

OFFICE OF DISPUTE RESOLUTION

In the Matter of the Arbitration Between

Name of Claimants

James T. Martin
Low Country OB/GYN Profit Sharing Plan

96-03086

Name of Respondents

Fidelity Brokerage Services, Inc.
William F. Morganweck
Lore S. Brown
Investment Management Advisory Services
Fidelity Investment Advisor Group

REPRESENTATION

For Claimants James T. Martin ("Martin") and Low Country O/B GYN Profit Sharing Plan ("Low Country") (collectively, "Claimant") appeared Aubrey J. Woody, III, Esq. of the law firm Woody, Cisa & Dodds located in Mount Pleasant, South Carolina.

For Respondents Fidelity Brokerage Services, Inc., ("Fidelity Brokerage") and Fidelity Investment Advisor Group ("FIAG") appeared Robert A. Buhlman, Esq., of Bingham, Dana & Gould LLP located in Boston, Massachusetts.

Respondent William F. Morganweck ("Morganweck") did not appear.

For Respondent Lore S. Brown ("Brown") appeared Fred Thompson, III, Esq., a solo practitioner located in Charleston, South Carolina.

For Respondent Investment Management Advisory Services ("Investment Management") appeared an in-house representative.

CASE INFORMATION

Statement of Claim filed: July 18, 1996.

Claimant's Submission Agreement signed on: July 17, 1996.

Reply to Counterclaim of Respondent Brown filed on: March 27, 1997.

Reply to Counterclaim of Respondents Fidelity Brokerage and FIAG filed on: March 27, 1997.

Joint Statement of Answer, Counterclaim and Cross claim filed by Respondents Fidelity Brokerage and FIAG on: April 2, 1997.

Respondent Fidelity Brokerage and FIAG's Submission Agreement signed on: February 7, 1997.

Statement of Answer filed by Respondent Brown on: March 7, 1997.
Respondent Brown's Submission Agreement signed on: June 11, 1997.

Respondent Morganweck did not file a Statement of Answer or file a Submission Agreement as required by Rule 10314(b) of the Code of Arbitration Procedure.

Respondent IMAS was served with the Statement of Claim and given the option to submit to the jurisdiction of NASD Office of Dispute Resolution. Respondent IMAS did not file a response.

HEARING INFORMATION

Pre-Hearing Conference:	July 10, 1997	-	One Session
Hearing Dates/Sessions:	July 14, 1997	-	Two Sessions
	July 15, 1997	-	Two Sessions

The hearings were held in Charlotte, North Carolina.

CASE SUMMARY

Claimant Martin alleged that in August 1994, he was a physician and trustee of Low Country OB/GYN's Profit Sharing Plan, and that Respondents Morganweck, Brown, and Fidelity Services and Investment Management were responsible for their account (the "account"). Claimant further alleged that he had no prior investing experience and relied heavily on the advice of the brokerage to find safe, conservative investments, that preserved capital yet made money for his companies' profit sharing plan. Claimant asserted that Morganweck and Brown solicited him to open an account with them and then proceeded to impose charges to the account for the large number of transactions. Claimant further asserted that respondents churned his account because between February 1994 and February 1995, the annualized turnover rate was 82.7 times, and furthermore, the commission/equity ratio was 53.3%, with a total cost/equity ratio of 67.7%. Claimant also asserted that FIAG & Fidelity Brokerage (collectively, "Fidelity") are interrelated and liable for their agents Morganweck, Brown, and Investment Management, who's acts and omissions were committed by them as agents for Fidelity who were derelict in supervising their agents' conduct, which resulted in claimant's damages.

Respondent Fidelity Brokerage maintained that it is a discount brokerage firm which opens and maintains accounts for customers and buys or sells securities or other products according to the instructions of the customer or his authorized agent/advisor. Respondent further maintained that Martin gave full trading authority to Investment Management, Morganweck, and Brown, while Fidelity Brokerage duly fulfilled those orders. Fidelity Brokerage further maintained that it neither recommends or assesses suitability of any transactions placed by independent advisors such as Investment Management. Fidelity Brokerage also maintained that in the Client Agreements, Martin and the Plan agreed that "Fidelity Brokerage shall assume no responsibility for reviewing or monitoring any investment decision..." of claimant or his authorized agents, leaving Fidelity Brokerage exempt from this claim.

Respondent Brown maintained that he is neither a partner in Investment Management, nor is he a shareholder, and he had no contact with claimant's accounts. Brown further maintained that Fidelity Brokerage and Morganweck filed all the account documents in their names only, while he had no input on investment decisions. Brown also maintained that the only liability to claimant would be through joint and several liability of partnership but that though Morganweck owned Investment Management as an unincorporated sole proprietorship. Brown requested that he be immediately dismissed from the case.

