

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Gordon Root, Claimant v. Gaines Berland, Inc. and Anthony George Keshish, Respondents

Case Number: 00-00114

Hearing Site: Portland, Oregon

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**REPRESENTATION OF PARTIES**

For Claimant:

Robert S. Banks, Jr., Esq.  
Banks & Underhill, P.C.  
Portland, Oregon

For Respondents:

Scott L. Silver, Esq.  
Gusrae, Kaplan & Bruno  
New York, New York

**CASE INFORMATION**

Statement of Claim filed on or about: January 10, 2000

Claimant's Uniform Submission Agreement filed on or about: December 20, 1999

Respondents' Statement of Answer filed on or about: April 12, 2000

**CASE SUMMARY**

Claimants alleged the following claims with respect to investments in various securities: 1) Misrepresentations and Omissions; 2) Breach of Fiduciary Duty; 3) Unsuitability; 4) Negligent Supervision; 5) Excessive Trading; and 6) Market Manipulation.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim. Respondents alleged that the Statement of Claim is nothing more than an allegation that the Claimants lost money investing in the stock market, followed by a boilerplate series of allegations alleging every cause of action known at law against the securities broker and the firm, regardless of the specific facts of the case. Respondents further alleged that as such, the Statement of Claim is nothing more than an attempt to recover damages for the losses sustained as a result of Claimants' investment decisions and strategy in their own accounts, regardless of the fact that the accounts were handled in accordance with their investment objective and desires. Respondents also asserted affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested an award as follows:

1. On claims 1-4 and 6, awarding Claimants their out of pocket losses in the amount of \$1,990,578, or such other amount as Claimants prove as losses to the arbitrators;
2. On claim 2 (Excessive Trading), awarding Claimants the amount of commissions and fees paid that the arbitrators determine to be excessive;
3. On all claims, for interest at the rate of 9% per annum from the date of the purchase of each security until the date it was sold, pursuant to ORS 59.115;
4. On all claims, for their reasonable costs and attorney fees incurred in bringing these claims; and
5. If the arbitrators determine that Respondents' conduct was willful and wanton, an award of punitive damages in an amount to be determined at the conclusion of the arbitration hearing.

Respondents requested that the Panel dismiss Claimants' Statement of Claim in its entirety, and award the Respondents their costs, disbursements and attorney's fees. Respondents also requested that all forum fees be assessed against the Claimants, as well as such other and further relief as the Panel deems appropriate.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Respondents did not file with the NASD Dispute Resolution, Inc. ("NASD-DR") properly executed submission agreements but are required to submit to arbitration pursuant to the NASD-DR Code of Arbitration Procedure ("Code") and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

On or about January 2, 2001, the Panel was advised of the settlement reached between Claimant Ashton Root and Respondents.

During the hearing, the Panel granted the request to dismiss Respondents Alan Gaines and Richard B. Crusco.

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, evidence presented at the hearing, and post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows ("Respondent" is used herein to refer to the remaining Respondents, Gaines Berland, Inc. ("Gaines Berland"), and Anthony George Keshish):

#### **I. Breach of Fiduciary Duty.**

Respondent's broker, Mr. Keshish, was providing investment advice knowing that Claimant was relying on that advice. Claimant had not previously heard of any of the stocks recommended and followed Respondent Keshish's advice. Therefore, Respondent owed a fiduciary duty to Claimant.

The panel finds that Respondent breached that fiduciary duty in the following particulars:

- a. By failing to carry out customer orders promptly (e.g., failed to "go to cash" as directed in May 1998), and serve the customers' best interest.
- b. By not refraining from self-dealing (e.g., emphasized stocks in which Respondent was a market maker).
- c. By making material misrepresentations and failing to disclose material information.
- d. By transacting business without prior authorization (e.g., purchased EEX and IBIS in May 1998, and sold Reliastar in May and June 1998).

#### **II. Negligent Supervision.**

Respondent failed to adequately supervise its brokers with respect to Claimant's account. The Panel finds that Respondent did the minimum necessary to comply with supervision requirements. There was "paper compliance," but little or no actual supervision.

#### **III. Churning/Unauthorized Trading.**

Respondent engaged in unauthorized trading. As indicated above, Claimant did not authorize the purchases of EEX and IBIS in May 1998, or the sale of Reliastar in May and June 1998.

Respondent engaged in churning. The Panel finds excessive trading, *de facto* control, and reckless disregard for the customer's best interest. Even considering the speculative nature of this account, the turnover ratio was excessive.

#### **IV. Misrepresentations/Omissions.**

As indicated above, by making material misrepresentations and failing to disclose material information in its solicitation of Claimant's business, Respondent breached its fiduciary duty.

