

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Charles E. Krpata, Charles and Brenda Krpata Trust, and Charles E. Krpata IRA, Claimants v.
Joseph Roberts & Co., Inc., John David Mull, Joseph Frank DeSanto, and Mark James McLain,
Respondents

Case Number: 00-05176

Hearing Site: San Francisco, California

Nature of the Dispute: Customers v. Member and Associated Persons

REPRESENTATION OF PARTIES

For Claimants:

Matthew R. Rutherford, Esq.
Rutherford & Rybacki, LLP
San Diego, California

For Respondent Mark James McLain:

Delmer C. Gowing III, P.A.
Attorney and Counselor at Law
Delray Beach, Florida

For Respondent John David Mull:

Gerald L. Fishman, Esq.
Wolin & Rosen
Chicago, Illinois

For Respondent Joseph Roberts & Co., Inc.:

This respondent did not enter an appearance.

For Respondent Joseph Frank DeSanto:

This respondent did not enter an appearance.

CASE INFORMATION

Statement of Claim filed: November 20, 2000

Claimants' Uniform Submission Agreement signed: November 12, 2000

Statement of Answer filed by Respondent Mark James McLain: January 11, 2002

Respondent Mark James McLain's Uniform Submission Agreement signed: January 11, 2002

Statement of Answer filed by Respondent John David Mull: January 28, 2002

CASE SUMMARY

Claimants alleged unsuitability, fraud, concealment, breach of fiduciary duty, respondeat superior, and failure to supervise, involving Novatek International Inc., Cayman Water Company Limited, Colorado Casino Resorts, Inc., Telefonica del Peru, and Affinity Teleproductions, Inc. stock.

Respondent Mark James McLain denied the allegations of wrongdoing set forth in Claimants' Statement of Claim and asserted various affirmative defenses.

Respondent John David Mull denied knowledge of the allegations set forth in Claimants' Statement of Claim.

Respondents Joseph Roberts & Co., Inc. and Joseph Frank DeSanto did not file a Statement of Answer.

RELIEF REQUESTED

Claimants requested \$920,000.00 in compensatory damages, pre-judgment interest at the rate of 10% per annum, \$500,000.00 in punitive damages, \$45,000.00 in commissions, \$200,000.00 for emotional distress, and costs, including attorney's fees.

Respondent Mark James McLain requested dismissal of Claimants' Statement of Claim in its entirety and that all costs be assessed against Claimants.

Respondent John David Mull requested dismissal from the proceedings.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents Joseph Roberts & Co., Inc. and Joseph Frank DeSanto did not file with NASD Dispute Resolution a properly executed submission agreement but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure ("the Code") and are bound by the determination of the Panel on all issues submitted.

Respondent John David Mull did not file with the NASD Dispute Resolution a properly executed submission agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, is bound by the determination of the Panel on all issues submitted.

On July 7, 2003, Claimants 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 May 29, 2003, Respondent Mark James McLain's counsel signed a Waiver Agreement on Respondent Mark James McLain's behalf expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the NASD Code of Arbitration Procedure IM-10100, the waiver of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

On April 11, 2003, Respondent John David Mull filed a Motion to Dismiss. At the initial pre-hearing conference held on November 12, 2003, the Panel ruled that Claimants will either file a response to Respondent's motion by November 26, 2003 or said Respondent would be dismissed. Claimants did not file a response. At the commencement of the hearings, Claimants informed the Panel that Respondent John David Mull was indeed dismissed.

Only Claimants and Respondent Mark James McLain appeared at the hearing. Furthermore, Claimants only proceeded against Respondent Mark James McLain. The panel was not presented with, and therefore did not consider, any claims or service issues relating to the non-appearing respondents, Joseph Roberts & Co., Inc. and Joseph Frank DeSanto.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

FINDINGS

The Arbitration Panel finds in favor of Respondent Mark James McLain.

The Panel found that Claimants failed to carry their burden of proof of proving that Respondent Mark James McLain misrepresented material information, committed fraud, breached his fiduciary duty, or was more responsible than Claimant Charles Krpata for the ownership of Novatek in the quantity it was purchased and held, and as the exclusive asset of the IRA account, and a substantial asset in the two other accounts. Further, the Panel found Claimant Charles Krpata to be a very knowledgeable and aggressive trader who knew, or should have known, exactly what he was doing independent of the comments of brokers and others. As he said, he checked Novatek on the computer every night.

