

STATE OF ILLINOIS  
SECRETARY OF STATE  
SECURITIES DEPARTMENT

IN THE MATTER OF:

HENRY L. AUWINGER

FILE NO. 0300023

**CONSENT ORDER OF DISMISSAL**

TO THE RESPONDENT: Henry L. Auwinger  
(CRD# 807347)  
9937 Wexford Circle  
Granite Bay, California 95814

c/o Morgan Stanley DW, Inc.  
1221 Avenue of Americas  
44th Floor  
New York, New York 10020

c/o Phillip L. Stern  
Freeman, Freeman & Salzman, P.C.  
Attorneys at Law  
Suite 3200  
401 North Michigan Avenue  
Chicago, Illinois 60611-4207

WHEREAS, Respondent on the 7<sup>th</sup> day of April, 2003 executed a certain Stipulation to Enter Consent Order of Dismissal ("Stipulation"), which hereby is incorporated by reference herein.

WHEREAS, by means of the Stipulation, Respondent has admitted to the jurisdiction of the Secretary of State and service of the Notice of Hearing of the Secretary of State, Securities Department, dated March 18, 2003 in this proceeding (the "Notice") and Respondent has consented to the entry of this Consent Order of Dismissal ("Consent Order").

WHEREAS, by means of the Stipulation, the Respondent acknowledged, while neither admitting nor denying the truth thereof, that the following allegations contained in the Notice of Hearing shall be adopted as the Secretary of State's Findings of Fact:

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1. That on January 21, 2003, Morgan Stanley DW, Inc. a registered dealer, filed a Form U-4 application for registration of the Respondent as a salesperson in the State of Illinois.
2. That on March 6, 2003, a Summary Order of Denial (the "Order") was issued by the Secretary of State denying this application. Pursuant to the terms of the Order, the Respondent requested a hearing on March 10, 2003.
3. That on March 8, 1999 the United States Securities and Exchange Commission (SEC) issued Order Making Findings And Imposing Remedial Sanctions against the Respondent in Administrative Proceedings File No. 3-9686 which imposed the following sanctions:
  - a. Suspended from association with any broker or dealer for a period of three months;
  - b. Suspended from association in a supervisory and proprietary capacity with any broker or dealer for period of nine months immediately following the period of his suspension from association; and
  - c. Pay a civil money penalty in the amount of \$10,000.
4. That the above-referenced Order found:
  - a. This matter involves the Respondent's failure reasonably to supervise a registered representative whose largest accounts included single, elderly women. Over a more than four-year period, the broker recommended unsuitable investments, churned the accounts to generate enormous commissions, and had the customers invest on margin. As a result of this activity the customers lost at least \$320,000 and generated commissions of about \$277,000-in the accounts of four elderly women. The Respondent improperly failed to respond to significant warning signs about the broker's conduct from at least October 1992 until September 12, 1994.
  - b. The Respondent, age 50, was the branch manager of the Hayward branch of Dean Witter Reynolds Inc. ("Dean Witter") from November 1990 until on or about September 12, 1994. As the branch manager, the Respondent was the direct supervisor of the registered representatives in that office. The Respondent has been the branch manager of Dean Witter's Sacramento, California, office since he left the Hayward office.

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- c. Dean Witter engages in a general securities business and is a Delaware corporation with its principal place business located in New York, and approximately 350 branch offices located throughout the United States. Dean Witter is the wholly-owned subsidiary of Morgan Stanley, Dean Witter & Co.
- d. Michael J. Oberholzer ("Oberholzer") was a registered representative in Dean Witter's Hayward branch from January 1989 until September 1995.
- e. Ruth B. is a single, eighty-four year old retired nurse who resides in a small house in Hayward, California. After being cold called by Oberholzer in 1989, Ruth B. opened an account with Oberholzer and eventually invested approximately \$200,000 with Dean Witter. That amount represented nearly two-thirds of her assets. Ruth B. lent \$2,500 to Oberholzer in March 1991 so that he could purchase an automobile. Oberholzer repaid that amount without interest. Under Oberholzer's mismanagement, Ruth B.'s account declined \$7,638 in value.
- f. Pearl H. is a single, eighty-one year old retired doctor who resided with her long-time friend, Ruth B. Pearl H. invested \$125,000 with Dean Witter through Oberholzer. That amount represented nearly all of her liquid assets. Pearl H. lent \$2,500 in March 1991 and \$9,000 in November 1992 to Oberholzer so that he could purchase an automobile. Oberholzer repaid that amount without interest. Under Oberholzer's mismanagement, Pearl H.'s account declined about \$77,732 in value. She and Ruth B. together paid \$66,419 in commissions and \$6,872 in margin interest to Dean Witter.
- g. Leona S. is a widowed, seventy-one year old retired housewife who resided in a trailer home in Livermore, California. With only a tenth grade education, Leona S. relied upon her husband, until his death in 1998, for all her financial decisions. After being cold called by Oberholzer, Leona S. eventually invested \$400,000 with Dean Witter, which represented more than 75% of her net worth. She also lent \$90,000 on an unsecured and interest-free basis to Oberholzer so that he could purchase a house. Oberholzer repaid only \$15,000 of that amount. Not including the loan, Leona S. experienced a \$171,379 decline in the value of her accounts. She paid \$201,362 in commissions and \$1,695 in margin interest to Dean Witter.

