

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Names of Claimants

Barry Brenner and Madeline McCarthy,
as Successor Trustees for Mary Brenner Trustee
UAD 5/7/84 FBO Mary Brenner Trust,
and Mary Brenner Trustee UAD 5/7/84
FBO Joel Brenner Trust

96-04508

Names of Respondents

Dean Witter Reynolds, Inc.
John G. Forrester, Jr.

REPRESENTATION

For Claimants: Scott L. Warfman, Esq. of Nortman, Bloom & Warfman, P.A., Miami, FL.

For Respondent Dean Witter Reynolds, Inc. ("Dean Witter"): Anne Tennant Cooney, Esq., Vice President, Senior Attorney, Law Department of Morgan Stanley Dean Witter, San Francisco, CA.

For Respondent John G. Forrester, Jr. ("Forrester"): Neil S. Baritz, Esq. of Dreier & Baritz, Boca Raton, FL.

CASE INFORMATION

Statement of Claim filed on October 10, 1996.

Amended Statement of Claim filed on December 15, 1996.

Claimants Barry Brenner and Madeline McCarthy, as Successor Trustees for Mary Brenner Trustee UAD 5/7/84 FBO Mary Brenner Trust's ("Mary Brenner"), Submission Agreement signed on November 14, 1996.

Claimants Barry Brenner and Madeline McCarthy, as Successor Trustees for Mary Brenner Trustee UAD 5/7/84 FBO Joel Brenner Trust's ("Joel Brenner"), Submission Agreement signed

NASD Award #96-04508

on November 15, 1996.

Statement of Answer filed by Respondent Dean Witter on March 13, 1997.

Statement of Answer filed by Respondent Forrester on April 22, 1997.

Respondents Dean Witter and Forrester did not file executed Submission Agreements (See "Other Issues").

HEARING INFORMATION

A telephonic pre-hearing conference which lasted one (1) session was conducted by the Arbitration Panel on June 27, 1997. In addition, two (2) telephonic pre-hearing conferences which lasted one (1) session each were conducted by the Chairperson on May 7, 1998 and September 17, 1998.

The evidentiary hearing which lasted fourteen (14) sessions was conducted in Boca Raton, Florida on January 11, 12, 13, 14, and 19, 1999 and May 24 and 25, 1999.

CASE SUMMARY

Claimants alleged the following: that the disputed account was opened in 1991 with Dean Witter by Mary Brenner when she was 82 years old; that she was a housewife with no business experience; that she was the only account holder and suffered from some diminished mental capacity including memory problems; that she was easily influenced; that by the time the account stopped trading, she was obviously mentally impaired, wrote left and right on her shoes to distinguish them and put signs in her apartment so she could identify which room she was in; that she relied on her broker's recommendations for all of the investments in the account; that when the account was opened it consisted primarily of municipal bonds; that approximately two years later, she became the holder of a highly leveraged, margined account, purchasing speculative securities based upon the recommendations of Forrester; that the speculation ranged from high yielding junk bonds to a Canadian penny stock traded on the Vancouver Stock Exchange, and also included a \$100,000.00 purchase of 80% of a private start-up company in Vancouver known as Rap Math; that Rap Math became a worthless investment; that apart from the Rap Math investment, the other primary disputed investments were the purchase on margin of approximately \$400,000.00 of junk bonds, consisting of Dean Witter High Yield Fund, VKM Strategic Income Fund, Eaton Vance High Income Fund, and Alliance North American, and the purchase of approximately \$185,000.00 worth of Krupp Securities; that all of these investments, given their characteristics, and the amount purchased, were unsuitable; that these purchases resulted in principal trading losses of approximately \$215,000.00; that in summary, the disputed account was opened with approximately \$450,000.00 worth of securities; that during the four year period that this account was open, it essentially made no money, and generated

commissions of approximately \$100,000.00 and margin interest of \$30,000.00; that the trading losses combined were approximately \$315,000.00; and, that a well managed portfolio would have generated more than \$400,000.00 in gains during the subject four year period.

Respondent Dean Witter alleged the following: that Dean Witter denies all allegations of wrongdoing contained in the Statement of Claim; that all of the investments were authorized by Claimants and were entirely appropriate and suitable for Claimants based on their financial situation and needs; that Dean Witter fully disclosed to Claimants all of the risks associated with their investments; that Dean Witter never breached any duty or obligation owed to Claimants; that Claimants are barred from any recovery under the doctrines of waiver, estoppel and ratification; and, that any losses in Claimants' accounts were caused by extraordinary market forces and other events entirely beyond Dean Witter's control.

