

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

John Lissberger, individually and as Trustee of the John Lissberger Revocable Trust, Claimant v.
Wells Fargo Brokerage Services, L.L.C., Peter J. Evanecko and Phillip S. Loomis, Respondents

Case Number: 02-02209

Hearing Site: Los Angeles, California

Nature of Dispute: Customer v. Member Firm and Associated Persons

REPRESENTATION OF PARTIES

For Claimant:

Robert E. Thompson, Esq.
Law Office of Robert E.
Thompson
San Francisco, California

For Respondents:

Robert T. Sullwold, Esq.
Sullwold & Hughes
San Francisco, California

CASE INFORMATION

Statement of Claim filed: April 15, 2002

Claimant's Uniform Submission Agreement signed: May 22, 2002

Statement of Answer filed by Respondents Wells Fargo Brokerage Services, L.L.C., Peter J.
Evanecko and Phillip S. Loomis: July 29, 2002

Respondents' Uniform Submission Agreement signed: None submitted.

CASE SUMMARY

In his Statement of Claim, Claimant alleged breach of contract, negligence, failure to supervise, fraud, unsuitability of investment, breach of fiduciary duty, misrepresentation, interference with prospective economic advantage, intentional and negligent infliction of emotional distress and churning involving an investment in Wells Fargo Passage Variable Annuity.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim.

RELIEF REQUESTED

Claimant requested compensatory damages in the sum of \$520,000.00, special damages in the sum of \$25,000.00, punitive damages in the sum of \$275,000.00, lost profits in the sum of \$226,500.00, prejudgment and post judgment interest at the rate of 16% per annum, restitution, rescission, attorneys' fees and costs.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety and costs.

OTHER ISSUES CONSIDERED AND DECIDED

On December 19, 2002, Claimant and Claimants' Counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On February 9, 2003, Respondents counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

At the hearing, the panel denied Claimant's Motion to Amend the Statement of Claim.

Respondents Wells Fargo Brokerage Services, L.L.C., Peter J. Evanecko and Phillip S. Loomis did not file with the NASD Dispute Resolution properly executed submission agreements 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.

The parties 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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Claimant's claims are denied in their entirety.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) All other relief requested and not expressly granted is denied.

Dissenting Opinion of Arbitrator Herbert Leslie Greenberg, Esq.

Arbitrator Herbert Leslie Greenberg, Esq. dissents, and for himself alone, would conclude as set forth below:

1. The variable annuity investment was unsuitable for Claimant and its purchase was induced by the misrepresentation and omission of Respondent Phillip S. Loomis;
2. There was failure to adequately supervise the account of Claimant by Respondent Peter J. Evanecko;
3. The purported "ratification" by Claimant was induced by false promise;
4. Within one month after Claimant's discovery of the initial omission, a duty to mitigate damages arose;
5. Insufficient facts were presented by Claimant to support the existence of purported lost profits damages and/or to establish the amount of those claimed damages;
6. Insufficient facts were presented by Claimant to determine the amount of purported damages based upon allegations of failure to liquidate an equity securities position on a timely basis, even if the latter claim was otherwise determined to have merit;
7. The holder of the purported claim for interference with advantageous business relationship was not a party to the arbitration; and
8. Respondent Well Fargo Brokerage Services, L.L.C. is legally responsible for the acts of its agents, and, thus, damages against each of the Respondents, jointly and severally, were in the amount of the surrender fees charged to Claimant by the issuer of the variable annuity investment;

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee = \$ 500.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Wells Fargo Brokerage Services, L.L.C. is a party and the following fees are assessed:

Member Surcharge	= \$2,800.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$5,000.00</u>
Total Member Fees	= \$8,550.00

Adjournment Fees

The following adjournment fees are assessed:

December 15-18, 2003, adjournment requested by Respondents = \$1,200.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Panel. The following fees are assessed:

(1) Pre-hearing conference session with the Panel @ \$1,200.00/session = \$1,200.00
Pre-hearing conference: April 22, 2003 1 session

(6) Hearing sessions @ \$1,200.00/session = \$7,200.00
Hearings: January 20, 2004 2 sessions
January 21, 2004 2 sessions
January 22, 2004 2 sessions

Total Forum Fees = \$8,400.00

1. The Panel assessed \$4,200.00 of the forum fees to Claimant.
2. The Panel assessed \$4,200.00 of the forum fees jointly and severally to Respondents.

Administrative Costs

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Claimant requested photocopies of 4 pages:	= \$ 2.00
Respondents requested photocopies of 118 pages:	= \$ 59.00

Fee Summary

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 500.00
Administrative costs	= \$ 2.00
<u>Forum Fees</u>	<u>= \$ 4,200.00</u>
Total Fees	= \$ 4,702.00
<u>Less payments</u>	<u>= \$(1,700.00)</u>
Balance Due NASD Dispute Resolution	= \$ 3,002.00

2. Respondents Well Fargo Brokerage Services, L.L.C. is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
<u>Less payments</u>	<u>= \$(8,550.00)</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents, Wells Fargo Brokerage Services, L.L.C., Peter J. Evanecko and Phillip S. Loomis are charged jointly and severally with the following fees and costs:

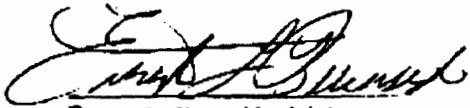
Forum Fees	= \$ 4,200.00
Administrative costs	= \$ 59.00
<u>Adjournment Fees</u>	<u>= \$ 1,200.00</u>
Total Fees	= \$ 5,459.00
<u>Less payments</u>	<u>= \$(1,200.00)</u>
Balance Due NASD Dispute Resolution	= \$ 4,259.00

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

ARBITRATION PANEL

Ernest L. Burnside, M.A. - Public Arbitrator, Presiding Chair
Herbert Leslie Greenberg, Esq. - Public Arbitrator
G. Thomas Fleming, III, Esq. - Non-Public Arbitrator

Concurring Arbitrators' Signatures



Ernest L. Burnside, M.A.
Chair, Public Arbitrator

1/30/04
Signature Date

G. Thomas Fleming, III, Esq.
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

Herbert Leslie Greenberg, Esq.
Non-Public Arbitrator

Signature Date

2/2/04
Date of Service

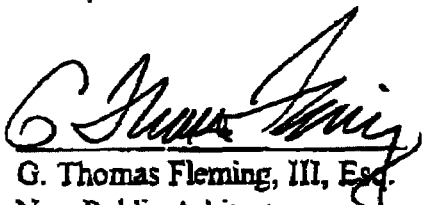
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Chair, Public Arbitrator

Signature Date


G. Thomas Fleming, III, Esq.
Non-Public Arbitrator

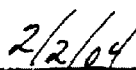


Signature Date

Dissenting Arbitrator's Signature

Herbert Leslie Greenberg, Esq.
Non-Public Arbitrator

Signature Date



Date of Service

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Chair, Public Arbitrator

Signature Date

G. Thomas Fleming, III, Esq.
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

Herbert Leslie Greenberg
Herbert Leslie Greenberg, Esq.
Non-Public Arbitrator

1/28/04
Signature Date

2/2/04
Date of Service