

**Award**  
**NASD Dispute Resolution**

---

In the Matter of the Arbitration Between:

Cataway, LLC (Claimant) v. Accutrade, Inc. and Advanced Clearing, Inc. (Respondents)

Case Number: 00-03474

Hearing Site: New York, New York

---

Nature of the Dispute: Customer vs. Members.

**REPRESENTATION OF PARTIES**

Claimant Cataway, LLC ("Cataway") hereinafter referred to as "Claimant": Gregory A. Sioris, Esq., Sioris and Molumby, New York, NY.

Respondents Accutrade, Inc. ("Accutrade") and Advanced Clearing, Inc. ("Advanced Clearing") hereinafter collectively referred to as "Respondents": Patrick B. Griffin, Esq., previously Thomas J. Kenny, Esq., Kutak Rock, LLP, Omaha, NE.

**CASE INFORMATION**

Statement of Claim filed on or about: August 11, 2000.

Claimant's Answer and Opposition to Advanced Clearing's Motion to Dismiss filed on or about: February 26, 2001.

Claimant signed the Uniform Submission Agreement: August 8, 2000.

Joint Statement of Answer filed by Respondents on or about: November 14, 2000.

Joint Amended Answer filed by Respondents on or about: March 16, 2001.

Motion to Dismiss filed by Respondent Advanced Clearing on or about: November 14, 2000.

Respondent Advanced Clearing's Consolidated Reply to Claimant's Answer to Motion to Dismiss filed on or about: March 16, 2001.

Respondent Accutrade signed the Uniform Submission Agreement: November 10, 2000.

Respondent Advanced Clearing did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: unauthorized trading; negligence and recklessness; breach of contract; and breach of fiduciary duty. The causes of action relate to shares of Dell, IOM, INTC, LU, AOL, and AMAT.

Unless specifically admitted in their Answer and Amended Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$245,359.01; interest from May 27, 1999; attorneys' fees; arbitration fees; witness fees; and other fees expended; and interest from the date of Respondents' improper acts and omissions.

Respondents requested that the claim be dismissed. Additionally, Respondent Advanced Clearing requested that it be dismissed from the arbitration immediately as the Statement of Claim made no allegations against it.

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

Respondent Advanced Clearing did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, and appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

#### **Respondents' Motion To Preclude; Panel's Statement:**

"Before the hearing of December 9, 2004, Respondents moved to preclude Claimant's use of an expert witness, because Claimant failed to provide Respondents the name of the expert in a timely manner pursuant to the Arbitration Panel's initial pre-hearing conference order. The Panel reserved decision until the hearing.

On December 9, 2004, the Panel heard Respondents' argument supporting the motion to preclude, during which the Panel first learned of Claimant's expert's name. (Respondents first learned the expert's name on the evening of December 3, 2004). Before hearing Claimant's opposing argument, Arbitrator Feinberg indicated that he had had two or three conversations with the same expert in connection with Arbitrator Feinberg's possible representation of an investor in an unrelated case. Arbitrator Feinberg never took the investor's case and never spoke with the expert again.

The parties continued to accept Arbitrator Feinberg on the Arbitration Panel and requested that he continue to preside over the hearing (including the arguments with regard to the motion to preclude). However, the parties requested that Arbitrator Feinberg not participate in the Panel's deliberations regarding the motion to preclude. The Panel decided that Arbitrator Feinberg should neither preside over the arguments nor participate in the deliberations. Accordingly, with regard to the motion to preclude, Arbitrator Feinberg was absent from both the arguments and the deliberations. Arbitrator Sloate presided over the arguments.

Arbitrators Koziol and Sloate denied Respondents' motion to preclude, but ruled that the expert could not testify before the next scheduled hearing date (December 14, 2004). Moreover, if Respondents wanted more time to prepare for the expert's testimony, the Panel would adjourn the December 14, 2004 hearing. Respondents declined to request an adjournment.

Following the ruling to allow the expert to testify, Arbitrator Feinberg agreed to withdraw from the arbitration if any party asked him to withdraw. Neither party asked Arbitrator Feinberg to withdraw, and he presided over the remainder of the hearing."

