

Award
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Names of Claimants

Marvin P. Martin and Mary Ann Martin

NASD Case No. 98-03884

Hearing Site: Charlotte, North Carolina

Names of Respondents

Paul Fitzgerald, Linda S. Kimbrough,
Rob Moses, Kimball N. Whitfield,
Debra L. Whitfield, and
First Allied Securities, Inc.

REPRESENTATION OF PARTIES

Claimants, Marvin P. Martin and Mary Ann Martin, hereinafter referred to as "Claimants", appeared pro se.

Respondents, Paul Fitzgerald ("Fitzgerald"), Linda S. Kimbrough ("Kimbrough"), Robert Moses ("Moses"), Kimball N. Whitfield ("K. Whitfield"), Debra L. Whitfield ("D. Whitfield"), and First Allied Securities, Inc. ("First Allied"), hereinafter collectively referred to as "Respondents": Brian J. Neville, Esq., First Allied Securities, Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed on: October 19, 1998.

Claimants signed the Uniform Submission Agreement: October 9, 1998.

Answer filed by Respondents on or about: January 8, 1999.

Respondent D. Whitfield signed the Uniform Submission Agreement: March 8, 1999.

Respondent K. Whitfield signed the Uniform Submission Agreement: March 9, 1999.

Respondents Fitzgerald, Kimbrough, Moses and First Allied all failed to file Uniform Submission Agreements.

CASE SUMMARY

Claimants alleged the following: Respondents D. Whitfield and K. Whitfield ("the Whitfields") and First Allied were maintaining registration as an Investment Advisor. Said Respondents failed to provide complete and accurate financial advice regarding their recommendation to buy a certain mutual fund. The Whitfields did not provide due diligence in their duties as financial advisors concerning Claimants' purchase of and maintaining said mutual fund in their portfolio. Furthermore, the Whitfields failed to maintain a Registered

Investment Advisor Registration while acting in the capacity of an investment advisor, and First Allied failed to supervise the Whitfields regarding their registration in accordance with its compliance manual.

Unless specifically admitted in their Answer, Respondents denied the allegations of wrongdoing contained in the Statement of Claim and asserted the following affirmative defenses: Claimants failed to state a cause of action upon which relief may be granted; Respondents did not act with any intent to defraud Claimants or with any willful disregard for them; all transactions in their accounts were authorized by Claimants and were executed with their knowledge and consent; the damages set forth in the Statement of Claim are not the result of any act or omission on the part of the Respondents; the actions or inactions of Claimants, not Respondents, caused the losses of which they complain; Claimants received confirmations and monthly statements reflecting all transactions in their accounts, did not object to such reports and, accordingly, ratified and approved all transactions; Claimants have waived the claims asserted herein; Claimants by their conduct, sophistication, and under all circumstances of this case are estopped from asserting the claims herein; events occurred not caused by Respondents which constitute superseding or intervening causes of some or all of the alleged losses of which Claimants complain; any and all duties owed to Claimants were fully and faithfully performed; Respondents have no fiduciary duty to Claimants as a matter of law; there was no negligence on the part of Respondents in the handling of Claimants' accounts; the investments in Claimant's accounts were suitable in light of their objectives, financial status and understanding; and, First Allied had in place adequate supervisory procedures which it reasonably and diligently implemented and followed.

RELIEF REQUESTED

Claimants requested total damages of \$11,044.00 as follows: actual principal lost in the amount of \$4,891.00; interest from December 1995 through January 1996 in the sum of \$3,873.00 (interest at 6% on original principal as provided in South Carolina Code); interest from November 1998 through November 1999 in the sum of \$480.00 (interest on principal and interest from date of complaint at 6%); and expenses of recovery (including filing fee, postage, telephone, outside consulting and claim preparation) in the sum of \$1,800.00.

Respondents requested that Claimants' Statement of Claim be dismissed in its entirety, together with any other relief against the Claimants deemed just.

OTHER ISSUES CONSIDERED AND DECIDED

On May 26, 1999, Claimants filed a "Summary Response to Respondents' Motion" whereby the parties stipulated that all claims against Respondents Fitzgerald, Kimbrough and Moses be withdrawn and that First Allied be substituted in the proceeding as a party Respondent. Accordingly, the Arbitrator did not reach any determinations with respect to Fitzgerald, Kimbrough and Moses.

On August 3, 1999, the Arbitrator deferred ruling on Claimants' Motion for Summary

Judgment dated June 16, 1999 (the "Motion") pending completion of the evidentiary hearing conducted in this matter. At the conclusion of the hearing, the Arbitrator denied the Motion.

The parties have agreed that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the undersigned Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents D. Whitfield, K. Whitfield and First Allied are found liable, jointly and severally, and shall pay to Claimants compensatory damages in the amount of \$5,619.00, inclusive of pre-award interest.
2. Any and all claims for relief not specifically addressed herein are denied.

FEES

Pursuant to the NASD Code of Arbitration Procedure, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$75.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm (First Allied) is a party.

Member surcharge = \$300.00

Forum Fees and Assessments

The Arbitrator assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the Arbitrator, including a pre-hearing conference with the Arbitrator, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with a single arbitrator x \$200.00 = \$400.00

Pre-hearing conference dates: May 18, 1999 1 session
August 10, 1999 1 session

Two (2) hearing sessions x \$200.00 = \$400.00

Hearing dates: October 14, 1999 2 sessions

Total Forum Fees = \$800.00

The Arbitrator has assessed the total forum fees of \$800.00 jointly and severally to Respondents D. Whitfield, K. Whitfield and First Allied.

Fee Summary

Claimants be and hereby are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$75.00
Total Fees	= \$75.00
<u>Less payments</u>	= \$75.00
Balance Due NASD Regulation, Inc.	= \$0.00

Respondent First Allied be and hereby is solely liable for:

<u>Member Fees</u>	= \$300.00
Total Fees	= \$300.00
<u>Less payments</u>	= \$300.00
Balance Due NASD Regulation, Inc.	= \$0.00

Respondents, First Allied, D. Whitfield and K. Whitfield, be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$800.00
Total Fees	= \$800.00
<u>Less payments</u>	= \$0.00
Balance Due NASD Regulation, Inc.	= \$800.00

All balances are due and payable to NASD Regulation, Inc.

Arbitrator's Signature

/s/
William H. Malloy, Jr., Esq.
Public Arbitrator

November 26, 1999
< Signature Date >

November 26, 1999
Date of Service (For NASD office use only)

The Arbitrator has assessed the total forum fees of \$800.00 jointly and severally to Respondents D. Whitfield, K. Whitfield and First Allied.

Fee Summary

Claimants be and hereby are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$75.00
<u>Total Fees</u>	= \$75.00
<u>Less payments</u>	= \$75.00
<u>Balance Due NASD Regulation, Inc.</u>	= \$0.00

Respondent First Allied bc and hereby is solely liable for:

<u>Member Fees</u>	= \$300.00
Total Fees	= \$300.00
<u>Less payments</u>	= \$300.00
Balance Due NASD Regulation, Inc.	= \$0.00

Respondents, First Allied, D. Whitfield and K. Whitfield, be and hereby are jointly and severally liable for:

Forum Fees	= \$800.00
Total Fees	= \$800.00
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Regulation, Inc.	= \$800.00

All balances are due and payable to NASD Regulation, Inc.

Arbitrator's Signature

William H. Malloy, Jr., Esq.
Public Arbitrator

November 26, 1999
< Signature Date >

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