FIDELITY BROKERAGE'S COUNTERCLAIM AGAINST MARTIN AND THE PLAN

Fidelity Brokerage alleged that in the Client Agreements executed by Martin and the Plan, each agreed to "indemnify and hold Fidelity Brokerage harmless, and to pay Fidelity Brokerage promptly upon demand for any losses or financial obligations that may arise from the act or omission of the authorized agent/Advisor with respect to the account." Fidelity Brokerage further alleged that Martin and the Plan have a contractual obligation to hold it harmless from any losses incurred from these proceedings. Accordingly, Fidelity Brokerage requested: 1) A declaration that Fidelity must be indemnified and or held harmless, pursuant to Martin and the Plan's contract, therefore cannot be held liable to either party; 2) An award against Martin and the Plan, jointly and severally of any amounts Fidelity might pay as a result of any decision in this matter; 3) An award of Fidelity's attorneys' fees and costs against Dr. Martin and the Plan, jointly and severally.

CLAIMANT, JAMES T. MARTIN, INDIVIDUALLY AND AS TRUSTEE OF LOW COUNTRY, MOTION TO DISMISS AND REPLY TO COUNTERCLAIM OF RESPONDENTS FIDELITY BROKERAGE SERVICES, INC., AND FIDELITY INVESTMENTS ADVISOR GROUP

By way of reply to the counterclaims of the companies (collectively "Fidelity"), claimant asserted that he had brought an action against Fidelity under the theories that: claimant maintained accounts with Fidelity and that respondents Morganweck, Brown and investment Management were acting as its agents; Morganweck filled out Fidelity's "Client Account Application" and "Trust Account Application" and had claimant sign them, but did not show or give claimant a copy of these applications, or the "Client Agreement" for the individual trust accounts, therefore, Martin did not agree to be bound by the "Client Agreement" nor did same constitute any agreement between the parties. Claimant further maintained that he never agreed to the Contractual Indemnity and that Fidelity's claim should be dismissed. Claimant also maintained that Fidelity is not an intended beneficiary under the Plan and as such does not have the requisite standing to bring a claim against Martin as Trustee for the Plan. Claimant requested that, based on the foregoing reasons, respondents Fidelity Brokerage Service, Inc., and Fidelity Investment Advisor Group's Counterclaim alleging contractual indemnity, equitable indemnity and/or contributions should be dismissed.

FIDELITY BROKERAGE'S CROSSCLAIM AGAINST INVESTMENT MANAGEMENT, MORGANWECK AND BROWN

Fidelity Brokerage maintained that in the Investment Advisor's Account Agreement executed by Investment Management, Morganweck and Brown, each agreed to: "indemnify and hold Fidelity Brokerage harmless, and to pay Fidelity Brokerage promptly upon demand for any losses or financial obligations that may arise from the act or omission of the authorized agent/Advisor with respect to the account". Fidelity Brokerage further maintained that Investment Management, Morganweck and Brown have a contractual obligation to indemnify and hold Fidelity Brokerage harmless from any losses arising from these proceedings.

RESPONDENT BROWN'S COUNTERCLAIM AGAINST CLAIMANTS

Brown maintained that Martin knew he had never offered investment advice to him, or performed any

act or omission for which Martin can state a claim for recovery. Brown further maintained that his name did not appear on any of the investment advice documents executed by claimant, Morganweck, and Investment Management. Brown also maintained that he did not share in the profits, fees or commissions generated by Martin and the Plan, nor did he undertake the risk of loss of Investment Management or of Morganweck. Brown contended that he was semi-retired and suffering from a serious illness which limited his activities. Brown further contended that claimant knew these facts when filing his claim, which has resulted in Brown incurring attorney's fees, personal expenses, and investment of personal time to address the claim, and therefore, is entitled to damages from claimant.

**CLAIMANT'S MOTION TO DISMISS AND REPLY TO COUNTERCLAIM OF
RESPONDENT LORE S. BROWN**

Claimant Martin maintained that the action against Brown was based on the belief that he was a general partner with Morganweck at Investment Management. Martin further maintained that this belief was formed from several factors: 1) Brown was listed as a registered Investment Advisor with the Securities Division of the South Carolina Security of State's Office under the name of Investment Management Advisory Services for the period of July 29, 1995 to July 28, 1997; 2) in the Advisor's Account Application filed by Morganweck with Fidelity, Investment Management is listed in Section No. 2 on the line for "Partnership/Corporate/Trust Name"; and, 3) that Brown and Morganweck operated Investment Management beginning in 1984. Claimant asserted that for those reasons, the claim is made in good faith, and Brown's Counterclaim alleging malicious prosecution should be denied.