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- h. Anne O. is a widowed, eighty-two years old retired clerk who resides in a modest Palm Springs, California house. With only a tenth grade education, Anne O. had relied upon her late husband to manage her financial affairs. Anne O. invested \$100,000 with Oberholzer, which represented most of her liquid assets. Under Oberholzer's mismanagement, Anne O.'s account suffered a \$64,127 decline in value. She paid \$23,482 in commissions and \$9,253 in margin interest to Dean Witter.
- i. From approximately September 1989 through May 1995, Oberholzer willfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10 (b) of the Exchange Act and Rule 10b-5 thereunder, by engaging in fraudulent conduct in the accounts of elderly customers, including, but not limited to, Ruth B., Pearl H., Leona S., and Anne O. Each of these customers was financially unsophisticated, entrusted Oberholzer with a substantial amount of her life savings, and had a conservative investment objective, which was the preservation of her assets. As a result of Oberholzer's actions, these four customers lost at least \$320,000, not including unrepaid loans. These losses included at least \$275,000 that these customers paid in brokerage commissions.
- j. Oberholzer managed those accounts as if he had discretionary authority by buying and selling securities without normally discussing the trades with the customers. Each woman signed a document requesting margin privileges, but did not know what margin was and was not aware she was agreeing to open a margin account. Oberholzer checked off the box requesting margin privileges on an account application, and the customer simply signed the application without reading or understanding it.
- k. After gaining de facto control over his elderly customers' accounts, Oberholzer churned them with the objective of generating commissions and without regard to his clients' best interests or their conservative investment objectives. The high turnover ratios and cost to equity ratios demonstrate that Oberholzer excessively traded the women's accounts.
- l. Oberholzer engaged in unsuitable trading by investing a substantial portion of each of these elderly investors' accounts in speculative securities. He exposed his customers to further risk by purchasing these securities on margin.

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- m. Oberholzer made materially false and misleading statements and failed to state material facts to his elderly customers on a regular basis. From the time Oberholzer first met them, he misled them into believing that their assets would be secure under his management at Dean Witter. Oberholzer not only failed to provide important information to his customers about the trading in their accounts, when they did ask questions he made affirmative misrepresentations to them to prevent them from understanding the extent of their exposure and trading losses. He told Anne O., for example, that the margin notices she was receiving were “mistake” and that she should disregard them.
  
- n. Oberholzer willfully aided and abetted Dean Witter’s violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder because he regularly falsified information on Dean Witter’s books and records, including the following:
  - (1) Account documentation containing untrue and exaggerated information about customer investment objectives, investment experience, assets, and occupations;
  - (2) Order tickets falsely recording unauthorized trades as “unsolicited,” and
  - (3) Forged signature on letters of authorization and other documents pertaining to the transfer of assets between accounts.
  
- o. The Respondent was Oberholzer’s direct supervisor from November 1990 to September 1994. At Dean Witter, branch managers have primary responsibility for enduring that brokers comply with the firm’s procedures and the securities laws. Branch managers have the authority to sanction, suspend, or terminate brokers who fail to do so.
  
- p. Because he reviewed all of the branch’s order tickets each day, and regularly received exception reports, the Respondent always knew the type and volume of trading activity, and the extensive use of margin, in the accounts of the four elderly women. The compliance department regularly brought to the Respondent’s attention the accounts of these customers. Among other things, the compliance department questioned Oberholzer’s marking of order tickets as “unsolicited” when many of his customers were trading the same securities. The Respondent received warnings from his assistant branch manager and operations manager about the way

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Oberholzer was conducting his business in other accounts, which did not relate to the trading or activity that took place in any of the accounts of the elderly women. The assistant branch manager told the Respondent that Oberholzer was a “compliance time bomb.”

