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AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

William E. Mros

and

96-05138

Name of Respondent

Sterling Foster & Co., Inc.,
Christopher B. Atteo,
David Lieberman,
Andrew Edward Reegen,
Adam Lieberman, and
Edmund Patrick Heeney

REPRESENTATION OF PARTIES

William E. Mros ("Claimant") was represented by Robert D. Mitchell, Esq., Phoenix, Arizona.

Sterling Foster & Co., Inc. ("SFC"), Christopher B. Atteo ("Atteo") David Lieberman, Andrew Edward Reegen, Adam Lieberman ("Lieberman") and Edmund Patrick Heeney ("Heeney") (collectively referred to as "Respondents") were represented by Gergory M. Curley, Esq., of the Law Offices of Joseph D'Elia, Huntington, New York. Respondents were represented until March 6, 1997 by Leslie K. Case, Esq., of Gersten, Savage, Kaplowitz, Fredericks & Curtin, LLP, New York, New York.

CASE INFORMATION

Claimant filed the Statement of Claim on or about November 12, 1996, and signed the Submission Agreement on November 12, 1996.

Respondents filed their joint Statement of Answer on or about January 24, 1997. The Office of Dispute Resolution does not have a record of Respondents having filed Submission Agreements.

HEARING INFORMATION

Telephonic pre-hearing conferences were held on July 20, 1997 for one (1) session, August 28, 1997 for one (1) session, and September 22, 1997 for one (1) session.

The Arbitration Panel held a hearing on October 9, 1997 for two (2) sessions and October 10, 1997 for one (1) session in Scottsdale, Arizona for a total of three (3) sessions.

CASE SUMMARY

Claimant alleged that Respondents: Were negligent in advising Claimant to invest in unsuitable and improper securities purchased in his portfolio, and in failing to conservatively invest his funds in accordance with claimant's needs and objectives; violated NASD Conduct Rule 2310 and NYSE Rule 405 due to the investments sold to Claimant, and the excessive discretionary trading on margin of the investments; never explained the risks associated with the investments made by the Respondents, and had assured him that the investment recommendations would be appropriate for him and would not unduly risk his principal; made one or more trades without first having spoken with Claimant to obtain his expressed consent; violated A.R.S. §44-1991 in making the unsuitable and unauthorized trades, and by affirmatively recommending and encouraging Claimant to purchase the investments subject to this claim without disclosing all relevant facts; churned Claimant's account; violated § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5; breached their fiduciary duty to the Claimant; breached their contract with Claimant; committed common law fraud and intentional misrepresentations through their numerous material misrepresentations of material fact or omissions of material fact in connection with the subject investments; and made negligent misrepresentations to Claimant. Claimant also alleged that Sterling, Lieberman, and Reegen failed to supervise Atteo's activities with respect to Claimant's account. The allegations arose out of transactions in corporate stocks, more fully covered at the hearing.

Respondents denied the allegations set forth in the Statement of Claim. Respondents asserted the following affirmative defenses: The Statement of Claim and each cause of action contained therein, fail to state a cause of action against Respondents upon which relief can be granted; Claimant assumed the risk of investing in the securities market; throughout the entire relevant period, Claimant's account was non-discretionary, and no trades were executed on discretion, except for one trade that was canceled, Claimant paid for each and every trade in his account; the Statement of Claim, and each cause of action therein, is barred by the equitable doctrine of waiver; the Statement of Claim, and each cause therein, is barred by the equitable doctrine of estoppel; the Claimant having specifically instructed his broker to execute the trades in his account, and having ratified the trades, should not be allowed to complain about the transactions; The Statement of Claim, and each cause of action therein, is barred by the equitable doctrine of ratification; Respondents, in discharging their duties, if any, to Claimant, acted in good faith and exercised at least that degree of care, diligence, and skill which an ordinarily prudent person would exercise in similar circumstances and like position; the Statement of Claim, and each cause of action contained therein, is barred by the equitable doctrine of laches; Claimant's dispute with Respondents is governed by the law of the State of New York; any losses suffered by Claimant were the result of market conditions and/or fluctuations normally associated with investments in the securities market; and Claimant failed to mitigate his damages.

