

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Helen K. Mathieson,

Claimant and Counter-Respondent,

v.

Charles Schwab & Co., Inc.,

Respondent, Counter-Claimant, and Cross-Claimant,

No. 96-04408

v.

Gary A. Wawrzaszek,

Respondent and Cross-Respondent.

REPRESENTATION OF PARTIES

Claimant and Counter-Respondent Helen K. Mathieson ("Claimant") was represented by Frederick K. Hoops, Esq., Frederick H. Hoops, III, and Daniel S. Hoops, Esq. of Hoops, Hoops & Hoops, P.L.C. located in Farmington Hills, Michigan.

Respondent, Counter-Claimant, and Cross-Claimant Charles Schwab & Co., Inc. ("Charles Schwab") was represented by Steven Lanum, Esq. of Charles Schwab located in San Francisco, California.

Respondent and Cross-Respondent Gary A. Wawrzaszek ("Wawrzaszek") appeared pro se.

CASE INFORMATION

The Statement of Claim was filed on or about October 4, 1996.

Claimant's Submission Agreement was signed on October 2, 1996.

The Statement of Answer, Counterclaim, and Cross-Claim of Charles Schwab was filed on or about December 27, 1996.

The Amended Statement of Answer, Counterclaim, and Cross-Claim of Charles Schwab was filed on or about January 21, 1997.

Claimant's Response to Counter-Claim was filed on or about January 27, 1997.

The Statement of Answer of Wawrzaszek was filed on or about May 8, 1998.

The Submission Agreement of Wawrzaszek was signed on April 30, 1998.

HEARING INFORMATION

The telephonic pre-hearing discovery conference was held on January 28, 1998 for one (1) session.

The hearing was held on March 10, 1998 for two (2) sessions and September 23, 1998 for two (2) sessions. The hearing location was Southfield, Michigan.

CASE SUMMARY

~~In the Statement of Claim, Claimant alleged that Respondent Wawrzaszek purchased inappropriate investments in her account at Charles Schwab including: Orion Pictures stock; Rockefeller Center stock; Miniscribe stock; Koger stock; Venture Fund I - Tampa Apartments; and NSI Income Fund II - Westwind Apartments. Claimant further asserted that Respondent Wawrzaszek made inappropriate short sales in Claimant's account involving the stock of Wells Fargo and Coca Cola. Claimant contended that all investments were unsuitable for her based on her age, income and net worth, as well as her articulated investment objectives. Claimant also maintained that Respondent Wawrzaszek failed to make adequate disclosures to Claimant concerning the nature of these investments and the high risks associated therein. Claimant asserted claims for securities law fraud, common law fraud, and other violations of law.~~

Respondent Charles Schwab characterized this action as a dispute between Claimant and her personal financial advisor, and requested that the panel dismiss all allegations against Charles Schwab. In its Statement of Answer, Respondent Charles Schwab alleged that Respondent Wawrzaszek is an independent financial advisor who is not and never was a Charles Schwab employee or agent. Respondent Charles Schwab contended that Claimant selected Respondent Wawrzaszek as her investment advisor and voluntarily granted him discretionary authority over the account. According to Charles Schwab, it had no discretionary authority over the account and did not make any of the recommendations that are the subject of the claim. Moreover, Respondent Charles Schwab alleged that both Claimant and Wawrzaszek expressly agreed to indemnify it from all liabilities, costs or expenses resulting from Wawrzaszek's exercise of trading authority over Claimant's accounts. Charles Schwab also asserted a Counter-Claim and

Cross-Claim against Claimant and Wawrzaszek for indemnity.

Respondent Wawrzaszek also denied all liability to Claimant in his Statement of Answer. Respondent Wawrzaszek contended that the investments at issue were suitable and consistent with Claimant's expressed investment objectives, risk tolerance, as well as her prior investment history. Respondent Wawrzaszek alleged that approximately 80% of all investments were invested in a diversified portfolio of low risk, income producing investments. Respondent Wawrzaszek asserted that he fully disclosed all risks associated with the investments and that Claimant accepted those risks. Respondent Wawrzaszek contended that he believed that he repaid the outstanding loan owed to Claimant.