BROWN'S CROSSCLAIM AGAINST FIDELITY

Brown maintained that Fidelity had full knowledge that he was not a partner, and had no contact with any transaction herein, consequently, he was required to engage attorneys, investigate, and defend himself at great expense. Brown further maintained that their crossclaim was without probable cause, with bad intent, and entitled him to recover for his damages from Fidelity.

**RESPONDENTS', FIDELITY BROKERAGE SERVICES, INC.'S AND FIDELITY
INVESTMENT ADVISOR GROUP'S RESPONSE TO CROSSCLAIM OF RESPONDENT
BROWN**

Respondents maintained that they had no knowledge of Brown's lack of involvement in this matter; although the account documents were signed by Morganweck, that did not preclude the possibility that Brown was a general partner, as alleged in the Claim, and therefore liable for the acts of his partner, Morganweck, and the partnership, Investment Management. Respondents also maintained that they were not privy to the communications between Martin, Investment Management, Morganweck or Brown, and had no actual knowledge that Brown had no contact with any transactions in the accounts as he maintained. Respondents further maintained that if Martin's Claim against Fidelity is dismissed, then Fidelity's crossclaim against Brown is moot, but while still pending, Fidelity is entitled to assert cross claims against the other allegedly responsible parties, including Brown. Respondents contended that its claims against Brown are in good faith, and that Browns cross claims alleging bad faith prosecution should be dismissed.

RELIEF REQUESTED

Claimant contended that the well-managed profit sharing account lost \$216,945.00, while his well-managed personal account lost \$228,184.00. Claimant requested damages of \$445,129.00, punitive damages of \$500,000, plus attorney's fees, costs, and interest at the highest rate allowed by law.

RELIEF REQUESTED

Claimant further requested that the counterclaims filed by the respondent be dismissed in their entirety.

Respondents Fidelity Brokerage and FIAG requested that claimant's claims against it be dismissed and that it be indemnified as contractually provided for from Investment Management, Morganweck and Brown. Respondents further requested that claimant indemnify it for any liability found against them and that they be reimbursed for costs and attorney's fees. Respondents further requested that Respondent Brown's crossclaim be dismissed in its entirety.

Respondent Brown requested that claimant's claim against him be dismissed, and entered a counterclaim for costs, expenses, and attorney's fees against claimant. Respondent Brown also filed a crossclaim against Fidelity Brokerage and FIAG for indemnification for any liability plus requested reimbursement for all costs, expenses, and attorney's fees. Respondent Brown further requested that Respondent Fidelity Brokerage and FIAG's cross 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 originals remain on file with NASD Regulation.

The arbitration panel made the following rulings concerning Respondents William F. Morganweck and Investment Management Advisory Services who did not file Statements of Answer nor Submission Agreements, and who also failed to appear at the evidentiary hearing conducted in this matter:

1. Pursuant to Rule 10101 of the NASD Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that respondent William Morganweck was an associated person of an NASD member at the time this controversy arose. Consequently, the panel found personal jurisdiction over respondent Morganweck pursuant to Rule 10301 of the Code.
3. The panel found that respondent Investment Management Advisory Services was not an NASD member firm at the time this controversy arose and did not have an agreement to arbitrate this dispute through NASD Office of Dispute Resolution. Therefore, the panel dismissed all claims against respondent IMAS without prejudice.
4. In view of (2) above, the panel found that respondent Morganweck was required to file with NASD Regulation a Statement of Answer and a properly executed Submission Agreement pursuant to Rule 10314(b) of the Code. In this regard, the panel found that the Statement of Claim was properly served upon respondent Morganweck pursuant to Rule 10314(a) of the Code.

5. In addition, in accordance with Rules 10310 10315 and 10318 of the Code, the panel found that NASD Regulation provided respondent Morganweck with "due notice" of the hearing conducted in this matter by regular and certified mail. The panel therefore, determined to proceed with the hearing without respondent Morganweck, whose absence was unexcused.

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. All claims and cross claims against respondent Investment Management Advisory Services, Inc. are dismissed without prejudice. (for explanation see page five, point #3 of this document)
2. Respondents William F. Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services be and hereby are jointly and severally liable and shall pay to Claimant James T. Martin, Individually, \$160,701.00 in actual damages.
3. Respondents William F. Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services be and hereby are jointly and severally liable and shall pay to Claimant James T. Martin, Individually, simple interest at the rate of 8.75 % per annum from July 17, 1996 to the date of payment of the award.
4. Respondents William F. Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services be and hereby are jointly and severally liable and shall pay to Claimant James T. Martin, Individually, \$15,000.00 in attorney's fees as provided for under South Carolina Code Section 35-1-1490 and 1500, and 10(b)-5 of the Securities Exchange Act of 1934.
5. Respondents William F. Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services be and hereby are jointly and severally liable and shall pay to Claimant James T. Martin, as Trustee, \$104,931.00 in actual damages.
6. Respondents William F. Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services be and hereby are jointly and severally liable and shall pay to Claimant James T. Martin, as Trustee, simple interest at the rate of 8.75 % per annum from July 17, 1996 to the date of payment of the award.
7. Respondents William F. Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services be and hereby are jointly and severally liable and shall pay to Claimant James T. Martin, as Trustee, \$15,000.00 in attorney's fees as provided for under South Carolina Code Section 35-1-1490 and 1500, and 10(b)-5 of the Securities Exchange Act of 1934..
8. The claims of claimant James T. Martin, both individually and as trustee, against respondent Lore S. Brown are dismissed in their entirety.
9. The cross claims of Respondent Lore S. Brown against Respondents Fidelity Investment Advisor Group and Fidelity Brokerage Service are dismissed in their entirety.