- q. As this activity continued over several years, the Respondent’s contacts with customers were limited to a series of form “activity” letters that are used by the branch managers. While some of these activity letters generally called the clients’ attention to the commissions being generated and the level of activity in their accounts and suggested they contact him directly or arrange for a meeting to discuss their accounts with him, the Respondent did not personally meet with any of these customers, send them personalized activity letters, or otherwise directly bring to their attention the amount of commissions, margin interest, and risk they were incurring. The Respondent did personally call three of these customers and spoke directly with them and received a letter from one of them referencing their prior communication and reiterating her satisfaction with her broker’s performance and her awareness of the activity taking place in her account. For the most part, however, the Respondent simply obtained assurances from Oberholzer that the customers were actively managing their accounts. The Respondent’s response was insufficient and consisted of inadequate follow-up.
- r. From no later than October 1992 until on or about September 12, 1994, the Respondent failed reasonably to supervise Oberholzer with a view to preventing Oberholzer’s violations of Section 17(a) of the Securities Act, Section (b) of the Exchange Act and Rule 10b-5 thereunder, and aiding and abetting violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. As part of his failure to supervise, the Respondent did not adequately investigate Oberholzer’s activities, and never suspended, terminated, or otherwise disciplined Oberholzer. Branch manager must respond reasonably when confronted with indications suggesting that a registered representative may be engaging in improper activity. In re Nicholas A. Boccella, Exchange Act Release No. 26,574 (Feb. 27, 1989). “Even where the knowledge of supervisors is limited to ‘red flags’ or ‘suggestions’ of irregularity, they cannot discharge their supervisory obligations simply by relying on the unverified representations of employees.” In the Matter of John H. Gutfreund, Exchange Act Release No. 31554 (Dec. 3, 1992). A supervisor must conduct “adequate follow-up and review” whenever he or she detects unusual trading

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activity or other irregularities. The Respondent's contacts with the customers did not constitute such follow-up.

5. That Section 8.E (1)(k) of the Act provides, inter alia, that the registration of a salesperson may be denied if the Secretary of State finds that such salesperson has any order entered against him after notice and opportunity for a hearing by the United States Securities and Exchange Commission arising from any fraudulent or deceptive act or a practice in violation of any statute, rule, or regulation administered or promulgated by the agency.
6. That the Respondent had notice and opportunity to contest the matters in controversy but chose to settle the matter with the SEC.

WHEREAS, by means of the Stipulation Respondent has acknowledged, without admitting or denying the averment, that the following shall be adopted as the Secretary of State's Conclusion of Law:

That by virtue of the foregoing, the Respondent's registration as a salesperson in the State of Illinois is subject to denial pursuant to Section 8.E(1)(k) of the Act.

WHEREAS, by means of the Stipulation Respondent has acknowledged and agreed that:

1. He shall never act in the capacity of Illinois Designated Principal;
2. He shall pay the sum of One Thousand dollars (\$1,000.00) to the Office of the Secretary of State, Investors Education Fund as reimbursement to cover the cost of investigation of this matter. Said sum shall be payable by means of certified or cashier's check and made to the order of the Secretary of State, Investors Education Fund and shall be due within thirty (30) days from the entry of this Consent Order.

WHEREAS, the Secretary of State, by and through his duly authorized representative, has determined that the matter related to the aforesaid formal hearing may be dismissed without further proceedings.

NOW THEREFORE IT SHALL BE AND IS HEREBY ORDERED:

1. Henry L. Auwinger shall never act in the capacity of Illinois Designated Principal.
2. Henry L. Auwinger shall pay the sum of One Thousand dollars (\$1,000.00) to the Office of the Secretary of State, Investors Education Fund as reimbursement to cover the cost of investigation of this matter. Said sum shall be payable by means of certified or cashier's check and

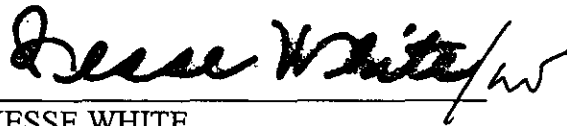
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made to the order of the Secretary of State, Investors Education Fund and shall be due within thirty (30) days from the entry of this Consent Order.

3. The Summary Order of Denial entered on March 6, 2003 shall be and is vacated.
4. The formal hearing scheduled on this matter is hereby dismissed without further proceedings.

ENTERED: This 9<sup>th</sup> day of April 2003.

A handwritten signature in black ink that reads "Jesse White" followed by a stylized flourish or initials.

JESSE WHITE  
Secretary of State  
State of Illinois

NOTICE: Failure to comply with the terms of this Order shall be a violation of Section 12.D of the Illinois Securities Law of 1953 [815 ILCS 5] (the Act). Any person or entity who fails to comply with the terms of this Order of the Secretary of State, having knowledge of the existence of this Order, shall be guilty of a Class 4 felony.