

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

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**In the Matter of the Arbitration Between:**  
**John W. McCall, Claimant v. CapBay Financial Services, Respondent**

**Case Number:** 00-04541

**Hearing Site:** San Francisco, CA

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**REPRESENTATION OF PARTIES**

**For Claimant:**

**Stephen Porter, Esq.**  
**Whitehead, Porter & Gordon LLP**  
**220 Montgomery Street**  
**Suite 1850**  
**San Francisco, CA 94104**

**For Respondent:**

**Steven Benjamin, Esq.**  
**3620 American River Drive**  
**Suite 130**  
**Sacramento, CA 95864**

**CASE INFORMATION**

**Statement of Claim filed: October 13, 2000**

**Claimant's Uniform Submission Agreement signed: October 3, 2000**

**Statement of Answer and Counterclaim filed by Respondent: December 29, 2000**

**Respondent's Uniform Submission Agreement signed: November 20, 2000**

**Response to the Counterclaim filed by Claimant: January 17, 2001**

**CASE SUMMARY**

**Claimant alleged that Respondent failed to affect his industry registration in the state of Montana. Claimant further alleged that the failure to affect the registration led to a loss of his business relationships and potential business relationship with other customers, and led to a loss in his own brokerage account after Respondent allegedly wrongfully blocked trading in his account.**

Respondent denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim. Additionally, Respondent alleged several affirmative defenses, including that Claimant failed to state a claim and is barred from recovery by the doctrines of estoppel and unclean hands.

In its counterclaim, Respondent sought recovery, from Claimant, of an unpaid balance due pursuant to the terms of a Consent Decree that Respondent entered into with the state of Montana. The Consent Decree required the rescission of trades that Claimant had made in Montana while he was unregistered.

Claimant denied the allegations in the counterclaim and asserted affirmative defenses, including that any amount that Claimant allegedly owed Respondent is setoff by the greater amounts that Respondent owed to the Claimant, and that Respondent failed to mitigate its alleged damages.

#### **RELIEF REQUESTED**

Claimant requested a full accounting of trading losses caused by the fact that Claimant was not registered in the state of Montana; \$48,054.94 (actual damages-loss of commission income); interest; \$180,000 (loss of business opportunity and trading profit); reimbursement to a transfer agent; \$180,000 (loss of business opportunity and trading profit); reimbursement to a transfer agent; a declaration instructing Respondent to issue a revised Form U-4 and Form U-5 and an award of costs.

Respondent requested a dismissal of the Claimant's Statement of Claim in its entirety. In its counterclaim, Respondent requested \$20,854.53 which represents the unpaid balance due from Claimant as a result of the Montana Consent Decree; \$4,500 which represents the approximate remaining lease payments on computer equipment that is still in Claimant's possession and such other and further relief, including fees and costs, as the Panel deems appropriate.

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

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) Respondent shall pay Claimant the sum of \$23,248.00.
- 2) Respondent shall amend its U4 filing with respect to Claimant to delete the second sentence in Paragraph 7 of the U4, and shall further amend its U5 filing, Paragraph 19, to reflect this amendment.
- 3) Claimant shall have title to the computer equipment and software that he is leasing from Respondent and shall have no further obligations to make lease payments to the Respondent

thereon.

- 4) Respondent's request for damages in its counterclaim is denied.
- 5) Each party shall bear its own costs, including attorney's fees.
- 6) All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$300
Respondent's Counterclaim filing fee	= \$1000

#### **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 is a party and the following fees are assessed:

Member Surcharge	= \$1500
Pre-Hearing Process Fee	= \$ 600
Hearing Process Fee	= \$2500
<b>Total Member Fees</b>	<b>= \$4600</b>

#### **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:

One (1) Pre-hearing conference session with a single arbitrator @ \$1125/session = \$450  
Pre-hearing conference: July 25, 2001 1 session

Two (2) Pre-hearing conference sessions with the Panel @ \$1125/session = \$2250  
Pre-hearing conferences: May 14, 2001 1 session  
June 11, 2001 1 session

Following the June 11, 2001 pre-hearing conference call, the Panel met and decided that the parties would not be charged for the May 21, 2001 initial pre-hearing conference.

Four (4) Hearing sessions @ \$1125/session = \$4500  
Hearings: August 2, 2001 2 sessions  
August 3, 2001 2 sessions

**Total Forum Fees = \$7200**

1. The Panel assessed \$3600 of the forum fees to Claimant.
2. The Panel assessed \$3600 of the forum fees to Respondent.

**Fee Summary**

Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 300
Forum Fees	= \$3600
Total Fees	= \$3900
Less Payments	= \$(0)
Balance Due NASD Dispute Resolution, Inc.	= \$3900

Respondent is charged with the following fees and costs:

Counterclaim Filing Fee	= \$1000	Counterclaim Filing Fee
Member Fees	= \$4600	Member Fees
Forum Fees	= \$3600	Forum Fees
Total Fees	= \$9200	Total Fees
Less Payments	= \$(1500)	Less Payments
Balance Due NASD Dispute Resolution, Inc.	= \$7700	Balance Due NASD Dispute Resolution, Inc.

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.

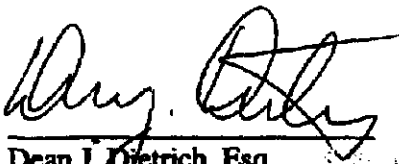
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**ARBITRATION PANEL**

Dean J. Dietrich, Esq.  
Michelle Brant  
Theodore R. Seton

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

**Concurring Arbitrators' Signature**



Dean J. Dietrich, Esq.  
Chair, Public Arbitrator

Sept. 15, 2001

Signature Date

Chair, Public Arbitrator

Michelle Brant  
Public Arbitrator

Signature Date

Michelle Brant  
Public Arbitrator

Theodore R. Seton  
Industry/Non-Public Arbitrator

Signature Date

Date Served:

SEP 19 2001

Date of Service

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Arbitration No. ##-00-04541  
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**ARBITRATION PANEL**

Dean J. Dietrich, Esq.  
Michelle Brant  
Theodore R. Seton

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

**Concurring Arbitrators' Signature**

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Dean J. Dietrich, Esq.  
Chair, Public Arbitrator

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Signature Date

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*Michelle Brant*  
Michelle Brant  
Public Arbitrator

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9-14-01  
Signature Date

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Theodore R. Seton  
Industry/Non-Public Arbitrator

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Signature Date

Date Served:  
SEP 19 2001

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Date of Service