

AWARD

NASD REGULATION, INC., OFFICE OF DISPUTE RESOLUTION

In the Matter of the Arbitration Between

Name of Claimant

Chad R. Eshleman

96-02190

Name of Respondents

Mark Lamm;
Berthel Fisher & Company Financial Services Inc.

REPRESENTATION

For Claimant: Chad R. Eshleman ("Eshleman") was represented by James J. Moylan, Esq. of Arnstein & Lehr, located in Chicago, Illinois.

For Respondents: Berthel Fisher & Company Financial Services Inc. ("Berthel Fisher") and Mark Lamm ("Lamm") were represented by Vincent D. Louwagie, Esq. of Fruth & Anthony, located in Minneapolis, Minnesota.

CASE INFORMATION

Statement of Claim filed: May 22, 1996.

Claimant's Submission Agreement signed on: March 8, 1996.

Statement of Answer filed by Respondents on: August 2, 1996.

Respondent Berthel Fisher's Submission Agreement signed on: June 24, 1996 by Leslie D. Smith, Secretary, Berthel Fisher & Company Financial Services Inc.

Respondent Lamm's Submission Agreement signed on: August 2, 1996.

HEARING INFORMATION

Pre-Hearing Conference: February 12, 1997 for One (1) session before One (1) arbitrator.

Hearing Dates/Sessions: March 19, 1997 for Three (3) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant alleged that Respondent Lamm, while employed by or acting as an agent for Respondent Berthel Fisher, made the unsuitable recommendation to liquidate a portfolio of NYSE listed securities to purchase, exclusively, the common stock of Advantage Life Products, Inc., a low priced and speculative security. This liquidation occurred without Eshleman's express authority. In addition, Lamm misrepresented the suitability of the Advantage stock and took advantage of his prior relationship with Eshleman to persuade him to make the trade. Based upon these allegations, Claimant asserted claims for violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; violation of the Illinois Securities Law; violation of the Illinois Consumer Fraud and Deceptive Business Practices Act; breach of contract; negligence; common law fraud; respondeat superior and violation of control person liability pursuant to Section 20(a) of the Securities Exchange Act of 1934.

Respondents denied the material allegations of the statement of claim, alleging that:

1. Eshleman was an experienced investor who sought out Lamm in the summer of 1994 because he was disappointed in the small returns on his portfolio. Upon opening his account with Respondents, Eshleman explained that he had no desire to hold the investments in his portfolio because they were losing money;
2. Eshleman was young, single, owned his own business, and had a fairly stable and substantial income. In his brokerage account application, Eshleman listed an interest in speculative investments and was a candidate for more aggressive investments;
3. Lamm recommended Advantage, which was not an unsuitable or overly aggressive instrument. Lamm's research in 1994 indicated that Advantage was an ideal investment for Eshleman and it appeared that the company was on the rise;
4. There was no indication of a problem with the stock until the spring of 1995, when a dispute over the distribution of profits from a joint venture became public and the stock price plunged; and
5. Lamm advised Eshleman to sell his shares in late 1995, but Eshleman did not follow this advice and held onto the stock until the price sunk even lower.

In addition, Respondents asserted several affirmative defenses, including the applicable statutes of limitations, failure to mitigate and ratification.

RELIEF REQUESTED

Claimant requested entry of an award against Respondents permitting him to rescind the purchase of Advantage Life Products, Inc. and restoring his portfolio of NYSE securities liquidated by Respondents, including dividends; or for damages in the amount of no less than \$70,000.00, whichever is greater, plus interests, costs, consequential damages in an amount measured by the increase in value of an index of securities over the same period, punitive damages; and for such other relief as the panel allows.

Respondents requested that the arbitration panel dismiss Claimant's claims in their entirety and grant respondents an award of attorneys' fees and costs incurred to defend against the claims.

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.

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;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

OTHER COSTS

The NASD Regulation, Inc., Office of Dispute Resolution shall retain the \$300.00 member surcharge paid by Respondent Berthel Fisher pursuant to Section 10333 of the Code of Arbitration Procedure.

FORUM FEES

Pursuant to Section 10332(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) pre-hearing conference before One (1) arbitrator x \$300.00 = \$300.00; Three

(3) hearing sessions x \$500.00 per session = \$1,500.00; Total forum fees = \$1,800.00.

The NASD Regulation, Inc., Office of Dispute Resolution shall retain the \$150.00 non-refundable filing fee and shall retain as forum fees the \$500.00 hearing session deposit previously paid by Claimant Chad R. Eshleman. Respondents Berthel Fisher & Company Financial Services Inc. and Mark Lamm are jointly and severally liable for and shall pay to the Office of Dispute Resolution the sum of \$1,300.00 as forum fees.

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

Concurring Arbitrators' Signatures
Name

Date

/s/ G. Gale Roberson, Jr., Esq.
G. Gale Roberson, Jr., Esq.
Public Arbitrator/Chairperson

May 6, 1997

/s/ Leon Fox, J.D.
Leon Fox, J.D.
Public Arbitrator

May 8, 1997

/s/ Wade J. McGee
Wade J. McGee
Industry Arbitrator

May 6, 1997