

9/10/96

**AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Archie A. Van Elslander, and  
Mary Ann Van Elslander,

Claimants

v.

Case Number 96-02455

John Winans,  
\*Smith Barney, Inc., and  
Dean Witter Reynolds, Inc.,

Respondents.

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**REPRESENTATION OF PARTIES**

Claimants Archie A. Van Elslander and Mary Ann Van Elslander ("Claimants") were represented by Marjorie L. Kolin, Esq. of Keywell and Rosenfeld located in Troy, Michigan.

Respondent John Winans ("Winans") was represented by Thomas R. Cox, Esq. of Miller, Canfield, Paddock and Stone, P.L.C. located in Detroit, Michigan.

Respondent Smith Barney, Inc. ("Smith Barney") was represented by Susan E. Harkins, Esq. of Smith Barney, Inc. located in New York, New York.

Respondent Dean Witter Reynolds, Inc. ("Dean Witter") was represented by George D. Sullivan, Esq. of Dean Witter Reynolds, Inc. located in Sarasota, Florida.

**CASE INFORMATION**

The Statement of Claim was filed on or about June 6, 1996. Claimants' Submission Agreement was signed on June 5, 1996.

Respondent Winans' Statement of Answer was filed on or about September 16, 1996. Respondent Winans' Submission Agreement was signed on September 24, 1996.

Respondent Smith Barney's Statement of Answer was filed on or about September 16, 1996. NASD Regulation, Inc. Office of Dispute Resolution has no record that Respondent Smith Barney filed a properly executed Submission Agreement.

Respondent Dean Witter's Statement of Answer was filed on or about August 13, 1996. Respondent Dean Witter's Submission Agreement was signed on August 20, 1996 by George D. Sullivan, Assistant General Counsel of Dean Witter Reynolds, Inc.

### **HEARING INFORMATION**

The telephonic pre-hearing conferences were held on June 12, 1997 for one (1) session and July 22, 1997 for one (1) session.

The hearing was held on August 5, 1997 for two (2) sessions; August 6, 1997 for two (2) sessions; August 7, 1997 for two (2) sessions; September 23, 1997 for two (2) sessions; September 25, 1997 for two (2) sessions; and September 26, 1997 for two (2) sessions.

### **CASE SUMMARY**

Claimants alleged that Mr. Van Elslander advised Respondent Winans that Claimants were conservative investors and that their goal was to earn income on their capital but not to place their capital at any substantial risk. Claimants contended that Respondent Winans during his services as money manager/investment advisor to Claimants: (1) failed to disclose the nature and scope of risks in the various transactions; (2) failed to make a determination as to whether the transactions were suitable under all circumstances then existing; (3) failed to appropriately diversify Claimants' portfolio as required in furtherance of their investment goals; (4) made material misrepresentations of fact regarding the safety and security of the investments; (5) failed to disclose to the Claimants that their funds would be at substantial market risk; and (6) repeatedly assured the Claimants that their funds were not at risk; that the securities purchased, particularly Anacomp, Inc., would "turn around" and result in substantial profit to the Claimants; and that, despite the continually falling value of the investments purchased, that the Claimants should trust him, not change their investments and not close their accounts. Claimants asserted that, as a result of Respondent Winans' intentional, fraudulent and deceptive mismanagement of Claimants' account, Claimants lost almost all of their entire \$1,000,000 investment, plus income which they reasonably expected on this investment. Claimants alleged that, the foregoing acts are in violation of both federal and state securities law as well as the common law.

Respondent Winans denied all liability to Claimants in his Statement of Answer. Respondent Winans alleged that Mr. Van Elslander was a successful businessman with years of investment experience. Respondent Winans contended that Claimants' New Account Application lists their

Risk Tolerance as "Aggressive" and their number one Investment Objective as "Growth." Respondent Winans asserted that Claimants' investment experience, sophistication, financial circumstances, stated investment objectives, and level of risk tolerance are more consistent with Claimants' investments in their account, than with the attempted portrait of them as "conservative investors." Respondent Winans alleged that Claimants' investments were in accord with their objectives and financial circumstances and that Respondent Winans had reasonable grounds to believe that the investment recommendations were suitable when made.

