

NASD AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

Gary D. and Shirley H. McCutchen

96-02596

Name of Respondents

L.C. Wegard & Co., Inc.
Joseph Scurman
Leonard Greer
Michael McDermott

REPRESENTATION

Claimants Gary D. and Shirley H. McCutchen ("Claimants") were represented by Andrew O. Whiteman, Esq., of the law firm of Hartzell & Whiteman, LLP, Raleigh, NC.

Respondent L.C. Wegard & Co., Inc. ("Wegard") was represented by Leonard B. Greer.

Respondent Joseph Scurman ("Scurman") was represented by Mark F. Raymond, Esq., of the law firm of Tew & Beasley, L.L.P., Miami, FL.

Respondent Leonard B. Greer ("Greer") appeared pro se.

Respondent Michael McDermott ("McDermott") appeared pro se.

CASE INFORMATION

Statement of Claim filed: June 12, 1996

Claimant's Submission Agreement signed on: June 5, 1996

The Joint Statement of Answer of Respondents Wegard and Greer was filed on: August 2, 1996

Wegard's Submission Agreement signed on: August 5, 1996

Greer's Submission Agreement signed on: August 5, 1996

Statement of Answer filed by Scurman on: August 26, 1996

Scurman's Submission Agreement signed on: August 14, 1996

Statement of Answer filed by McDermott on: August 30, 1996

McDermott's Submission Agreement signed on: September 12, 1996

HEARING INFORMATION

Pre-Hearing Date/Sessions: August 6, 1997/one session with panel

Hearing Dates/Sessions: September 23, 1997/two sessions
September 24, 1997/one session
April 27, 1998/two sessions
April 28, 1998/two sessions
April 29, 1998/two sessions
April 30, 1998/two sessions
July 7, 1998/two sessions
July 8, 1998/two sessions

Hearing Location: Raleigh Plaza Hotel, Best Western Hotel, and Radisson Hotel, Raleigh, North Carolina

CASE SUMMARY

Claimants alleged, among other things, that they received an unsolicited telephone call from Scurman in April of 1993. Claimants alleged that Scurman identified himself as a stockbroker for Wegard and offered to provide investment opportunities. Claimants asserted that they provided Scurman with their personal financial information, investment experience and objectives. Claimants alleged that they explained to Scurman that their investment objective was to make solid investments that provided for growth and safety of principal. Claimants alleged that they told Scurman that their prior experiences with individual stocks had not been successful, and that they were risk adverse. Claimants alleged that Scurman indicated that he would recommend investments that were consistent with Claimants' stated investment objectives.

Claimants alleged that they invested approximately \$129,000 with Wegard. Claimants alleged that this money represented nearly all their savings, and it was placed in three accounts: a joint account, Mr. McCutchen's IRA account, and Mrs. McCutchen's IRA account. Claimants alleged that Scurman convinced Claimants to invest most of their savings in speculative, high risk stocks and bonds, and that these investments were unsuitable. Claimants alleged that Respondents, to induce Claimants to invest, made false and misleading statements and failed to disclose material information. Claimants alleged that Wegard's commission structure favored the sale of "stock-of-the-month" companies which generated higher commissions than other stocks. Claimants alleged that they believed they were receiving advice well suited to their needs, whereas they were actually receiving advice only on stocks Wegard's brokers were instructed to sell. Claimants alleged that Scurman repeatedly stated that the stocks he recommended had been thoroughly analyzed by Wegard's research department. Claimants alleged that they later learned that little research took place, and if it had, the stocks had not been determined to be suitable securities for Claimants. Claimants alleged that Scurman stated that the stocks he recommended were solid, undervalued and a great opportunity to invest before an anticipated price rise. Claimants alleged that Scurman's statements were materially misleading in that they provided only favorable information, suggested imminent price increases not reasonably based in fact, and falsely stated that there was a limited supply or time in which to act. Claimants alleged that Scurman dismissed declines in value of recommended stocks and urged Claimants to average down and purchase additional stock. Claimants alleged that this practice was a technique to generate additional commissions.

