

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Timothy J. Mahan and Ursula M. Mahan.

Claimants,

and

No. 96-00612

Dean Witter Reynolds, Inc. and David S. Rossman,

Respondents,

REPRESENTATION OF PARTIES

For Claimants: Timothy J. Mahan and Ursula M. Mahan (the "Mahans") were represented by James J. Moylan, Esq., of Arnstein & Lehr, located in Chicago, Illinois.

For Respondents: Dean Witter Reynolds, Inc. ("Dean Witter") and David S. Rossman ("Rossman") were represented by Michelle Bryan Oroschakoff, Esq., of Dean Witter Reynolds, Inc., located in San Francisco, California.

CASE INFORMATION

Claimants' Statement of Claim was filed on: February 9, 1996.
Claimants' Submission Agreement was signed on November 27, 1995.

Respondents' Statement of Answer was filed on: March 20, 1996.
Dean Witter Reynolds' Submission Agreement was signed by Michelle Bryan Oroschakoff, Vice President and Senior Attorney of Dean Witter, on: March 20, 1996.
Rossman's Submission Agreement was signed on: March 27, 1996.

HEARING INFORMATION

Pre-Hearing Conferences: September 23, 1996 for one (1) session.

Hearing Date/Sessions: November 19, 1996 for two (2) sessions;
November 20, 1996 for two (2) sessions; and
November 21, 1996 for two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimants alleged that Respondents Dean Witter and Rossman, a registered representative of Dean Witter and Claimants' account executive, made unsuitable investments by failing to follow Claimants' investment objectives of preservation of principal and conservative investing, and by failing to diversify Claimants' account. The Mahans asserted that initially they were trading of various securities in their Dean Witter account for quick profits and losses, which generated commissions for Respondents, but led to the financial detriment of their account. The Mahans further asserted that eventually Rossman placed all of their assets into only one security: Beta Well Service, Inc. As a result, Claimants' claimed that they had suffered substantial financial losses up to and including the liquidation of their account. Claimants' made the following legal claims: (1) violation of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934; (2) violation of NASD Rules of Fair Practice Art. III, §§ 1 and 2; (3) violation of the Illinois Securities Law of 1953, as Amended; (4) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act; (5) breach of contract; (6) negligence; (7) common law fraud; (8) breach of fiduciary duty; (9) control person liability of Dean Witter for acts of Rossman; and (10) *respondeat superior* liability of Dean Witter for acts of Witter.

Respondents Dean Witter and Rossman denied the allegations set forth in the Statement of Claim. Respondents stated that Claimants made all decisions, authorized all investments and retained control over their Dean Witter account at all times, including their purchases of Beta stock. Respondents further contended that Claimants' indicated that their investment objective was aggressive speculation. According to Respondents, Claimants' holding of Beta stock was liquidated in order to cover margin debt. Respondents argued that all federal securities law claims are time-barred, and that there is no basis for Claimants' allegations that Respondents are liable for Claimants' market losses. Respondents also made the following affirmative defenses: (1) Claimants' claims are barred by the doctrine of ratification; (2) Claimants' claims are barred by the doctrine of waiver; (3) Claimants' claims are barred by the doctrine of estoppel; (4) Claimants failed to mitigate their damages; (5) Respondents cannot be held liable for losses resulting from market and other economic forces beyond the control of Respondents; (6) Claimants' losses, if any, are the result of individuals or corporations other than Respondents, including the actions of Claimants, whose own contributory and comparative negligence bars them from recovering any damages from Respondents; (7) Claimants' assumed the risk of all transactions; and (8) Claimants have failed to calculate their damages correctly.

RELIEF REQUESTED

Claimants the Mahans requested an award in an amount no less than \$197,000 (including margin interest), plus interest thereon, and costs.

Respondents Dean Witter and Rossman requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorney fees.

OTHER ISSUES CONSIDERED & DECIDED

Prior to the hearing of this matter, the Mahans moved to strike the Statement of Answer and bar evidence, and Respondents Dean Witter and Rossman submitted a response in objection of this motion. After careful consideration, the undersigned panel of arbitrators denied this motion.

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 NASD Regulation, Inc. Office of Dispute Resolution.

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. The Statement of Claim is dismissed with prejudice and denied in its entirety; and
2. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Pursuant to §10332(b) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed: One (1) pre-hearing conference session x \$300 = \$300.00; Six (6) hearing sessions x \$750 = \$4,500; Total Forum Fees = \$4,800.00.

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 \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimants Timothy J. Mahan and Ursula M. Mahan.

Claimants Timothy J. Mahan and Ursula M. Mahan are jointly and severally liable for and shall pay forum fees in the amount of \$1,650 (= 1/2\$4,800 total forum fees - \$750 hearing session deposit).

Respondent Dean Witter Reynolds, Inc. is liable for and shall pay forum fees in the amount of \$1,650 (= ½\$4,800 total forum fees - \$750 credit for unrefunded postponement fee).

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent Dean Witter Reynolds, Inc. NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent Dean Witter Reynolds, Inc.

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

Dated:

/s/ Stephen James Nagy, Esq.
Stephen James Nagy, Esq.
Public Arbitrator, Presiding Chair

January 23, 1997

/s/ Brian H. Boyle, Esq.
Brian H. Boyle, Esq.
Public Arbitrator

January 22, 1997

/s/ Michael T. Gedzun
Michael T. Gedzun
Industry Arbitrator

January 22, 1997

Date Served: February 5, 1997