

NASD Arbitration & Mediation

National Association of Securities Dealers, Inc. * 515 E. Las Olas Boulevard * Suite 1100 * Fort Lauderdale, FL 33301 * Phone 954-522-7391
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NASD Regulation, Inc. AWARD

Office of Dispute Resolution

In the Matter of the Arbitration Between _____

Name of Claimant

Douglas Shapiro

and

96-03267

Name of Respondent

PaineWebber, Inc.

Ira P. Cohen

Lucille Weist

Merrill Lynch Pierce Fenner & Smith, Inc.

REPRESENTATION OF PARTIES

For Claimant Douglas Shapiro ("Shapiro"): Jeffrey Tew, Esq. of the law firm of Tew & Novack, Miami, FL.

For Respondents PaineWebber, Inc. ("PW"), Ira P. Cohen ("Cohen") for the time period during which he was employed by PW, and Lucille Weist ("Weist"): Joseph A. Vallo, Esq., Fort Lauderdale, FL.

For Respondent Merrill Lynch Pierce Fenner & Smith, Inc. ("ML") and Cohen, for the time period during which he was employed by Merrill: Joycelyn E. McGeachy, Esq. of Merrill Lynch Pierce Fenner & Smith, Inc., New York, NY.

CASE INFORMATION

Statement of Claim was filed on or about July 31, 1996. Submission Agreement of Claimant Douglas Shapiro was signed on July 24, 1996.

Statement of Answer was filed by Respondents PW, Cohen, and Weist on or about October 9, 1996. Submission Agreements of Mr. Cohen and Ms Weist were signed on October 8, 1996. Submission Agreement of PW was signed on June 3, 1997 by Lucille Weist.

Statement of Answer was filed by Respondents ML and Cohen on or about September 30, 1996. Submission Agreement of ML was signed on October 9, 1996.

HEARING INFORMATION

A telephonic pre-hearing conference was held on November 12, 1996, with the full panel presiding.

The evidentiary hearing was held on June 3 and 4, 1997, in Fort Lauderdale, Florida for a total of four sessions.

CASE SUMMARY

Claimant contended that the Respondents breached their common law fiduciary duty to him, were negligent, violated the NASD rule regarding recommendations, and made misrepresentations and omitted to disclose material facts to him both during the time when Cohen was with ML and later with PW. Specifically, Claimant alleged that Respondents PW, Cohen, and Weist represented to him that they had researched whether he should sell three Alliance mutual funds; stated that in their opinion these funds were suitable for him; stated that he should not sell those mutual funds; failed to advise him that all of the funds were too speculative and illiquid for his investment needs and objectives; and, as to the Alliance North American Government Income Fund, Respondents PW, Cohen, and Weist failed to advise him that said fund had recently changed its investment policy to increase to 25%, the amount which could be invested in Argentinean securities.

Respondents ML and Cohen denied all allegations of wrongdoing and alleged that Claimant was a knowledgeable investor who was very definite about his investment parameters. More specifically, Respondents ML and Cohen asserted that the Claimant informed ML and Cohen that his objectives were growth and income and he preferred international to U.S. funds. Respondents ML and Cohen further maintained that the Claimant made his own investment decisions regarding the Alliance funds after reviewing the prospectuses provided by ML and Cohen. Respondents ML and Cohen asserted affirmative defenses including that the losses were due to adverse market conditions, suitability, waiver, estoppel, ratification, authorization and sole control by Claimant, and assumption of risk. Respondents ML and Cohen further asserted as an affirmative defense that punitive damages were not appropriate.

Respondents PW, Cohen, and Weist denied the allegations set forth in the Statement of Claim and specifically denied any and all liability to Claimant. Respondents PW, Cohen, and Weist asserted that there were absolutely no transactions in Claimant's account while it was serviced at PW; that the Alliance fund investments, which are the subject matter of this arbitration, were all purchased by Claimant at ML and were subsequently sold at Bear Stearns; and, that they

provided Claimant with information regarding the investments in his account and presented alternative investments when Claimant expressed concern over the performance of the Alliance funds. Respondents PW, Cohen, and Weist further alleged that, despite the information and alternatives presented by Respondents, Claimant chose not to make any changes and decided to hold the investments. Respondents PW, Cohen, and Weist asserted the affirmative defenses of estoppel, ratification, bar by laches and statute of limitations, failure to state a claim, contributory negligence, failure to mitigate damages, assumption of risk, and good faith.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested an award for damages in excess of \$100,000.00, punitive damages, prejudgment interest, costs and attorney's fees. However, at the hearing of this matter, Claimant did not pursue his request for punitive damages and stated he did not believe that attorney's fees were awardable under applicable law but, in the event that the panel determined that fees were awardable, then Claimant requested reasonable attorney's fees.

Respondent ML and Cohen requested dismissal and costs.

Respondents PW, Cohen, and Weist requested that the claims asserted against them be denied in their entirety, that they be awarded their costs and attorney's fees in the amount of \$9,175.37, and that all references to this arbitration proceeding be expunged from the Central Registration Depository ("CRD") records of Cohen and Weist.

OTHER ISSUES CONSIDERED & DECIDED

1. The panel was notified at the commencement of the evidentiary hearing that the Claimant had reached a settlement agreement with ML. Therefore, this panel made no determination regarding the liability of Respondent ML.
2. 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 the 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. Respondents are found not liable and, therefore, all claims against them are hereby dismissed.
2. All references to this arbitration proceeding shall be expunged from the CRD records of Cohen and Weist.
3. Claimant's requests for attorney's fees and costs are denied.
4. Claimant is found liable and shall pay to the Respondents, collectively, their attorney's fees in the amount of \$9,175.37. In making this Award of attorney's fees, this panel relies upon the Federal Arbitration Act, the rules of the NASD, Inc., the submission agreements executed by the respective parties, the pleadings filed by the parties, the attorney's fee affidavits submitted by the parties, and the cases reported at 115 S. Ct. 1212 (1995), 81 F.3d 1193 (1996), and 72 F.3d 234 (1995).

FORUM FEES

Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure ("Code"), a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, the panel has assessed forum fees in the amount of \$3,000.00 (one pre-hearing conference x \$750.00 plus three sessions x \$750.00 per session).

1. Claimant is assessed \$3,000.00, for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited in partial satisfaction thereof, leaving a balance due to the NASD Regulation, Inc. of \$2,250.00.
2. NASD Regulation, Inc. shall retain the non-refundable filing fee of \$200.00 paid by the Claimant.
3. Pursuant to Rule 10333 of the Code, Respondent ML shall pay to NASD Regulation, Inc. the \$300.00 past due member surcharge, which was previously invoiced.

4. Pursuant to Rule 10333 of the Code, Respondent PW shall pay to NASD Regulation, Inc the \$300.00 past due member surcharge, which was previously invoiced.

Fees are payable to the NASD Regulation, Inc.

/s/
William M. Howard, Esq.
Public Arbitrator, Presiding Chair

/s/
Arnold Sarrow
Public Arbitrator

/s/
Michael Z. Brennan
Industry Arbitrator

Date of Award: 6-18-97