

**AWARD**  
**NASD Dispute Resolution, Inc.**

---

In the Matter of the Arbitration Between

Name of Claimants

Isaac H. Zacharia, Maryann Zacharia, and J. Michael Suarez, M.D.

and

01-00669  
Scottsdale, Arizona

Name of Respondents

Advest, Inc.  
Richard B. Day

---

**REPRESENTATION OF PARTIES**

Isaac H. Zacharia, Maryann Zacharia, and J. Michael Suarez, M.D. ("**Claimants**") were represented by Robert D. Mitchell, Esq., of Mitchell Law Offices, P.C., and Martin R. Galbut, Esq., of Galbut, Hunter & Conant, Phoenix, Arizona.

Advest, Inc. ("**Respondent Advest**") and Richard B. Day ("**Respondent Day**") (collectively as "**Respondents**") were represented by Paul J. Roshka, Jr., Esq. and Dax R. Watson, Esq., Roshka Heyman & DeWulf PLC, Phoenix, Arizona.

**CASE INFORMATION**

Statement of Claim and Demand for Arbitration was filed on or about February 16, 2001. Request for Additional Response Time and Preliminary Response to Motion to Dismiss was filed on or about January 15, 2002. Claimants' Additional Response to Motion to Dismiss was filed on or about January 28, 2002. Submission Agreements of Claimants Isaac H. Zacharia, Maryann Zacharia were signed on January 22, 2001. Submission Agreement of Claimant J. Michael Suarez, M.D. was signed on January 16, 2001.

Respondents Answer and Request for Attorneys' Fees and Costs was filed on or about April 24, 2001. Respondent Advest, Inc.'s and Richard B. Day's Motion to Dismiss was filed on or about January 8, 2002. Submission Agreement of Respondent Advest, Inc. was signed on April 3, 2001 by Lee Kuckro. Submission Agreement of Respondent Richard B. Day was signed on March 21, 2001.

### **CASE SUMMARY**

Claimants submitted the following summary:

The Zacharias and Dr. Suarez alleged that the Respondents were subject to fiduciary duties and the standard of care of investment professionals toward their clients such as the Zacharias and Dr. Suarez. Claimants alleged that the Respondents solicited the Claimants in late 1999 to purchase a highly speculative private placement investment involving substantial risks in a company known as Acadia Group, Inc. ("Acadia"). The Claimants alleged that the subject private placement investment was misrepresented, poorly designed, fraught with conflicts of interest, unsuitable, illiquid, and plummeted in value in a short time resulting in substantial losses for the Claimants.

The Claimants alleged that the Respondents were negligent in soliciting the Claimants for Acadia; that the Respondents failed to advise the Claimants of the pertinent facts concerning Acadia; that the Respondents violated NASD Conduct Rule 2310; that the Respondents violated Arizona and Federal securities laws; and that the Respondents' actions in connection with the Claimants' investment accounts constituted common law fraud, intentional misrepresentation, negligent misrepresentation, breach of contract, breach of fiduciary duty and failure to supervise.

Respondent Advest submitted the following summary:

Respondents denied the allegations in the Statement of Claim ("SOC") and denied that they made any material misrepresentations or omissions to Claimants. Respondents contend that Claimants were not misled in any way with respect to the investment in Acadia. Rather, Claimants are sophisticated investors who were fully apprised of the risks associated with the investment. Claimants each executed a Subscription Agreement setting forth, among other things, that they had knowledge and experience in financial and business matters, that they carefully reviewed and understood the various risks of the investment, that they reviewed and understood the Private Offering Memorandum ("POM"), including the "Risk Factors" set forth in the POM and that they had not relied on any statements not included in the POM. Further, each Claimant easily satisfied the "accredited investor" requirement of the offering. Indeed, they represented that they had sufficient wealth and sophistication to enter into the investment, and specifically represented that they understood the speculative nature of the investment, that they could suffer a loss of their entire investment and that they could economically bear such a loss. Claimants also affirmed that they met the suitability requirements for the offering.