Claimants alleged that Wegard employed "boiler room" sales tactics by materially misrepresenting information about securities, omitting material information, and engaging in other fraudulent acts to induce customers to invest. Claimants alleged that Greer acquired ownership of Wegard with financing from Robert E. Brennan ("Brennan"), former owner of First Jersey Securities, Inc. ("First Jersey"), and that First Jersey was a firm known to have engaged in fraudulent and illegal sales practices. Claimants alleged that under Greer's leadership, Wegard concentrated primarily on re-selling high risk OTC securities. Claimants alleged that Greer and McDermott instituted a system where customers were urged to purchase recommended stocks without regard to their investment needs. Claimants alleged that Greer's initial act was to replace Wegard's existing personnel with employees familiar with the sales practices employed at First Jersey and other firms connected to Brennan. Claimants alleged that Greer and McDermott were responsible for directing all sales activity and trading that occurred at the retail sales branches.

Claimants alleged that McDermott was formally a branch manager of an office of Hibbard Brown, a firm which operated the split up retail sales operations of First Jersey after being sold by Brennan. Claimants alleged that McDermott had formerly been with First Jersey, and the sales practices and tests that were carried out at Wegard were identical to those at Hibbard Brown. Claimant alleged that Wegard employed the three call method similar to that employed by Hibbard and First Jersey. Claimants alleged that the third phase of the method involved McDermott, who would direct the brokers in the office on what the house stock they were to sell and hand out sales scripts. Claimants alleged that Wegard and Scurman failed to disclose that Wegard routinely purchased inventories of recommended securities from Brennan controlled entities at prices far below quoted prices and marked up these securities at percentages ranging from 20% to 200%.

Claimants alleged that they suffered a loss of principal of at least \$75,000 as a result of the decline in the investments. Accordingly, Claimants alleged that Respondents were liable based on: the RICO Act, 18 U.S.C. Section 1961 et. seq.; the North Carolina Securities Act, G.S. 78A-1 et. seq.; breach of fiduciary duty; North Carolina common law of fraud; breach of contract.

Wegard and Greer maintained that they lacked information sufficient to form a belief as to the truth of the allegations in Claimants' claim. Wegard and Greer specifically maintained, among other things, that their actions did not result in Claimants' losses on stocks recommended by Wegard. Wegard and Greer denied that the investments that Claimants made were unsuitable for them. Wegard and Greer denied that Wegard concentrated primarily on re-selling high risk OTC securities, and that they urged customers to purchase stocks without regard to their needs. Wegard and Greer denied that they instructed salesman to use sales scripts containing materially false information; that brokers were paid higher commissions on sales of recommended securities; and that they engaged in acts and practices which operated as a fraud on Claimants. Wegard and Greer denied that Wegard's research department failed to analyze the securities and that they were unsuitable.

Scurman maintained that he lacked information sufficient to form a belief as to the truth of the allegations in Claimants' claim, and denied that Claimants sustained losses as a result of Respondents' actions. Scurman specifically maintained, among other things, that he contacted Claimants through an unsolicited call in April 1993 and that Claimants provided him with information concerning their finances and investment objectives. Scurman maintained that Claimants opened three accounts with Wegard with approximately \$129,000, but denied that the investments made for Claimants were unsuitable. Scurman denied that Wegard instructed salesman to use sales scripts containing materially false information; that brokers were paid higher commissions on sales of recommended securities; and that Respondents engaged in acts and practices which operated as a fraud on Claimants. Scurman denied that Claimants invested

funds represented their "nest egg"; that the securities invested in were unsuitable; and that the securities were not analyzed by Wegard's research department. Scurman denied making false representations, using sales scripts and failing to disclose risks. Scurman maintained that he stated that certain stocks he recommended were, in Wegard's opinion, solid investments with risks that provided investment opportunities. Scurman denied that the practice of cost averaging was a technique to generate commissions, and asserted that this technique was known to Claimants and sometimes initiated by Claimants.

Scurman raised the following affirmative defenses: good faith; contributory negligence and comparative fault; assumption of risk; estoppel, waiver, laches and ratification; mitigation of damages; independent causation; and lack of fiduciary duty.

