

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

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In the Matter of the Arbitration Between

Name of Claimant

Roger A. Malcolm and Stacy C. Malcolm

and

01-00712  
Phoenix, Arizona

Name of Respondents

New England Securities Corp.  
Peter R. Kolesar

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**REPRESENTATION OF PARTIES**

Roger A. Malcolm and Stacy C. Malcolm ("**Claimants**") were represented by Mark D. Chester, Esq., Scottsdale, Arizona.

New England Securities Corp. ("**Respondent New England**") was represented by Charles W. Herf, Esq. and Robert N. Mann, Esq., Quarles & Brady Streich Lang LLP, Phoenix, Arizona.

Peter R. Kolesar ("**Respondent Kolesar**") having filed for bankruptcy did not appear or participate in the hearing of this matter. At the time of filing his Answer to Statement of Claim, Mr. Kolesar was represented by John R. Tellier, Esq., Titus, Brueckner & Berry, P.C., Scottsdale, Arizona.

**CASE INFORMATION**

The Statement of Claim was filed on or about February 12, 2001. Claimants' Response to New England Securities' Motion to Dismiss *Res Judicata* Claim was filed on or about June 4, 2001. Claimants' Response to New England's Motion to Dismiss on Statute of Limitations Grounds was filed on or about February 25, 2002. Submission Agreement of Claimant Roger A. Malcolm and Stacy C. Malcolm was signed on January 17, 2001.

Respondent New England Securities' Answer to Statement of Claim and Cross Claim against Peter Kolesar was filed on or about April 16, 2001. Respondent New England Securities' Motion to Dismiss the Malcolms' "*Res Judicata - Issue Preclusion*" Claim was filed on or about April 18, 2001. Motion to Dismiss on Statute of Limitations Grounds was filed on or about January 2, 2002. Submission Agreement of Respondent New England Securities Corp. was signed on April 13, 2001 by Michael Toland.

Answer to Statement of Claim was filed by Respondent Peter R. Kolesar on or about May 14, 2001. Answer to Crossclaim against Peter Kolesar was filed on or about May 21, 2001. Submission Agreement of Respondent Peter R. Kolesar was signed on May 8, 2001.

### CASE SUMMARY

Claimant submitted the following summary:

Claimants filed a Statement of Claim seeking recovery of \$141,000 (in principal) plus interest for damages that Claimants incurred as a result of two investments recommended by Respondent Peter Kolesar, who was a registered representative of New England Securities. Claimants alleged that Respondents:

- (a) failed to properly supervise Respondent Peter Kolesar and others in connection with the investments sold to Claimants by Kolesar;
- (b) failed to disclose material facts to Claimants regarding the securities recommended to Claimants and the investment strategies employed by Respondents; and
- (c) recommended unsuitable investments.

Claimants relied on Kolesar and his affiliation with New England as a reputable company owned by New England Financial Corporation. Claimants initially purchased life insurance and mutual funds through Kolesar and New England. Kolesar later led Claimants to believe that speculative promissory notes from real estate developer UDI were backed by New England and New England Financial. Claimants purchased over \$116,000 of those notes.

Respondent Kolesar later recommended an American Cowboy investment that was purportedly affiliated with UDI. Claimants invested \$25,000 through Kolesar with assurances that there was no risk and a guaranteed 12% rate of return. In 1999, UDI filed for bankruptcy protection and, unknown to Claimants, the American Cowboy investment also never materialized.

At all times Kolesar held himself out as an experienced, capable broker and financial planner with substantial experience in managing retirement assets. He never disclosed any of the risks involved in Claimants' investments in UDI and American Cowboy.

Respondent New England submitted the following summary:

New England Securities Corporation ("New England") is a broker-dealer incorporated in the State of Delaware and licensed in the State of Arizona. Claimants Roger A. Malcolm and

Stacy Malcolm and Peter Russell Kolesar (a former registered representative of New England with respect to New England-authorized investments) are Arizona residents.

New England did not offer, authorize, or even know about any of the alleged investments in an entity known as "U.D.I." identified in the Statement of Claim. No such investments are reflected in New England confirmations, quarterly statements or annual reports submitted to the Malcolms. Mr. Malcolm has extensive training and education in financing and real estate financing as a 20-year real estate agent in Arizona. He knew or reasonably should have known the speculative U.D.I. investments he acquired from U.D.I. through Kolesar were not New England products. New England engaged in no conduct from which the Malcolms could reasonably conclude that the U.D.I. investments were New England products. New England maintained and enforced a comprehensive supervisory system for its registered representatives that complied with the supervision requirements established by industry standards and by the National Association of Securities Dealers ("NASD").<sup>1</sup> During this time period, the NASD conducted extensive routine examinations of New England's entire supervisory system. A goal of New England's supervisory system is to prevent registered representatives from participating in business activities not approved by New England. New England prohibits registered representatives from selling away, or from participating in any outside business activity without full disclosure and obtaining New England's approval. Among other things, New England conducted annual compliance meetings to reemphasize New England's policies regarding outside business activity.

To ensure that registered representatives comply with New England's policies regarding selling away and outside business activities, New England enforces numerous policies and procedures. New England learned through an NASD Statement of Claim filed in May of 1999 that Kolesar allegedly fraudulently sold, or otherwise was somehow involved in the sale of, U.D.I. notes to individuals not parties to this matter. It investigated the matter, terminated Kolesar in 1999 for "selling away," referred the matter to the NASD and fully cooperated with the NASD in its investigation. Kolesar actively concealed from New England facts underlying the U.D.I. investments that provide the basis for the Malcolms' claim. Kolesar misrepresented to New England that he had been complying with New England's compliance rules regarding selling away and outside business activities. Kolesar's concealments prevented New England from discovering Kolesar's involvement with UDI, despite New England's diligent good faith supervision of Kolesar.