Respondent Forrester, in his answer and affirmative defenses, denied the allegations asserted against him and alleged that he had a fifteen year relationship with Mary Brenner and regularly met with her and discussed her investment objectives, changing investment needs, and ultimately, account performance. Respondent Forrester maintained that each and every transaction was reviewed, discussed, and authorized by Mary Brenner and was suitable for her based on her disclosed objectives and as such, any and all losses, are necessarily Claimants' responsibility.

Further, Respondent Forrester maintained the following: that any alleged obligation on his part, to the extent such existed, was discharged and/or excused due to Claimants' negligence; that to the extent that Claimants suffered any damages, Claimants failed to mitigate their damages; that to the extent that Claimants suffered any damages, their damages were proximately caused by their own conduct, negligence, failure to conduct due diligence and/or breach of fiduciary duty; that to the extent that Claimants suffered any damages or claimed to suffer any damages that were caused, directly or indirectly, by persons or entities other than Forrester, Forrester is entitled to be indemnified and held harmless against any losses, claims, damages or liabilities to which he may become subject; that Claimants' claims are barred under the doctrines of release, waiver, equitable estoppel, ratification, accord and satisfaction; that to the extent that Claimants purport to assert a claim based on tort or other non-contract theories as a basis for recovery, such claims fail to state a cause of action upon which relief can be granted; and, that Forrester cannot be found liable for churning because he exercised no control, real or de facto, over Claimants' affairs or accounts.

RELIEF REQUESTED

Claimants requested compensatory damages in the sum of \$737,000.00, punitive damages, attorneys' fees, and costs.

NASD Award #96-04508

Respondent Forrester requested a dismissal of the Statement of Claim and an award of fees and costs in defense thereof.

Respondent Dean Witter requested that the Statement of Claim be dismissed in its entirety and that it be awarded attorneys' fees and costs.

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 remains on file with NASD Regulation, Inc.

Respondents did not file with the NASD Regulation, Inc., Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration Pursuant to Rule 10301 of the Code of Arbitration Procedure ("Code"), and having answered the claim, appeared, and testified at the hearing, are bound by the determination of the Arbitration Panel on all issues submitted.

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:

Respondents Dean Witter and Forrester are liable, jointly and severally, and shall pay to the Claimants the sum of \$109,650.00 plus pre-judgment interest at the rate of 6% commencing on March 1, 1993 until the date of decision.

Respondent Forrester is liable and shall pay to the Claimants the additional sum of \$50,000.00 plus pre-judgment interest at the rate of 6% commencing on March 1, 1993 until the date of decision.

Claimants' requests for punitive damages, attorneys' fees, and costs are denied.

Respondent Forrester's requests for attorneys' fees and costs are denied.

OTHER FEES

Pursuant to Rule 10332 of the Code, Claimants have paid to NASD Regulation, Inc. the claim filing fee of \$250.00.

NASD Award #96-04508

Pursuant to Rule 10333 of the Code, Respondent Dean Witter has paid to NASD Regulation, Inc. the member surcharge of \$500.00.

Pursuant to Rule 10319(b) of the Code, Claimants have paid to NASD Regulation, Inc. \$1,000.00 representing the adjournment fee for the postponement of the hearing scheduled for January 15, 1999.

FORUM FEES

Pursuant to Rule 10332 of the Code, the Arbitration Panel has assessed forum fees in the amount of \$15,600.00 (one (1) pre-hearing conference-Panel x \$1,000.00 plus two (2) pre-hearing conferences-Chairperson x \$300.00 plus fourteen (14) hearing sessions x \$1,000.00) as follows:

Respondents are assessed, jointly and severally, the sum of \$15,600.00 for which NASD Regulation, Inc. shall retain the \$1,000.00 previously deposited by Respondent Dean Witter in partial satisfaction thereof, leaving a balance due to NASD Regulation, Inc. of \$14,600.00.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/s/

Public

Elaine Feldman, Esq.

/s/

Public

J. Porter McClean

/s/

Industry

David M. Levine

Date of Decision:

July 12, 1999

NASD Award #96-04508

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Concurring Arbitrators' Signatures**Name****Public/Industry**

Elaine Feldman
Elaine Feldman, Esq.

Public

I. Porter McClean

Public

David M. Levine

Industry**Date of Decision:**7/2/99

NASD Award #96-04508

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Concurring Arbitrators' Signatures**Name****Public/Industry**Elaine Feldman, Esq.**Public**L. Porter McClean**Public**David M. Levine**Industry****Date of Decision:** _____