Respondent urged in its Blue Book Exhibit #10, which is in evidence, the application of California's Statue of Limitations defense with regard to the claims for fraud and constructive fraud (Code of Civil Procedure §338 (d) – 3 years), breach of fiduciary duty (Code of Civil Procedure §339 – 2 years), and breach of contract (Code of Civil Procedure §337 – 4 years). The Panel determined that these causes of action arose in October 1996. By the end of October 1996, Claimants knew that they had a loss in their holding of Novatek. During that month they also knew of Respondent Joseph Roberts & Co, Inc.'s possible involvement from reading an article in *Business Week*, and most likely reading that month the *Barron's* article which initially exposed the problem of Novatek. Further, the collapse of Respondent Joseph Roberts & Co, Inc. within days of the lost value of Novatek because of Respondent Joseph Roberts & Co, Inc.'s possession of large quantities of Novatek common stock gave further notice of the connection between Novatek and Respondent Joseph Roberts & Co, Inc. A cause of action arises when the facts constituting the cause of action is discovered (Code of Civil Procedure §338 (d)).

Thus, the 2-year and 3-year statues apply and provide respondent with a defense to the claims for fraud, constructive fraud, and breach of fiduciary duty. The 4-year statute, breach of a written contract, does not apply here as no alleged breached written contract was introduced into evidence.

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) Claimants' claims against Respondent Mark James McLain are denied in their entirety. Respondent Mark James McLain is, therefore, dismissed with prejudice.
- 2) Respondents Joseph Roberts & Co., Inc. and Joseph Frank DeSanto are dismissed without prejudice.
- 3) The Parties shall bear their respective costs, including attorney's fees.
- 4) All other relief requested and not expressly granted is denied.

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

Adjournment Fees

The following adjournment fees are assessed:

Adjournment of the May 25, 2004 to May 27, 2004 Hearings requested by Respondent Mark James McLain waived

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 or Panel. The following fees are assessed:

2 Pre-hearing conference sessions with the Panel @ \$ 1,200.00/session = \$ 2,400.00
Pre-hearing conferences: November 6, 2003 1 session
November 12, 2003 1 session

2 Hearing sessions @ \$ 1,200.00/session = \$ 2,400.00
Hearings: October 5, 2004 2 sessions

Total Forum Fees = \$ 4,800.00

1. The Panel assessed \$1,200.00 of the forum fees jointly and severally to Claimants Charles E. Krpata, Charles and Brenda Krpata Trust, and Charles E. Krpata IRA for the November 6, 2003 pre-hearing conference call due to Claimants' failure to appear at said call.
2. The Panel assessed \$1,800.00 of the forum fees jointly and severally to Claimants Charles E. Krpata, Charles and Brenda Krpata Trust, and Charles E. Krpata IRA.
3. The Panel assessed \$1,800.00 of the forum fees to Respondent Mark James McLain.

FEE SUMMARY

1. Claimants Charles E. Krpata, Charles and Brenda Krpata Trust, and Charles E. Krpata IRA are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 3,000.00
Total Fees	= \$ 3,500.00
Less payments	= \$(1,700.00)
Balance Due NASD Dispute Resolution	= \$ 1,800.00

2. Respondent Mark James McLain is charged with the following fees and costs:

Forum Fees	= \$ 1,800.00
Less payments	= \$(0.00)
Balance Due NASD Dispute Resolution	= \$ 1,800.00

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

Thomas D. Reese	-	Public Arbitrator, Presiding Chair
Charles B. Stark, Jr.	-	Public Arbitrator
E. Duane Stephens	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Thomas D. Reese
Chair, Public Arbitrator

Signature Date

Charles B. Stark, Jr.
Public Arbitrator

Signature Date

E. Duane Stephens
Non-Public Arbitrator

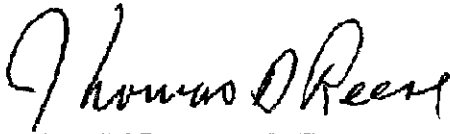
Signature Date

Date of Service

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10/11/04
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E. Duane Stephens
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