

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants
The Esper A. Petersen Foundation and
The Edgar Petersen Trust

Case Number: 03-00864

Name of the Respondents
Morgan Stanley Dean Witter and Richard Welton

Hearing Site: Chicago, Illinois

NATURE OF THE DISPUTE

Customer v. Member Firm and Associated Person

REPRESENTATION OF PARTIES

Thomas Hargett, Esq., and Andrew J. Stoltmann, Esq., of the firm Maddox Hargett & Caruso, P.C. represented Claimants The Esper A. Petersen Foundation and The Edgar Petersen Trust ("Petersen").

Harold Hirshman, Esq., Marc Whitehead, Esq., and Jeffery S. Davis, Esq., of the firm Sonnenschein, Nath, and Rosental located in Chicago, Illinois represented Respondents Morgan Stanley Dean Witter ("Morgan Stanley") and Richard Welton ("Welton"), hereinafter collectively referred to as ("Respondents.")

CASE INFORMATION

Claimants filed the Statement of Claim filed on or about February 5, 2003. Claimants each signed the Uniform Submission Agreement on December 18, 2002.

Respondents filed a Joint Statement of Answer on May 16, 2003.

Claimants filed a Pre-Hearing Memorandum on June 15, 2004.
Respondents filed a Pre-Hearing Memorandum on June 15, 2004.

Respondents' Motion to Dismiss filed on May 7, 2004.
Claimants filed a Response to the Motion to Dismiss on May 24, 2004.
Respondents filed a Reply on May 31, 2004.

CASE SUMMARY

Claimants asserted the following causes of action: suitability, misrepresentations, omissions of facts, unauthorized trading, breach of contract, breach of fiduciary duty

and constructive fraud, *respondeat superior*, negligence and negligent supervision, and violation of NASD rules, state and federal securities laws.

The causes of action relate to investments in stocks.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: the filing of this claim is in violation of the Customer Service Agreement and the other documents executed between Claimants and Respondents; Claimants failed to properly investigate their claim; Claimants agreed to indemnify and hold Respondents harmless from any losses in their accounts; Esper A. Petersen, as fiduciary to the Foundation and Trust, is responsible for those losses and is liable in indemnity to Morgan Stanley and Welton; Claimants fail to plead fraud with sufficient particularity; no factual basis is pled upon which an allegation of fiduciary duty of Morgan Stanley or Welton can be based; pursuant to the Client Service Agreement New York law applies, consequently claims based on Illinois law should be dismissed with prejudice, and Respondents should have judgment for their costs and expenses, including attorneys fees, of responding to those allegations; the claim fails to state a claim upon which relief may be granted; the claim should be dismissed based on the doctrines of estoppel and waiver; claimants are estopped from bringing this action because they had full knowledge of the risks of their investments and failed to mitigate their damages; the claims are barred by the Claimants' own comparative fault; at no time did the Respondents, their agents, employees or representatives make any promise, warranty, express or implied, or representation of Claimants in connection with the allegations of their claim; Claimants did not reasonably rely on any promise, warranty, express or implied, or representation which may have been made by Respondents in connection with the allegations of their claim; Claimants were aware of the risks of loss associated with investing in the stock market and voluntarily assumed the risk of loss; and the claim should be dismissed based on the applicable Statutes of Limitation, including Section 10304 of the NASD Code of Arbitration Procedure.

RELIEF REQUESTED

Claimant Petersen requested compensatory damages in the amount of \$1,866,632.00, punitive damages, pre and post award interest at 10% per annum, attorney's fees, costs, and any such relief the panel deems just and equitable.

Respondents requested denial and dismissal of claims, as well as costs and expenses as allowed by NASD rules.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Morgan Stanley Dean Witter and Richard Welton did not file with NASD Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to 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.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Morgan Stanley Dean Witter is solely liable for and shall pay to The Esper A. Petersen Foundation the sum of \$29,000.00 as compensatory damages for failure to supervise and suitability. The above sum includes interest.
2. Morgan Stanley Dean Witter is solely liable for and shall pay to The Edgar Petersen Trust the sum of \$392,000.00 as compensatory damages, including interest, for failure to supervise and suitability. The above sum includes interest.
3. Morgan Stanley Dean Witter is solely liable for and shall pay to The Esper A. Petersen Foundation and The Edgar Petersen Trust the sum of \$126,300.00 as attorney's fees. The panel finds authority to award attorney's fees.
4. Morgan Stanley Dean Witter is solely liable for and shall pay the costs incurred for providing the long distance phone records.
5. Any and all claims asserted against Richard Welton are dismissed in their entirety.
6. Any and all other claims asserted in this matter are denied with prejudice.
7. Except for forum fees or as specified herein, the parties shall bear their own costs.
8. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 500.00
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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 firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Morgan Stanley, as a party, is assessed the following fees:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00
<u>Total</u>	<u>= \$ 8,550.00</u>

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

Respondents requested adjournment of the July 13 - 16, 2004 hearing dates. The panel granted the motion and waived the adjournment fee.

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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 a single arbitrator at \$450.00	= \$ 900.00
Pre-hearing conferences: June 25, 2004	1 session
October 28, 2004	1 session
Three (3) Pre-hearing sessions with Panel at \$1,200.00	= \$ 3,600.00
Pre-hearing conferences: November 7, 2003	1 session
July 29, 2004	1 session
October 11, 2004	1 session
Five (5) Hearing sessions at \$1,200.00	= \$ 6,000.00
Hearing Dates: November 30, 2004	3 sessions
December 1, 2004	2 sessions
Total Forum Fees	= \$ 10,500.00

The Panel assessed \$4,050.00 of the forum fees to The Esper A. Petersen Foundation and The Edgar Petersen Trust, jointly and severally, and assessed \$6,450.00 of the forum fees to Morgan Stanley Dean Witter.

FEE SUMMARY

Claimant The Esper A. Petersen Foundation and The Edgar Petersen Trust is solely liable for:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 4,050.00
Total Fees	= \$ 4,550.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution	= \$ 2,850.00

Respondent Morgan Stanley Dean Witter is solely liable for:

Member Fees	= \$ 8,550.00
Forum Fees	= \$ 6,450.00
Total Fees	= \$ 15,000.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 6,450.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Stuart D. Summers	-	Public Arbitrator, Presiding Chairperson
Carrie Belle Washington	-	Public Arbitrator
Susan K. Franz	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Stuart D. Summers

Stuart D. Summers
Public Arbitrator, Presiding Chairperson

1-27-05

Signature Date

Carrie Belle Washington
Public Arbitrator

Signature Date

Susan K. Franz
Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution office use only)