Respondent Smith Barney also denied all liability to Claimants in its Statement of Answer. Respondent Smith Barney contended that Claimants received confirmations of all transactions in their account. Respondent Smith Barney alleged that Claimants also received account statements on a monthly basis that reflected all activity in the account and set forth, among other things, the assets in the portfolio, Smith Barney's research rating on the equities in the account, the amount of the margin debit balance and the amount of the margin interest charged on a month-to-date and year-to-date basis. Respondent Smith Barney asserted that duplicate copies of Claimants' monthly statements were also sent to their accountant.

Respondent Dean Witter denied all liability to Claimants in its Statement of Answer. Respondent Dean Witter asserted various affirmative defenses, including: (1) the Claimants were advised of the relative risks inherent in their investments and knowingly chose to assume those risks; (2) all of the transactions which the Claimants effected in their Dean Witter account were discussed with them, authorized by them, and effectuated with their full knowledge and consent; (3) by their discussions with Dean Witter, their authorization and instructions to proceed with the transactions at issue and their failure to complain after receiving confirmations and statements, the Claimants have ratified and approved the subject transaction; (4) Claimants have failed to state a claim upon which relief can be granted; and (5) the claims set forth in the Statement of Claim are barred in whole or part by applicable statutes of limitations.

### **RELIEF REQUESTED**

Claimants requested an award in excess of \$1,000,000 plus exemplary and punitive damages together with prejudgment and post-judgment interest, costs, and attorney fees.

Respondents requested that all claims asserted by the Claimants be denied in their entirety, with all costs and attorney fees assessed to Claimants.

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

Prior to the start of the hearing, the Claimants informed the arbitration panel that they had reached a settlement with Respondent Dean Witter.

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

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 Respondents John Winans and Smith Barney, Inc. are jointly and severally liable for and shall pay to Claimants Archie A. Van Elslander and Mary Ann Van Elslander the amount of Seventy Six Thousand Dollars and No Cents (\$76,000.00); and
- (2) That other than forum fees, which are specified below, all other claims and requests for relief not specifically addressed and enumerated are hereby dismissed in their entirety with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing session before a single arbitrator. There were two (2) pre-hearing sessions before a single arbitrator x \$300 = \$600 in forum fees. There were twelve (12) hearing sessions before the full panel x \$1,000 = \$12,000 in forum fees. Total forum fees = \$12,600. Pursuant to §10332(b) of 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 \$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 Claimants. Pursuant to §10333 of the Code, NASD

Regulation, Inc. Office of Dispute Resolution shall also retain Respondent Dean Witter's member surcharge in the amount of \$500.

Pursuant to §10332(c) of the Code, Claimants are jointly and severally liable for and shall pay forum fees in the amount of \$5,300 (1/2 total forum fees - hearing session deposit). Pursuant to §10332(c) of the Code, Respondents Winans and Smith Barney are jointly and severally liable for and shall pay forum fees in the amount of \$6,300 (1/2 total forum fees). Pursuant to §10333 of the Code, Respondent Smith Barney is also liable for and shall pay its member surcharge in the amount of \$500.

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

Concurring Arbitrators' Signatures

\s\ Barry Goldman, Esq.

Barry Goldman, Esq.

Chairperson

Public Arbitrator

October 7, 1997

Dated:

\s\ Matthew W. Schlegel, Esq.

Matthew W. Schlegel, Esq.

Panelist

Public Arbitrator

October 7, 1997

Dated:

\s\ Robert Shiffra, Esq.

Robert Shiffra, Esq.

Panelist

Industry Arbitrator

October 9, 1997

Dated:

For NASD Regulation use only:

Date award served on the parties: October 14, 1997