

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Carl R. McInnis and Tammy McInnis,

Claimants,

and

No. 96-01528

Dean Witter Reynolds, Inc., Charles Z. Plesofsky, and  
Ellsworth Stevens Scales,

Respondents,

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### **REPRESENTATION OF PARTIES**

Claimants Carl R. McInnis and Tammy McInnis were represented by Carl R. McInnis, of Memphis, Tennessee.

Respondents Dean Witter Reynolds, Inc., Charles Z. Plesofsky, and Ellsworth Stevens Scales were represented by Edward W. Larkin, Esquire, of Dean Witter Reynolds, Inc., located in New York, New York.

### **CASE INFORMATION**

Claimants Carl R. McInnis and Tammy McInnis' Statement of Claim was filed on or about April 8, 1996. Claimants Carl R. McInnis and Tammy McInnis' Submission Agreement was signed on April 1, 1996.

Respondents Dean Witter Reynolds, Inc., Charles Z. Plesofsky, and Ellsworth Stevens Scales' Statement of Answer was filed on or about June 21, 1996. The NASD Regulation, Inc. Office of Dispute Resolution has no record of Submission Agreements from respondents Dean Witter Reynolds, Inc., Charles Z. Plesofsky, and Ellsworth Stevens Scales

### **HEARING INFORMATION**

A pre-hearing conference was held on January 20, 1997 for one (1) session.

The hearing was held on January 22, 1997 for two (2) sessions.

The hearing was held in Memphis, Tennessee.

### CASE SUMMARY

Claimants Carl R. McInnis and Tammy McInnis ("Claimants") alleged that respondents Dean Witter Reynolds, Inc. ("Dean Witter"), branch manager respondent Ellsworth Stevens Scales, and account executive Charles Z. Plesofsky ("Mr. Plesofsky") were liable for damages resulting from churning, negligence, unsuitable investments, misrepresentations of material facts, and failure to supervise. Claimants stated that on March 10, 1993 Carl R. McInnis ("Mr. McInnis") rolled over his entire individual retirement account (the "IRA") to Dean Witter containing 900 shares of Lowes stock valued at \$30,487.50, and that Mr. Plesofsky was informed that the IRA was to be handled in a secure and conservative manner. Claimant also stated that on August 13, 1993 another 500 shares of Lowes stock was put into the IRA. Claimants asserted that Mr. Plesofsky induced them to invest into options without explaining the associated risks, and also induced them to divest their shares of Lowes stock and invest in other entities, which resulted in losses in the IRA. Claimants calculated their losses as of February 1996 from the following transactions:

<u>Transaction</u>	<u>Total Price</u>	<u>Current Value</u>	<u>Losses</u>
buy 1,000 shares of Spectrum at \$9 per share	\$9,000.00	\$ 0.00	\$9,000.00
buy 1,000 shares of Spectrum at \$7.25 per share	7,250.00	0.00	7,250.00
buy 200 shares of Marvel at \$30.25 per share	6,050.00	2,300.00	3,750.00
buy into Latin America Fund	5,000.00	957.26	4,042.74
buy into Pacific Growth Fund	5,000.00	4,918.26	81.74
			<u>\$24,124.48</u>

Claimants further asserted that 1,400 shares of Lowes stock at said date would number 2,800 due to a split and would be worth \$31.00 per share for a total value of \$86,800.00, which resulted in an additional loss of \$52,310.77 when offset by the current value of the IRA, which was \$22,489.23, and a \$12,000 withdrawal from the IRA. Thus, according to Claimants, their total losses are \$76,435.25.

Respondents Dean Witter, Ellsworth Stevens Scales, and Mr. Plesofsky (hereinafter collectively referred to as "Respondents") denied the allegations set forth in the Statement of Claim. Respondents stated that Claimants' initial purchase of Spectrum was unsolicited, as was marked on the confirmation, but the second purchase of Spectrum was not because Mr. Plesofsky had advised Mr. McInnis about this transaction. According to Respondents, Mr. Plesofsky advised Mr. McInnis on several occasions to sell his Spectrum shares and limit his loss, but Mr. McInnis refused to follow this advise. Respondents asserted that Mr. McInnis believed that Spectrum stock would rebound and that he wanted to avoid taking a loss. Furthermore, Respondents stated, the options activity in Claimants' account was only of the covered options writing type, which is conservative, and of which Claimants' received a complete description of risks and rewards. Respondents also asserted that Claimants had received prospectuses which disclosed all material facts pertaining to the mutual funds. Respondents made the following affirmative defenses: (1) Claimants' claims are barred in whole or in part by the applicable statutes of limitation; (2) Claimants' claims are barred by the doctrines of waiver, estoppel, and by their failure to mitigate damages; and (3) Claimants' losses were caused by market movements and economic fluctuations beyond Respondents' control and are not attributed to Respondents.

### **RELIEF REQUESTED**

Claimants Carl R. McInnis and Tammy McInnis requested an award in the amount of \$100,000.00.

Respondents Dean Witter Reynolds, Inc., Ellsworth Stevens Scales, and Charles Z. Plesofsky requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondents Dean Witter Reynolds, Inc., Ellsworth Stevens Scales, and Charles Z. Plesofsky did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.

At the arbitration hearing in this matter, claimants Carl R. McInnis and Tammy McInnis moved to exclude the testimony of Jeff Perry. Claimants Carl R. McInnis and Tammy McInnis subsequently withdrew 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 original(s) 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. That respondent Dean Witter Reynolds, Inc. is liable for and shall pay claimants Carl R. McInnis and Tammy McInnis for compensatory damages in the amount of \$1,500.00;
2. That all claims against respondents Charles Z. Plesofsky and Ellsworth Stevens Scales are dismissed with prejudice;
3. That all records of this proceeding are to be expunged from the CRD records of respondents Charles Z. Plesofsky and Ellsworth Stevens Scales; and
4. 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**

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 session x \$300 = \$300, and there were two (2) hearing sessions x \$500 = \$1,000 in forum fees. Total forum fees are thus \$300 + \$1,000 = \$1,300. 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 claimants Carl R. McInnis and Tammy McInnis.

Respondent Dean Witter Reynolds, Inc. is liable for and shall pay the member surcharge pursuant to §10333 of the Code in the amount of \$300.

Respondent Dean Witter Reynolds, Inc. is liable for and shall pay forum fees in the amount of \$800 (= \$1,300 total forum fees - \$500 hearing session deposit by claimants Carl R. McInnis and Tammy McInnis).

Respondent Dean Witter Reynolds, Inc. is liable for and shall reimburse claimants Carl R. McInnis and Tammy McInnis for their hearing sessions deposit in the amount of \$500.

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

Dated:

John J. Heflin, III  
John J. Heflin, III,  
Public Arbitrator, Presiding Chair

/s/

February 21, 1997

Joe N. Pigott  
Joe N. Pigott  
Public Arbitrator

/s/

February 5, 1997

Paul Mann  
Paul Mann  
Industry Arbitrator

/s/

February 3, 1997