RELIEF REQUESTED

Claimant requested an award in the amount of the following: Compensatory damages of at least \$17,300, plus lost opportunity damages/or interest, in a specific amount to be proven at the hearing; recovery of commissions, margin interest and other fees charged by Respondents on Claimant's investments; recovery of his filing fees and such other costs and expenses as may be incurred in bringing this arbitration; attorneys' fees pursuant to A.R.S. §§ 12-341.01 and 44-2001; punitive damages of at least \$25,000 in a specific amount the arbitrators deem appropriate; and such other relief in favor of Claimant as the arbitrators deem just and appropriate under the circumstances.

Respondents requested that the claim be denied in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

Respondents David Lieberman, Adam Lieberman, Edmund Heeney and Andrew E. Reegen filed a Motion to Dismiss. Claimant responded to the motion; and also filed a formal notice of dismissal with regard to claims against David Lieberman and Andrew Reegen. David Lieberman and Andrew Reegen were removed as parties to this arbitration and did not participate further. After review of the relevant documents, the arbitrators denied the motion.

Claimant filed a Motion to Strike Respondents' 10321(c) List of Witnesses and Exhibits, and Motion to Bar Presentation of Witnesses and Exhibits. Respondents responded to the motion. After review of the relevant documents, and deliberation the arbitrators denied the motion.

On or about October 31, 1997, which was after the hearing in this matter but before a decision was entered, Respondents filed a copy of an order from the United States District Court for the Eastern District of New York (the "Order"). Pursuant to the Order, all arbitrations were stayed until after Claimants affected by the Order were able to review a Consolidated Class Action Complaint and file an appropriate opt-out form for the class action. On or about December 30, 1997, Claimant filed a Request for Early Exclusion with counsel in the class action captioned *Thomas Rogers, et al. vs. Sterling Foster & Co., Inc., et al.*, No. 97 CV 00189 (DRH). A copy was also received by the NASD Regulation Office of Dispute Resolution on January 6, 1998. Based on Claimant's election to proceed solely with his arbitration claim, this matter was reactivated, and the matter returned to the arbitrators for final decision.

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

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:

Respondents Sterling Foster & Co., Inc. And Adam Lieberman are jointly and severally liable for, and shall pay to the Claimant, William E. Mros, the following: \$18,107.62 as an award of compensatory damages; \$1,855.00 as an award of interest; and \$520.00 as an award of costs of filing this arbitration.

Claimant's claims made against Respondents Christopher Atteo and Edmund Heeney are, and each of them, denied with prejudice.

All other requests for relief/claims for damages are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each prehearing conference, if any. There were three pre-hearing sessions @ \$300 per session and three (3) hearing sessions @ \$400 = \$2,100 in forum fees. Pursuant to Rule 10332(b) of the Code of Arbitration Procedure (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 Rule 10332© of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$120 and shall retain as forum fees the hearing session deposit in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to Rule 10333 of the Code, Sterling Foster & Co., Inc. Is liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$200.

Pursuant to Rules 10319 and 10332 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the postponement fee in the amount of \$400 previously paid by Sterling Foster & Co., Inc.

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NASD Regulation, Inc. Office of Dispute Resolution
Arbitration No. 96-05138
Award Page 5 of 5

Additional forum fees in the amount of \$1,700 (\$2,100-\$400) are assessed jointly and severally against Sterling Foster & Co., Inc. And Adam Lieberman.

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

Dated:

Howard R. Gaines
Howard R. Gaines
Public Arbitrator, Presiding Chair

/s/

January 14, 1998

Beryl I. Dulsky
Beryl I. Dulsky
Public Arbitrator

/s/

January 15, 1998

Leon G. Mackey
Leon G. Mackey
Industry Arbitrator

/s/

January 14, 1998