Respondents allege that the POM is unequivocal in its risk disclosures. In the various sections of the POM, including the Investor Suitability, Investment Notices and Investment Caveats, and Risk Factors sections, as well as its disclosures regarding Acadia's debt position,

the POM is explicit that Acadia was speculative. And, not only did Claimants execute a Subscription Agreement stating they reviewed and understood those disclosures, the information contained in the POM was imputed to them by law. In their Answer, Respondents requested the SOC be dismissed with prejudice and that Respondents be awarded its attorneys' fees and costs incurred in defending this matter.

Respondents also filed a Motion to Dismiss Claimants' Statement of Claim. Respondents contend that all of Claimants' allegations in the Statement of Claim are belied by the express disclosures in the POM and Claimants' own representations in the Subscription Agreements.

Respondents contend that the filing of this Motion was authorized by the Panel in its Case Management Schedule, and is fully authorized by the NASD and by the federal and state courts interpreting the NASD Code.

Respondents set forth that the Motion to Dismiss is well-taken. As to Claimants' fraud claims, Respondents argue that Claimants failed to plead those claims with particularity, and that Claimants cannot establish scienter, reasonable reliance or loss causation. Claimants cannot establish scienter as (1) Respondent Advest was not the issuing company and did not have access to Acadia's financial records, (2) even if Respondent Advest received fees as a result of this offering, that does not, as a matter of law, give rise to an inference of scienter, and (3) Respondent Day invested \$403,750 of his own money in Acadia. Claimants cannot establish reasonable reliance as the POM and Subscription Agreement "bespeak caution," and Claimants could not have reasonably relied on any alleged representations that contradicted the disclosures in these documents. Lastly, Claimants cannot establish loss causation as the losses they suffered were caused by the financial collapse of Acadia, not the conduct of Respondents.

Likewise, Respondents allege that Claimants' breach of fiduciary duty, negligence and negligent misrepresentation claims are equally flawed. Claimants have failed to establish an actual duty owed to them, or breach thereof, in this matter. In fact, Claimant Suarez did not have an account with Respondents and there was no duty owed him. Further, as set forth above, Claimants have failed to establish that they reasonably relied on any misstatements or omissions attributed to Respondents. Claimants do attempt to buttress their negligence claims with claims for violations of the NASD and NYSE Conduct Rules; however, those conduct rules do not create a separate claim for relief and Respondents did not violate those rules.

As to their negligent supervision claim, the Subscription Agreements that Claimants executed include the exact information that a branch manager would have requested in monitoring an account, and/or an investment, and is equally baseless.

Lastly, Respondents allege that Claimants' breach of contract claim, punitive damages and attorneys' fees claims, are also subject to dismissal. Further, Claimants have not and cannot

assert a legal basis for separate and independent causes of action for punitive damages and/or attorneys' fees. Moreover, because all of Claimants' claims should be dismissed, Claimants are not entitled to recover punitive damages or attorneys' fees.

### **RELIEF REQUESTED**

The Claimants requested an award of the following: Compensatory damages of at least \$610,000 for the out-of-pocket losses caused by the improper investments made on behalf of the Claimants, plus interest and/or lost opportunity damages, recovery of the commissions and other fees charged on Claimants' investments, recovery of Claimants' filing fees and such other costs and expenses as have been incurred in bringing this arbitration, and attorney's fees. The Claimants also sought punitive damages in an amount not less than the amount of actual damages, and such other relief in favor of the Claimants as the arbitrators deem just and proper under the circumstances.

At the hearing, Claimants requested compensatory damages as follows:

- Isaac H. Zacharia, compensatory damages in the amount of \$403,750 and interest in the amount of \$80,750;
- Maryann Zacharia, compensatory damages in the amount of \$118,750 and interest in the amount of \$28,750; and
- J. Michael Suarez, M.D. compensatory damages in the amount of \$95,750 and interest in the amount of \$19,950;

Respondents move the Panel to dismiss Claimants' SOC in its entirety, and award Respondents its attorneys' fees and cost incurred herein defending this matter.