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, and 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. Claimant's claims against Respondent Advanced Clearing are dismissed in their entirety.
2. Respondent Accutrade is liable for and shall pay to Claimant compensatory damages in the amount \$60,015.00, plus simple interest at the rate of 6% per annum from May 25, 1999 through the date of this Award.
3. Respondent Accutrade is liable for and shall pay to Claimant compensatory damages in the amount of \$15.00, plus simple interest at the rate of 6% per annum from June 4, 1999 through the date of this Award.
4. Respondent Accutrade is liable for and shall pay to Claimant compensatory damages in the amount of \$26,648.00.
5. Claimant is liable for and shall pay to Respondent Accutrade sanctions in the amount of \$1,000.00 for failure to comply with NASD discovery rules, including timely disclosures regarding the expert witness.
6. Claimant is liable for and shall pay to NASD Dispute Resolution all forum fees in this matter as sanctions for failure to comply with NASD discovery rules, including timely disclosures regarding the expert witness.
7. Any and all relief not specifically addressed herein 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	= \$300.00
--------------------------	------------

### **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, Accutrade, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

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, Advanced Clearing, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

June 18-20, 2001, adjournment request by Accutrade	= \$1,125.00
Respondents' share	= \$1,125.00
January 22-24, 2003, joint adjournment request	= \$1,125.00
Claimant's share	= \$562.50
Respondents' share	= \$562.50
June 22-24, 29-30, 2003, adjournment request by Claimant	= \$1,125.00
Claimant's share	= \$1,125.00

### **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:

Four (4) Pre-hearing sessions with Panel @ \$1,125.00	= \$ 4,500.00
Pre-hearing conferences:	
February 28, 2001	1 session
January 5, 2004	1 session
February 11, 2004	1 session
February 25, 2004	1 session
Six (6) Hearing sessions @ \$1,125.00	= \$ 6,750.00
Hearing Dates:	
December 9, 2004	2 sessions
December 14, 2004	2 sessions
January 4, 2005	2 sessions
Total Forum Fees	= \$11,250.00

1. The Panel has assessed \$11,250.00 of the forum fees against Claimant.

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 300.00
Adjournment Fee	= \$ 1,687.50
<u>Forum Fees</u>	<u>= \$11,250.00</u>
Total Fees	= \$13,237.50
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Balance Due NASD Dispute Resolution	= \$11,812.50

2. Respondent Accutrade is solely liable for:

<u>Member Fees</u>	<u>= \$4,600.00</u>
Total Fees	= \$4,600.00
<u>Less payments</u>	<u>= \$4,600.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondent Advanced Clearing is solely liable for:

<u>Member Fees</u>	<u>= \$4,600.00</u>
Total Fees	= \$4,600.00
<u>Less payments</u>	<u>= \$4,600.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

4. Respondents are jointly and severally liable for:

<u>Adjournment Fees</u>	<u>= \$1,687.50</u>
Total Fees	= \$1,687.50
<u>Less payments</u>	<u>= \$1,125.00</u>
Balance Due NASD Dispute Resolution	= \$ 562.50

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

**ARBITRATION PANEL**

Martin L. Feinberg, Esq.	-	Public Arbitrator, Presiding Chairperson
Alan R. Sloate, Esq.	-	Public Arbitrator
Joseph D. Koziol	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Martin L. Feinberg, Esq.  
Public Arbitrator, Presiding Chairperson

1/10/05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Alan R. Sloate, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Joseph D. Koziol  
Non-Public Arbitrator

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

January 11, 2005  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Martin L. Feinberg, Esq.	-	Public Arbitrator, Presiding Chairperson
Alan R. Sloate, Esq.	-	Public Arbitrator
Joseph D. Koziol	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
Martin L. Feinberg, Esq.  
Public Arbitrator, Presiding Chairperson

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

  
\_\_\_\_\_  
Alan R. Sloate, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Joseph D. Koziol  
Non-Public Arbitrator

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

\_\_\_\_\_  
January 11, 2005

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Martin L. Feinberg, Esq.  
Alan R. Sloate, Esq.  
Joseph D. Koziol

- Public Arbitrator, Presiding Chairperson  
- Public Arbitrator  
- Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
Martin L. Feinberg, Esq.  
Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
Alan R. Sloate, Esq.  
Public Arbitrator

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

Joseph D. Koziol  
Joseph D. Koziol  
Non-Public Arbitrator

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

January 11, 2005

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)