RELIEF REQUESTED

Claimant sought damages of \$109,299.85, plus treble and exemplary damages, as well as interest at 12%, costs, attorney fees, additional damages, and rescission. Claimant also sought damages of \$2,590 which Respondent Wawrzaszek allegedly borrowed from Claimant and never repaid.

Respondents requested that the Statement of Claim be dismissed in its entirety with prejudice, plus an award of attorney fees and/or costs. In its Counter-Claim and Cross-Claim against Claimant and Wawrzaszek, Charles Schwab requested that it be indemnified for all liabilities and costs incurred by Charles Schwab as a result of this action.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Charles Schwab's Motion to Dismiss pursuant to Rule 10304 of the NASD Code of Arbitration Procedure ("Code") was denied by the panel.

Respondent Wawrzaszek did not appear in this matter until the middle of the March 10, 1998 hearing. At this hearing, Respondent Wawrzaszek informed the panel that he did not believe that he was compelled by the Rules of the NASD to arbitrate disputes in this forum. Respondent Wawrzaszek subsequently left the hearing. Pursuant to its authority under Rule 10318 of the Code, the panel decided to proceed with the March 10th hearing in Wawrzaszek's absence. However, after considering the evidence presented at the March 10th hearing, the panel decided that Wawrzaszek was required to submit to arbitration pursuant to §10301 of the Code and ordered that Wawrzaszek file a Statement of Answer and Submission Agreement by April 30, 1998. After Wawrzaszek filed his Statement of Answer and Submission Agreement, the panel scheduled the September 23, 1998 hearing to provide Wawrzaszek with an opportunity to testify and present evidence. Thereafter, Claimant filed a Motion to Close Record, Halt Further Hearings, Bar Respondent Wawrzaszek from Further Participation in this Case, and that an Immediate Decision be rendered by the panel. The panel subsequently denied Claimant's Motion, Wawrzaszek did testify at the September 23rd hearing, and the other parties were

permitted to cross-examine Wawrzaszek and present rebuttal evidence.

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 Gary A. Wawrzaszek is liable for and shall pay to Helen K. Mathieson compensatory damages in the amount of Thirty Nine Thousand Three Hundred Forty Dollars and Forty Four Cents (\$39,340.44);
- (2) That all Claimant's claims against Charles Schwab & Co., Inc. are hereby dismissed in their entirety with prejudice;
- (3) That the Counter-Claim and Cross-Claim of Charles Schwab & Co., Inc. are hereby dismissed in their entirety with prejudice;
- (4) That other than forum fees which are specified below, the parties shall each bear their own costs, attorney fees and expenses incurred in this matter; and
- (5) That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were four (4) hearing sessions x \$750 = \$3,000 in forum fees. There was one (1) pre-hearing conference x \$300 = \$300 in forum fees. Total forum fees = \$3,300. Pursuant to Rule10332(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 Rule10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall retain as forum fees the

hearing session deposit in the amount of \$750 previously deposited by the Claimant.

Pursuant to Rule 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fees associated with the Counter-Claim and Cross-Claim in the amount of \$1,000 and shall retain as forum fees a portion of the hearing session deposit in the amount of \$900 (1/2 forum fees from the first hearing sessions and pre-hearing conference) previously deposited by Charles Schwab.

Pursuant to Rule 10332(c) of the Code, Claimant is liable for and shall pay forum fees in the amount of \$150 (1/2 forum fees from the first hearing sessions and pre-hearing conference - hearing session deposit).

Pursuant to Rule 10332(c) of the Code, Respondent Wawrzaszek is liable for and shall pay forum fees in the amount of \$1,500 (all forum fees from last hearing sessions).

Pursuant to Rule 10333 of the Code, Respondent Charles Schwab has paid to NASD Regulation, Inc. the \$350 member surcharge previously invoiced.

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

Concurring Arbitrators' Signatures:

/s/ Marvin I. Horowitz, Esq.
Marvin I. Horowitz, Esq.
Chairperson
Public Arbitrator

October 8, 1998
Dated:

/s/ Michael J. Meeusen, Esq.
Michael J. Meeusen, Esq.
Panelist
Public Arbitrator

October 9, 1998
Dated:

/s/ John G. Martin
John G. Martin
Panelist
Industry Arbitrator

October 8, 1998
Dated:

For NASD Regulation use only:
Date award served on parties:

October 22, 1998