### **OTHER ISSUES CONSIDERED & DECIDED**

The parties had been advised of the Arbitration Panel's decision to deny the Motion to Dismiss prior to the hearing. Prior to the hearing, Respondent Day passed away and the Arbitration Panel did not consider his Estate as a party.

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. In either case, the parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD Dispute Resolution, Inc. (the "NASD").

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Advest, Inc. shall be and hereby is liable for and shall pay to Claimant Isaac H. Zacharia the sum of \$100,937.50 (**One Hundred Thousand Nine Hundred Thirty Seven Dollars and Fifty Cents**) as compensatory damages.
2. Respondent Advest, Inc. shall be and hereby is liable for and shall pay to Claimant Maryann Zacharia the sum of \$29,687.50 (**Twenty Nine Thousand Six Hundred Eighty Seven Dollars and Fifty Cents**) as compensatory damages.
3. Respondent Advest, Inc. shall be and hereby is liable for and shall pay to Claimant J. Michael Suarez, M.D. the sum of \$23,937.50 (**Twenty Three Thousand Nine Hundred Thirty Seven Dollars and Fifty Cents**) as compensatory damages.
4. Interest at the rate of 10% per annum is awarded on the above stated sum from February 27, 2002 to and inclusive of the date this award is paid in full.
5. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
6. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys' fees.

#### **FEES**

Pursuant to the Code, the following fees are assessed:

##### **Filing Fees**

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

Initial claim filing fee = \$500.00

##### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is Advest, Inc.

Member surcharge = \$2,500.00  
Pre-hearing process fee = \$ 600.00  
Hearing process fee = \$4,500.00

### **Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session(s) with Panel x \$1,200.00	= \$ 1,200.00
Pre-hearing conference(s): August 13, 2001 1 session	
Ten (10) Hearing sessions x \$1,200.00	= \$12,000.00
Hearing Date(s): February 21, 2002 2 sessions	
February 22, 2002 2 sessions	
February 25, 2002 2 sessions	
February 26, 2002 2 sessions	
February 27, 2002 2 sessions	
Total Forum Fees	= \$13,200.00

The Arbitration Panel has assessed \$3,300.00 of the forum fees to Isaac H. Zacharia, Maryann Zacharia, and J. Michael Suarez, M.D.

The Arbitration Panel has assessed \$9,900.00 of the forum fees to Advest, Inc.

### **Fee Summary**

Claimants, Isaac H. Zacharia, Maryann Zacharia, and J. Michael Suarez, M.D., shall be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
<u>Forum Fees</u>	= \$3,300.00
Total Fees	= \$3,800.00
<u>Less payments</u>	= \$2,000.00
Balance Due NASD Dispute Resolution, Inc.	= \$1,800.00

Respondent, Advest, Inc., shall be and hereby is liable for:

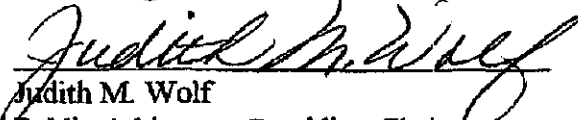
Member Fees	= \$ 7,600.00
<u>Forum Fees</u>	= \$ 9,900.00
Total Fees	= \$17,500.00
<u>Less payments</u>	= \$ 7,600.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 9,900.00

All balances are due to NASD Dispute Resolution, Inc.


**ARBITRATION PANEL**

Judith M. Wolf - Public Arbitrator, Presiding Chair  
Frederick K. Steiner, Jr. - Public Arbitrator  
Daniel B. Skelton - Non-Public Arbitrator

Concurring Arbitrators:

  
Judith M. Wolf  
Public Arbitrator, Presiding Chair

2/27/02  
Signature Date

  
Frederick K. Steiner, Jr.  
Public Arbitrator

2/27/02  
Signature Date

  
Daniel B. Skelton  
Non-Public Arbitrator

2/27/02  
Signature Date