke with Claimant during Claimant's account review in July 1993 and Oram specifically asked Claimant about the activity and losses in the account. Respondents Alex Brown and Oram contended that Claimant stated that while he was disappointed in the performance of his account, he had no complaint about the way the account was being serviced and was not accusing Branigan or Alex Brown of any wrong-doing.

Respondents Alex Brown and Oram raised the affirmative defenses of failure to mitigate damages; ratification; no private right of action for alleged violations of rules and regulations of self-regulatory organizations; a failure to state a claim upon which relief can be granted; fails to state a claim of fraud with specificity; estoppel and waiver; all transactions were authorized; and the claims are barred by the statutes of limitations.

Respondent Branigan denied the allegations of wrong-doing as asserted in the statement of claim. Respondent Branigan maintained that Claimant, a successful attorney with substantial assets, controlled his account, made each and every investment decision and authorized each and every purchase and sale in his account. Respondent Branigan further maintained that Claimant was an experienced and sophisticated investor, that he was fully informed of all essential facts regarding the investments he selected, and that he understood precisely what he was doing. Respondent Branigan contended that there was no churning or excessive trading in Claimant's account other than that directed by Claimant.

Respondent Branigan maintained that Claimant was not induced to open an account at Alex Brown, but rather it was Claimant who sought out Branigan and insisted upon opening the account. Respondent Branigan contended that Claimant, married to Branigan's ex-wife, made Branigan's acquaintance when Claimant was retained to represent Branigan in a personal injury action. Respondent Branigan further contended that Claimant became aware of the investment recommendations which Branigan made to his ex-wife and Claimant, after "shadowing" those recommendations to test them on his own, requested that an account be opened for him. Based on the prior relationship between Claimant and Branigan, it is inconceivable that Claimant was not aware of Branigan's experience and background.

Respondent Branigan maintained that no representations about rates of return, supervised programs or managed risk were ever made to Claimant, least of all a promise of a 48% rate of return. Respondent Branigan further maintained that although Claimant initially sought to open a discretionary account, Branigan never exercised discretion and declined to manage the account as a discretionary account, and thus it was converted to a non-discretionary account. Respondent Branigan maintained that Claimant never said anything about wanting to preserve capital and instead said that his broker at Shearson Lehman Brothers was "too conservative" and he wanted to "trade to increase his returns."

Respondent Branigan, in addition to reiterating the defenses also raised by Respondents Alex Brown and Oram, also raised the affirmative defenses of failure to mitigate damages; ratification; no private right of action for alleged violations of rules and regulations of self-regulatory organizations; a failure to state a claim upon which relief can be granted; a failure to state a claim of fraud with specificity; estoppel and waiver; all transactions were authorized; and the claims are barred by the statutes of limitations.

#### **RELIEF REQUESTED**

Claimant requested damages of \$480,000.00 plus pre-award interest; punitive damages of \$2,500,000.00 as well as attorney's fees and all costs and expenses of this arbitration.

Respondents Alex Brown and Oram requested that the claims asserted by Claimant be dismissed in their entirety and the administrative costs of this proceeding be assessed to Claimant.

Respondent Branigan requested the Statement of Claim be dismissed in its entirety and that Claimant be required to reimburse Branigan the costs and expenses of this arbitration and such other and further relief as is just and proper.

#### **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. >

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

### AWARD

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

1. That Respondent Branigan is liable to and shall pay to Claimant \$100,000.00; and
2. That Respondent Alex Brown is liable to and shall pay to Claimant \$30,000.00; and
3. That the claim for punitive damages is denied; and
4. That each party shall bear its own costs and expenses, including attorney's fees, with the exception of forum fees as specified below; and
5. That any and all relief not specifically addressed herein is denied.

### OTHER COSTS

Pursuant to Rule 10333 of the Code, Respondent Alex Brown was assessed a member surcharge of \$500.00 which was paid.

Pursuant to Rule 10319 of the Code, Claimant was assessed an adjournment fee of \$1,000.00 and Respondent Branigan was also assessed an adjournment fee of \$1,000.00.

### FORUM FEES

Pursuant to Rule 10332 of the Code, a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. Therefore, the following Forum Fees are assessed:

1 pre-hearing conference (single arbitrator) x \$300.00	\$ 300.00
1 pre-hearing conference (full panel) x \$1,000.00 =	\$ 1,000.00
34 hearing sessions x \$1,000.00 =	<u>\$34,000.00</u>
Total Forum Fees =	\$35,300.00

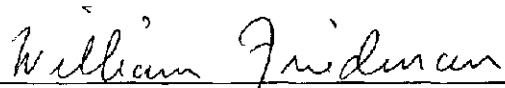
Forum Fees are assessed to Claimant in the amount of \$17,650.00, to Respondent Alex Brown in the amount of \$8,825.00 and to Respondent Branigan in the amount of \$8,825.00. Claimant will receive credit for the hearing session deposit previously submitted to the NASD, leaving Claimant with a net assessment due of \$16,650.00.

Respondents Alex Brown and Branigan each have a forum fees assessment due of \$8,825.00.

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

**AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE**

I, **WILLIAM FRIEDMAN, ESQ.**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

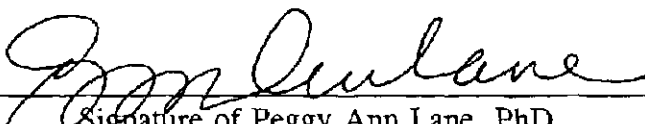


Signature of William Friedman, Presiding  
Public Arbitrator

Date Award Served by NASD Regulation: Dec. 18, 1998

**AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE**

I, **PEGGY ANN LANE, PhD**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

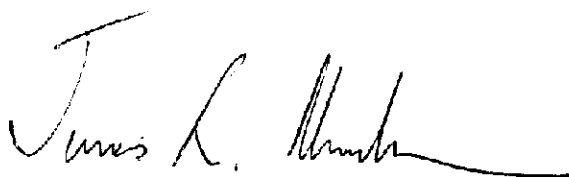
  
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Signature of Peggy Ann Lane, PhD  
Public Arbitrator

Date Award Served by NASD Regulation: Dec 18, 1998



**AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE**

I, **JAMES R. MADAN**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

A handwritten signature in cursive script, appearing to read "James R. Madan", written over a horizontal line.

Signature of James R. Madan  
Industry Arbitrator

Date Award Served by NASD Regulation: Dec. 18, 1998