

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Gerald Tarvis and Bernice Tarvis Trust,  
Nancy Paull, Individually and as Trustee  
of the Trust and John D. Tarvis, Individually,  
and as Trustee of the Trust,

Claimants,

v.

No. 96-04755

Kemper Securities, Inc.,  
Dean Witter Reynolds, Inc., and  
Thomas Gerald Tarvis,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimants Gerald Tarvis and Bernice Tarvis Trust, Nancy Paull, Individually and as Trustee of the Trust and John D. Tarvis, Individually, and as Trustee of the Trust, ("Claimants") were represented by Anthony V. Trogan, Esq. of Weisman, Trogan, Young & Schloss, P.C. located in Bingham Farms, Michigan.

Respondents Dean Witter Reynolds, Inc. ("Dean Witter") and Thomas Gerald Tarvis ("Tarvis"), to the extent of his employment at Dean Witter, were represented by David P. Restanio, Esq. of Dean Witter Reynolds, Inc. located in San Francisco, California.

Respondents Kemper Securities, Inc., n/k/a EVEREN Securities, Inc., ("EVEREN") and Tarvis, to the extent of his employment at EVEREN, were represented by Bruce Lewitas, Esq. of EVEREN Securities, Inc. located in Chicago, Illinois.

### **CASE INFORMATION**

The Statement of Claim was filed on or about October 21, 1996.

Claimants' Submission Agreement was signed on October 18, 1996.

The Joint Statement of Answer and Motion to Dismiss of EVEREN and Tarvis was filed on or about May 19, 1997.

The Joint Statement of Answer of Dean Witter and Tarvis was filed on or about May 1, 1997.

The Submission Agreement of Respondent EVEREN was signed on July 31, 1997.

The Submission Agreement of Respondent Dean Witter was signed on May 1, 1997.

The Submission Agreement of Respondent Tarvis was signed on May 9, 1997.

### **HEARING INFORMATION**

The telephonic pre-hearing conferences were held on October 14, 1997 for one (1) session, October 29, 1997 for one (1) session and December 8, 1997 for one (1) session.

The hearing was held on January 22, 1998 for two (2) sessions, July 14, 1998 for two (2) sessions, and July 15, 1998 for one (1) session. The hearing location was Southfield, Michigan.

### **CASE SUMMARY**

Claimants alleged that Respondents EVEREN, Dean Witter, and Tarvis (collectively referred to as "Respondents") violated their obligations and responsibilities by placing securities in the accounts of Claimants which were per se unsuitable for them based upon Claimants' status and the information disclosed to or made known to Respondents, and in violation of the standard of care for the Trust specified at Article X(A) of the Trust. Claimants also contended that the trading in the account was excessive. Claimants further asserted that Respondents acted without disclosure or an accounting to Claimants until late 1994. Claimants maintained that, as a result of the foregoing, Claimants lost upwards of \$75,000. Claimants based their claim upon the following legal theories and principles: breach of contract; common law fraud; conspiracy; promissory estoppel; conversion; negligence; malpractice; breach of fiduciary duty; breach of federal securities law; breach of Michigan securities law; and violation of Michigan Consumer's Protection Law.

Respondents denied all liability to Claimants in the Joint Statements of Answer. Respondents alleged that Claimants have filed a groundless claim in which they seek to air their family's dirty laundry through the arbitration process (Claimants are the brother and sister of Respondent Tarvis). Respondents contended that, while the account at issue was located at EVEREN, a total of five purchases were made for the account, two of which purchases were high rated bonds. Respondents alleged that, over the life of the account at Dean Witter, there were only two securities purchased, neither of which was sold. Respondents contended that both securities purchased were closed-end bond funds, which were a wholly appropriate component of the account. Respondents maintained that Claimants' claims of excessive trading and purchasing unsuitable securities misrepresent both the facts and law of this case.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimants requested: out-of-pocket losses in the amount of \$75,000, plus interest at 12%, reasonable attorney fees and costs, exemplary and punitive damages, additional damages, and rescission of all transactions.

Respondents requested that the Statement of Claim be dismissed in its entirety with prejudice, plus an award of attorney fees and costs.

### **OTHER ISSUES CONSIDERED & DECIDED**

After Arbitrator Elwood Simon disclosed at the hearing that he had a conflict involving one of the parties to the proceeding, he withdrew from the panel in accordance with Cannon II(e) of the Code of Ethics for Arbitrators in Commercial Disputes. Although the parties could have continued with the hearing with the two remaining arbitrators, there was an objection to proceeding with only two arbitrators. Pursuant to Rule 10313 of the NASD Code of Arbitration Procedure ("Code"), the NASD appointed Arbitrator A. Robert Stevenson to fill the vacancy on the panel so that the hearing could continue at a later date.

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 the Statement of Claim is hereby dismissed in its entirety with prejudice;
- (2) That all reference to this matter shall be expunged from the Central Registration Depository of the National Association of Securities Dealers, Inc. for the record of Thomas Gerald Tarvis;
- (3) 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
- (4) 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 \$500 per hearing session and \$300 for each pre-hearing conference, if any. There were five (5) hearing sessions x \$500 = \$2,500 in forum fees. There were three (3) pre-hearing sessions x \$300 = \$900 in forum fees. Total forum fees = \$3,400. Pursuant to §10332(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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$150 and shall retain as forum fees the hearing session deposit in the amount of \$500 previously deposited by the Claimants.

Pursuant to §10332(c) of the Code, Claimants are liable for and shall pay forum fees in the amount of \$1,200 (1/2 forum fees - hearing session deposit).

Pursuant to §10332(c) of the Code, Respondents are liable for and shall pay forum fees in the amount of \$1,700 (1/2 forum fees).

Pursuant to Rule 10333 of the Code, Respondent Dean Witter has paid to NASD Regulation, Inc. the \$300 member surcharge previously invoiced.

Pursuant to Rule 10333 of the Code, Respondent EVEREN has paid to NASD Regulation, Inc. the \$300 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

August 21, 1998

Dated:

/s/ A. Robert Stevenson, Esq.

A. Robert Stevenson, Esq.

Panelist

Public Arbitrator

August 10, 1998

Dated:

/s/ Patrick R. Sughrue

Patrick R. Sughrue

Panelist

Industry Arbitrator

August 20, 1998

Dated:

For NASD Regulation use only:

Date award served on parties:

August 25, 1998