

9907017

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Marvin Weiner, individually and
as trustee,

Claimant/Counterrespondent,

v.

No. 96-01634

William Blair & Company and
Stephen E. Elkins,

Respondents/Counterclaimants.

REPRESENTATION OF PARTIES

Marvin Weiner, individually and as trustee ("Claimant") was represented by John A. Diener III, Sedgwick Deter Moran & Arnold, Chicago, Illinois.

William Blair & Company ("Blair") and Stephen E. Elkins ("Elkins") (or collectively referred to as "Respondents") were represented by Christopher Q. King and Camille E. Bennett, Sonnenschein Nath & Rosenthal, Chicago, Illinois.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about April 8, 1996. Claimant's Submission Agreement was signed on April 8, 1996.

Respondents' Statement of Answer and Counterclaim was filed on or about July 11, 1996. Respondents' Submission Agreement were signed on July 8, 1996.

HEARING INFORMATION

The hearing was held on October 1, 2, and 3, 1996, for two (2) sessions each day, in Chicago, Illinois for a total of six (6) sessions.

CASE SUMMARY

The material contested issues of fact raised by the claimant consist of. a) whether or not the respondents' margin trading in equities (stocks) was with the knowledge and consent of the customer, b) whether the respondents' margin trading activities were suitable for the customer, c) whether the respondents "churned" the customer's account, d) whether the respondents disclosed all

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material facts relating to margin trading to the customer, e) whether the customer knowingly ratified the margin trades, f) whether the customer's claims are barred by various legal and equitable statutes of limitations and g) whether the customer suffered any damages as a result of the respondents' activities. The claimant alleged violations of RICO, the Illinois Securities Act, Illinois Consumer Fraud and Deceptive Practice Act, common law fraud (including churning), common law negligence in supervision, and unsuitability. The allegations arose out of transactions in securities more fully covered during the course of the hearing.

Respondents Blair and Elkins deny all liability. Respondents note that Weiner had signed margin agreements for his accounts, and assert that he was in possession of all information concerning the trading in his accounts, including the fact that he was trading on margin. Respondents assert that Weiner routinely monitored his account statements and trade confirmations, as well as statements prepared for him by Elkins' assistant which indicated which securities he received dividends on; Weiner entered information from these sources in a separate ledger. Weiner also filed federal income tax returns, or amendments to those returns, deducting the margin interest in his Blair accounts in every year from 1987 to 1994. As to the allegations that securities were purchased which were inconsistent with Weiner's investment goals, respondents assert that no trades were recommended that were inconsistent with those goals—in fact, Weiner's accounts generated substantial income for him throughout the period in question. Moreover, Weiner selected the majority of the securities in his accounts himself. Respondents assert that Weiner's claims under all counts are barred by applicable statutes of limitations, by numerous defenses applying to the individual counts, by the general defenses of waiver, ratification, laches, and estoppel, and by the six-year eligibility rule, Rule 10304, in the NASD Code of Arbitration Procedure.

Respondent Blair also filed a counterclaim alleging that Weiner's claim was brought in violation of the duty of good faith and fair dealing implicit in the arbitration clause of his account agreements with Blair. Respondents assert that Weiner's claim is wholly without merit, since it lacks any factual basis.

RELIEF REQUESTED

In his Statement of Claim, Claimant sought a joint and several award against the Respondents for: \$1,000,000 in compensatory damages; \$250,000 in punitive damages; costs and attorneys fees; punitive damages; treble damages; specific performance; and such other relief as the panel deemed to be just and reasonable under the circumstances.

Respondents requested that Weiner's claim be denied in its entirety. In addition, pursuant to its counterclaim, respondent Blair requests that it be awarded its attorneys' fees and costs of litigation.

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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 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 and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims are, and each of them, denied with prejudice.

Respondents' Counterclaims are, and each of them, denied with prejudice.

Except as set forth below, each party is responsible for its own costs and expenses, including attorneys' fees.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each pre-hearing conference, if any. There were six (6) sessions \times \$600 = \$3,600 in forum fees. Pursuant to §10332(b) 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 NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$500 previously paid by Respondent Blair.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable Counterclaim filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent Blair.

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Additional forum fees in the amount of \$2,000 are assessed against the Claimant.

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

Dated:

Johnathan P. Tomes
Johnathan P. Tomes
Public Arbitrator, Presiding Chair

/s/

October 16, 1996

Theodore M. Uichen
Theodore M. Uichen
Public Arbitrator

/s/

October 17, 1996

James A. Hume
James A. Hume
Industry Arbitrator

/s/

October 16, 1996