McDermott denied knowledge and information sufficient to form a belief as to the truth of the allegations in the Statement of Claim. McDermott specifically maintained, among other things, that he never recommended that Claimants purchase, sell or hold any securities. McDermott denied that Wegard concentrated primarily on re-selling high risk OTC securities; that they urged customers to purchase stocks without regard to their needs; that they instructed salesman to use sales scripts containing materially false information; that brokers were paid higher commissions on sales of recommended securities; and that he engaged in acts and practices which operated as a fraud on Claimants. McDermott denied that the commission structure favored the sale of "stock-of-the-month" securities, and that brokers were discouraged from selling anything else.

McDermott raised the following affirmative defenses: failure to state a cause of action; estoppel; waiver; and insufficient facts for punitive damages.

RELIEF REQUESTED

Claimants requested compensatory damages in the amount of \$225,000.00; an amount, to be determined by the arbitrators, equal to the earnings and growth Claimants would have realized had their funds been placed or remained in suitable investments; interest at the rate provided by law (8% per annum) from the time of loss until payment is made by respondents; attorneys fees and costs; and punitive damages in such amount as the arbitrators determine.

Wegard and Greer requested that the Claimants' action be dismissed

Scurman requested that the Statement of Claim be stricken in its entirety; that the claim for punitive damages be stricken for lack of sufficient facts; and that the Panel assess all fees and costs against the Claimants, as well as any other relief which the Panel deems just and appropriate.

McDermott requested that the Statement of Claim be dismissed in its entirety.

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 remain on file with NASD Regulation, Inc. ("NASD Regulation").

Respondent McDermott was present at the September 1997 hearing dates only. Claimants voluntarily dismissed their claims against Scurman with prejudice. Respondents Wegard and Greer made a motion to the Panel to add Scurman as a Third Party Respondent. The Panel denied Respondents Wegard and Greer's request.

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 Wegard, Greer, and McDermott are jointly and severally liable to Gary D. and Shirley H. McCutchen and shall pay to Gary D. and Shirley H. McCutchen the sum of \$33,000.00; plus 8% simple interest per annum from July 8, 1998 until the date the Award is paid.
2. That Claimants Gary D. and Shirley H. McCutchen claim for punitive damages is denied in its entirety.
3. That the parties shall bear their own costs and attorneys' fees, except as Forum Fees are addressed herein.
4. That any and all relief not specifically addressed above is denied in its entirety.

OTHER COSTS

Pursuant to Rule 10333 of the Code, Respondent Wegard was assessed a member surcharge of \$350 that has not been paid.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

(1 prehearing session with full panel x \$750.00) + (15 hearing sessions x \$750.00) = \$12,000 -
Claimant's hearing session deposit of \$750.00 = \$11,250.00 net due

The remaining forum fees of \$11,250.00 are jointly and severally assessed against Wegard, Greer, and McDermott.

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

DATE

CONCURRING ARBITRATORS' SIGNATURES

August 5, 1998

Thomas W. Steed, Jr.
Thomas W. Steed, Jr., Chairperson
Public Arbitrator

John R. Angermayer
John R. Angermayer, Panelist
Public Arbitrator

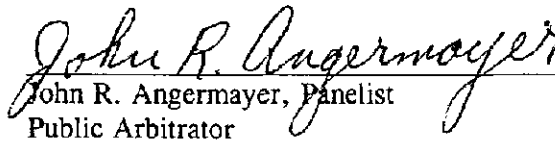
W. Wells Van Pelt, Jr.
W. Wells Van Pelt, Jr., Panelist
Industry Arbitrator

Date Award Served by NASD Regulation: August 11, 1998

DATE

CONCURRING ARBITRATORS' SIGNATURES

Thomas W. Steed, Jr., Chairperson
Public Arbitrator


John R. Angermayer, Panelist
Public Arbitrator

W. Wells Van Pelt, Jr., Panelist
Industry Arbitrator

Date Award Served by NASD Regulation:

August 11, 1998

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Public Arbitrator

John R. Angermayer, Panelist
Public Arbitrator

10 Aug 98

W. Wells Van Pelt
W. Wells Van Pelt, Jr., Panelist
Industry Arbitrator

Date Award Served by NASD Regulation: August 11, 1998