#### **V. Damages.**

The Panel finds and awards damages as follows:

- a. Churning: Respondents Gaines Berland and Keshish are jointly and severally liable to Claimant and Claimant is awarded damages of \$106,535.00 based upon the excessive turnover. The damages are calculated based upon Respondent's expert's opinion that the Equity Turnover was 9.73 and the Panel's decision that anything over 8 is excessive, even considering the speculative nature of this account. These churning damages reflect all margin interest and trading costs, minus trading costs that exceeded 5%, which are accounted for below as excessive fees.
- b. Failure to go to Cash: Respondents Gaines Berland and Keshish are jointly and severally liable to Claimant and Claimant is awarded damages of \$136,908.00 based upon the losses Claimant incurred between May 29, 1998, and June 30, 1998, for Respondent's failure to sell Claimant's holdings after May 29, 1998. Claimant's obligation to mitigate kicked in on June 30, 1998. These damages do not include the EEX and IBIS losses or the losses incurred on the sales of Reliastar in May and June 1998.
- c. Purchase of EEX and IBIS: Respondents Gaines Berland and Keshish are jointly and severally liable to Claimant and Claimant is awarded damages of \$186,402.00 for all losses associated with the unauthorized purchase of EEX and IBIS.
- d. Sale of Reliastar: Respondents Gaines Berland and Keshish are jointly and severally liable to Claimant and Claimant is awarded damages of \$7,933.00 for all losses associated with the unauthorized sale of Reliastar.
- e. Excessive Fees: Respondents Gaines Berland and Keshish are jointly and severally liable to Claimant and Claimant is awarded damages of \$118,682.92 based upon trading costs (purchase and sales commissions, and sales credits) that exceeded 5% of the original principle.
- f. Prejudgment Interest: Respondents Gaines Berland and Keshish are jointly and severally liable to Claimant and Claimant is awarded prejudgment interest of \$154,418.08, calculated at the rate of 9% per annum on the above compensatory damages (\$556,460.92) from May 29, 1998, to June 30, 2001. Prejudgment interest is accruing at the rate of \$137.21 per diem.
- g. Punitive Damages: The Panel finds by clear and convincing evidence that Respondent Gaines Berland's conduct in this case was intentional and a willful and wanton disregard for Claimant's interests. Claimant is awarded punitive damages of \$556,460.92 against Gaines Berland only, pursuant to ORS 18.537, the Panel finding that doubling the compensatory damages is a reasonable penalty in this case.

- h. Attorney Fees/Costs: Because Claimant is the prevailing party and considering the circumstances of this case, the Panel finds that Claimant is entitled to an award of costs and attorney fees pursuant to ORS 59.115(10). Therefore, Claimant is awarded attorney fees of \$78,117.00 and costs of \$12,300.00 against Gaines Berland only.
- i. Forum Fees: Gaines Berland is assessed all forum fees and is required to reimburse Claimant for the \$500.00 filing fee paid to NASD-DR.
- j. Post-judgment Interest: Post-judgment interest shall accrue at the rate of 9% per annum, the Oregon statutory rate.
- k. All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$500.00
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#### **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 Gaines Berland is a party and the following fees are assessed:

Member Surcharge	= \$2,500.00
Pre-Hearing Process Fee	= \$600.00
<u>Hearing Process Fee</u>	= <u>\$4,500.00</u>
Total Member Fees	= \$7,600.00

#### **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 Chair/Panel. The following fees are assessed:

2 Pre-hearing conference sessions with a single arbitrator @ \$450/session = \$900.00

Pre-hearing conferences:	October 2, 2000	1 session
	January 2, 2001	1 session

1 Pre-hearing conference session with the Panel @ \$1,200/session = \$1,200.00

Pre-hearing conferences:	August 22, 2000	1 session
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14 Hearing sessions @ \$1,200/session		= \$16,800.00
Hearings:		
	January 16, 2001	2 sessions
	January 17, 2001	2 sessions
	January 18, 2001	2 sessions
	January 19, 2001	1 session
	April 3, 2001	2 sessions
	April 4, 2001	2 sessions
	April 5, 2001	1 session
	May 8, 2001	1 session
	May 9, 2001	1 session

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<b>Total Forum Fees</b>	<b>= \$18,900.00</b>
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The Panel assessed the \$18,900.00 in forum fees to Respondent Gaines Berland.

**Fee Summary**

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

<u>Initial Filing Fee</u>	= \$500.00
<u>Total Fees</u>	= \$500.00
<u>Less Payments</u>	= \$(1,700.00)
<u>Refund</u>	= \$(1,200.00)

2. Respondent, Gaines Berland is charged with the following fees and costs:

<u>Member Fees</u>	= \$7,600.00
<u>Forum Fees</u>	= \$18,900.00
<u>Total Fees</u>	= \$26,500.00
<u>Less Payments</u>	= \$(7,600.00)
<u>Balance Due NASD Dispute Resolution, Inc.</u>	= \$18,900.00

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

**ARBITRATION PANEL**

Larry T. Coady, J.D.	-	Public Arbitrator, Presiding Chair
Carol N. Wenzel	-	Public Arbitrator
John J. Mulligan	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Larry T. Coady, J.D.  
Chair, Public Arbitrator

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Signature Date

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Carol N. Wenzel  
Public Arbitrator

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Signature Date

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John J. Mulligan  
Non-Public Arbitrator

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Signature Date

**Date Served:**

**JUL 24 2001**

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Date of Service

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Larry T. Coady, J.D.	-	Public Arbitrator, Presiding Chair
Carol N. Wenzel	-	Public Arbitrator
John J. Mulligan	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

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Larry T. Coady, J.D.  
Chair, Public Arbitrator

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Signature Date

Carol N. Wenzel  
Carol N. Wenzel  
Public Arbitrator

7-18-01  
Signature Date

\_\_\_\_\_  
John J. Mulligan  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

Date Served:

JUL 24 2001

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Date of Service