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<sup>1</sup> Although New England has been an industry leader during this entire time frame with respect to its supervision efforts, the only relevant supervision dates for arbitration purposes are those dates beginning one year prior to the Malcolms' purchase of the alleged investments. See e.g., NASD Notice to Members 99-90, List 5 (allowing discovery of supervision efforts up to one year prior to claimants' purchase of securities at issue). Because the Malcolms failed to specify the dates of purchase of their UDI investments or attach investment documents as exhibits, the relevant dates are not yet known to New England.

### **RELIEF REQUESTED**

Claimant requested an award in the estimated amount in excess of \$200,000.00 and less than \$200,000.00, interest at the rate of 10% per annum, unspecified punitive damages, fees, costs and attorneys' fees.

Respondents requested that the claims asserted against them be denied in its entirety and that they be awarded their costs and attorneys' fees.

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

On August 24, 2001, Respondent Peter R. Kolesar filed for bankruptcy. Pursuant to that filing all matters concerning Peter R. Kolesar were indefinitely stayed.

On March 13, 2002, the parties were advised of the Arbitration Panel's decision on the outstanding Motion to Dismiss filed in this matter. The Arbitration Panel decided to decline to rule on the Motion until it heard oral arguments and has the opportunity to question the parties at the start of the hearing commencing on April 29, 2002. The Arbitration Panel subsequently denied the Motion.

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. The undersigned find that the evidence and testimony presented did not support a finding against Respondent New England Securities Corp. Consequently, the Panel awards no damages against Respondent New England Securities Corp. The Panel did not rule with regards to the responsibility or liability of Respondent Kolesar for any losses or costs to Claimants or New England Securities Corp. as the result of any actions of Mr. Kolesar.
2. 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.
3. 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	= \$300.00
Cross 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 New England Securities Corp.

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

#### **Adjournment Fees**

Adjournments requested during these proceedings:

February 4-11, 2002 Hearing Date(s), adjournment requested by Respondent New England Securities Corp. Fee waived by the Arbitration Panel. = \$1,125.00

#### **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:

Two (2) Pre-hearing session(s) with Panel x \$1,125.00	= \$2,250.00
Pre-hearing conference(s): August 8, 2001 1 session	
September 6, 2001 1 session	
Six (6) Hearing sessions x \$1,125.00	= \$6,750.00
Hearing Date(s): April 29, 2002 2 sessions	
April 30, 2002 2 sessions	

Total Forum Fees May 1, 2002 2 sessions = \$9,000.00

The Arbitration Panel has assessed \$4,500.00 of the forum fees to Roger A. Malcolm and Stacy C. Malcolm.

The Arbitration Panel has assessed \$4,500.00 of the forum fees to New England Securities Corp.

**Fee Summary**

Claimants, Roger A. Malcolm and Stacy C. Malcolm, shall be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
Adjournment Fee	= \$ 0.00
<u>Forum Fees</u>	<u>= \$4,500.00</u>
Total Fees	= \$4,800.00
<u>Less payments</u>	<u>= \$1,425.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$3,375.00

Respondent, New England Securities Corp., shall be and hereby is liable for:

Type Filing Fee	= \$ 500.00
Member Fees	= \$4,600.00
Adjournment Fee	= \$ 0.00
<u>Forum Fees</u>	<u>= \$4,500.00</u>
Total Fees	= \$9,600.00
<u>Less payments</u>	<u>= \$7,225.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$2,375.00

All balances are due to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

Eugene R. Bronski, Esq. - Public Arbitrator, Presiding Chair  
George N. Roy, CPA - Public Arbitrator  
Richard B. Bequette - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Eugene R. Bronski

Eugene R. Bronski, Esq.  
Public Arbitrator, Presiding Chair

May 7, 2002

Signature Date

/s/ George N. Roy

George N. Roy, CPA  
Public Arbitrator

May 8, 2002

Signature Date

/s/ Richard B. Bequette

Richard B. Bequette  
Non-Public Arbitrator

May 9, 2002

Signature Date

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Concurring Arbitrators:

Eugene W Bronski  
Eugene R. Bronski, Esq.  
Public Arbitrator, Presiding Chair

5-7-02  
Signature Date

George N. Roy, CPA  
Public Arbitrator

                      
Signature Date

Richard B. Bequette  
Non-Public Arbitrator

                      
Signature Date



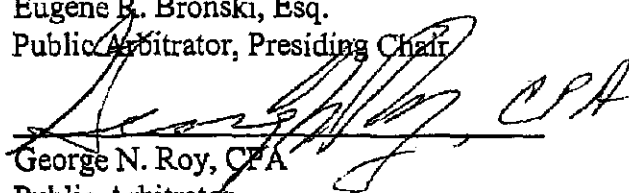
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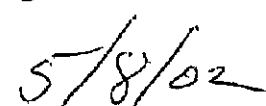
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Public Arbitrator, Presiding Chair

  
George N. Roy, CPA  
Public Arbitrator

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Richard B. Bequette  
Non-Public Arbitrator

Signature Date

NASD Dispute Resolution, Inc.  
Arbitration No. 01-00712  
Award Page 7 of 7

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Richard B. Bequette  
Non-Public Arbitrator

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5/9/02  
Signature Date