10. The counterclaims of Respondent Lore S. Brown against claimants James T. Martin, both individually and as trustee, are dismissed in their entirety.
11. The cross claim of respondents Fidelity Investment Advisor Group and Fidelity Brokerage Services against respondent Lore S. Brown is dismissed in its entirety.
12. The counterclaims of respondents Fidelity Investment Advisor Group and Fidelity Brokerage Services against claimants James T. Martin, both individually and as trustee, are dismissed in their entirety.
13. Respondent William F. Morganweck be and hereby is liable and shall reimburse cross claim claimants, Fidelity Investment Advisor Group and Fidelity Brokerage Services, all payments that are made to claimants James T. Martin, both individually and as trustee for actual damages, attorney's fees and interest.
14. Respondent William F. Morganweck be and hereby is liable and shall pay to Fidelity Investment Advisor Group and Fidelity Brokerage Services, simple interest at the rate of 8.75% per annum, from the date the above listed payment is made by respondents Fidelity Investment Advisor Group and Fidelity Brokerage Services to claimant James T. Martin, both individually and as trustee, to the date the respondents are reimbursed.
15. All other relief requests are denied.

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$250.00 non-refundable filing fee previously deposited by the Claimants, the \$500.00 cross claim filing fee filed by respondents Fidelity Brokerage and FIAG, \$500.00 counterclaim filing fee deposited by respondents Fidelity Brokerage and FIAG, the \$500.00 counterclaim filing fee deposited by respondent Lore S. Brown, \$300.00 of the \$500.00 cross claim filing fee deposited by Respondent Lore S. Brown, and have assessed the following forum fees:

1 pre-hearing conference x \$300.00	= \$ 300.00
4 sessions x \$1,000.00	= \$4,000.00
minus claimant's \$1,000.00 deposit	= <u>\$1,000.00</u>
total outstanding	= \$3,300.00

Respondents, William F. Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services are jointly and severally liable for the sum of \$4,300.00, representing the total amount of forum fees assessed. Respondent Fidelity previously deposited \$500.00 with NASD Regulation which shall be retained as partial satisfaction of forum fees. Therefore, Respondents Morganweck, Fidelity Investment Advisor Group, and Fidelity Brokerage Services shall pay to NASD Regulation, Inc., the sum of \$2,800.00 in satisfaction of outstanding forum fees and shall pay to claimants James T. Martin, both individually and as trustee, \$1,000.00 as reimbursement of the hearing session deposit.

Pursuant to Rule 10205, respondent Lore S. Brown shall pay to NASD Regulation \$200.00 in satisfaction of the balance of outstanding filing fees for the filed cross claim.

Pursuant to Rule 10333, respondent Fidelity Brokerage Services, Inc. is liable to NASD Regulation for a \$500.00 member surcharge. The surcharge has been paid.

ARBITRATORS' SIGNATURES

I, Wayne Parker, do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.


Wayne Parker
Public Chairperson

I, Barney Stewart, III, do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.


Barney Stewart, III
Industry Arbitrator

I, Nelson Fishman, Esq., do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.


Nelson Fishman, Esq.
Public Arbitrator

Date of Decision: August 25, 1997

ARBITRATORS' SIGNATURES

I, Wayne Parker, do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.

Wayne Parker
Public Chairperson

I, Barney Stewart, III, do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.

A handwritten signature in dark ink, appearing to read 'Barney Stewart, III', written over a horizontal line.

Barney Stewart, III
Industry Arbitrator

I, Nelson Fishman, Esq., do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.

Nelson Fishman, Esq.
Public Arbitrator

Date of Decision: August 25, 1997

ARBITRATORS' SIGNATURES


I, Wayne Parker, do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.

Wayne Parker
Public Chairperson

I, Barney Stewart, III, do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.

Barney Stewart, III
Industry Arbitrator

I, Nelson Fishman, Esq., do hereby swear or affirm, that I am the individual described herein, and who executed this document which is my oath and award.



Nelson Fishman, Esq.
Public Arbitrator

Date of Decision: August 25, 1997