

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between

Names of Claimants

Michael and Elaine Rose

Case No. 99-04594

Names of Respondents

M.J. Whitman, Inc.
Thomas Michael Marshburn, Jr.

REPRESENTATION OF PARTIES

For Michael and Elaine Rose ("Rose"), hereinafter collectively referred to as "Claimants": Craig D. Stein, Esq. and Jack Stein, Esq., Stein, Rosenberg & Winikoff, P.A., Fort Lauderdale, Florida.

For M.J. Whitman, Inc. ("Whitman") and Thomas Michael Marshburn, Jr. ("Marshburn"), hereinafter collectively referred to as "Respondents": William Nortman, Esq. and Jonathon S. Robbins, Esq., Atlas Pearlman P.A., Fort Lauderdale, Florida until a Stipulation for Substitution of Counsel occurred on October 1, 2000. Thereafter, Respondents were represented by W. James Hall, General Counsel, M.J. Whitman, Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: October 11, 1999.

Claimants signed the Uniform Submission Agreement: September 23, 1999.

Statement of Answer filed by Respondents on or about: January 6, 2000.

Respondents did not file executed Uniform Submission Agreements.

CASE SUMMARY

Claimants asserted the following: Respondents violated Section 10(b) of the Securities Exchange Act, Rule 10(b-5) of the Securities Exchange Commission, Florida Statutes Section 517.301, and the rules of the NYSE and NASD; Respondents excessively traded Claimants' account solely for the commissions generated; Respondents breached their contract with Claimants; Respondents breached their fiduciary duty to Claimants; Respondents knowingly made false statements regarding investments in which Respondents induced Claimants to invest; Respondents breached their duty of care to protect and safeguard Claimants' accounts;

Respondents made numerous fraudulent and unauthorized trades in Claimants' account; and Respondent Whitman breached its duty to supervise, direct and control Respondent Marshburn.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants were knowledgeable and sophisticated investors who understood the nature, substance, risks and rewards of the investments in their account; Claimants' claims are barred by waiver, ratification and estoppel; Respondents acted in accordance with Claimants' instructions and all purchases and sales were confirmed by Claimants; Claimants' account was handled in accordance and in compliance with the applicable brokerage industry standards, guidelines and regulatory requirements; Respondents acted with due diligence, in good faith and with the degree of care required; any damages suffered by Claimants were contributed to by conditions or events beyond the control of Respondents; Claimants' claims are barred by the economic loss doctrine; Claimants have failed to set forth sufficient causes of action for which they are entitled to relief; Claimants have failed to state a claim for the recovery of attorneys' fees or punitive damages; and, Claimants have failed to allege sufficient facts to support claims against Respondent Marshburn.

RELIEF REQUESTED

Claimants requested compensatory damages of \$245,000.00, plus interest, punitive damages of \$490,000.00, costs, attorneys' fees, and such other relief as the panel deemed just, fair and reasonable.

Respondents requested that all claims be dismissed in their entirety and that Claimants be assessed all costs and attorneys' fees. Respondents also requested such other and further relief as the Panel deemed appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents Whitman and Marshburn did not file with NASD Dispute Resolution, Inc. properly executed submissions to arbitration but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the 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.

AWARD

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

Respondent Whitman is liable under count eight of the Statement of Claim and shall pay to Claimants the sum of \$1.00 (one dollar) as compensatory damages.

Respondent Whitman is liable and shall pay to Claimants reasonable attorneys' fees of \$31,220.00. Attorneys' fees are awarded pursuant to the parties' account agreement.

Respondent Whitman is liable and shall pay to Claimants the sum of \$6,700.91 representing reimbursement of Claimants' costs in this proceeding.

Claimants' claims against Respondent Marshburn are dismissed with prejudice.

The Panel found for Respondents in counts one through seven and count nine of the Statement of Claim.

Each party to bear their own costs and attorneys' fees except as otherwise described herein.

Claimants' request for punitive damages is denied.

All other requests for relief not specifically addressed herein are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$375.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge	= \$2,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$3,500.00

Adjournment Fees

No adjournments were requested during these proceedings.

Forum Fees and Assessments

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

Two (2) Pre-hearing sessions with Panel	x \$1,200.00	= \$2,400.00
Pre-hearing conferences:		
May 8, 2000	1 session	
October 11, 2000	1 session	

Six (6) Hearing sessions	x \$1,200.00	= <u>\$7,200.00</u>
Hearing Dates:		
January 17, 2001	3 sessions	
January 18, 2001	3 sessions	

Total Forum Fees	= \$9,600.00
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The Panel has assessed \$4,800.00 of the forum fees to Claimants.

The Panel has assessed \$4,800.00 of the forum fees to Respondent Whitman.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during these proceedings.

Fee Summary

Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 375.00
Forum Fees	= <u>\$4,800.00</u>
Total Fees	= \$5,175.00
<u>Less payments</u>	= <u>\$1,575.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$3,600.00

Respondent Whitman be and hereby is solely liable for:

Member Fees	= \$ 6,100.00
Forum Fees	= <u>\$ 4,800.00</u>
Total Fees	= \$10,900.00
<u>Less payments</u>	= <u>\$6,100.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$4,800.00

All balances are payable to NASD Dispute Resolution, Inc. and are due immediately upon receipt of the Award by the parties.

Concurring Arbitrators' Signatures

_____/s/_____
Jonathan H. Parker, Esq.
Industry Arbitrator, Presiding Chair

Signature Date

_____/s/_____
Paul E. Morgan
Public Arbitrator

Signature Date

_____/s/_____
Roy B. Gonas, Esq.
Public Arbitrator

Signature Date

March 1, 2001
Date of Service (For NASD-DR office use only)

Conceding Arbitrators' Signatures



Jonathan H. Parker, Esq.
Industry Arbitrator, Presiding Chair

2-28-01

Signature Date

Paul E. Morgan
Public Arbitrator

Signature Date

Roy B. Gonas, Esq.
Public Arbitrator

Signature Date

Date of Service (For NASD-DR office use only)

Concurring Arbitrators' Signatures

Jonathan H. Parker, Esq.
Industry Arbitrator, Presiding Chair

Signature Date

Paul E. Morgan
Paul E. Morgan
Public Arbitrator

03/01/01
Signature Date

Roy B. Gonas, Esq.
Public Arbitrator

Signature Date

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Concurring Arbitrators' Signatures

Jonathan H. Parker, Esq.
Industry Arbitrator, Presiding Chair

Signature Date

Paul E. Morgan
Public Arbitrator

Signature Date



Roy B. Gonas, Esq.
Public Arbitrator

Signature Date

Date of Service (For NASD-DR office use only)

27 Feb. 01