

AWARD
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Jack Deem

and

01-00803
Kansas City, Missouri

Name of Respondents

Vestax Securities Corporation
Paul W. Ewing

and

Name of Third Party Respondent

Robert Keith Hoddick

REPRESENTATION OF PARTIES

Jack Deem ("**Claimant**") was represented by John J. Miller, Esq., Law Offices of John J. Miller, P.A., Kansas City, Missouri.

Vestax Securities Corporation ("**Respondent Vestax**") and Paul W. Ewing ("**Respondent Ewing**") were represented by Nina S. McKenna, Esq., Amy E. Rush, Esq., Sonnenschein Nath Rosenthal, Kansas City, Missouri.

Robert Keith Hoddick ("**Third Party Respondent Hoddick**") was represented by Stephen C. Caruso, Esq., Caruso Law Office, Kansas City, Missouri.

CASE INFORMATION

The Statement of Claim was filed on or about February 16, 2001. Claimant's Response to Respondents' Motion to Dismiss was filed on or about May 14, 2001. Submission Agreement of Claimant Jack Deem was signed and undated.

Respondents Vestax Securities Corporation and Paul W. Ewing Statement of Answer, Defenses and Motion to Dismiss was filed by on or about April 16, 2001. Third Party Claimants Vestax Securities Corporation and Paul W. Ewing Third Party Statement of Claim Against Robert K. Hoddick was filed by on or about April 16, 2001. Respondents' Reply to Claimant's Response to the

Respondents' Motion to Dismiss was filed on or about June 22, 2001. Third Party Claimants Vestax Securities Corporation's and Paul W. Ewing's Answer and Motion to Dismiss Third Party Robert K. Hoddick's Cross Claims was filed on or about July 31, 2001. Submission Agreement of Respondent Vestax Securities Corporation was signed on April 16, 2001 by Robert Conley.

Submission Agreement of Respondent Paul W. Ewing was signed on by

Statement of Answer to Third Party Claim of Vestax and Paul W. Ewing, Affirmative Defenses to Third Party Claim and Cross Claim Against Vestax and Paul W. Ewing was filed by Third Party Respondent Robert Keith Hoddick on or about June 18, 2001. Submission Agreement of Third Party Respondent Robert Keith Hoddick was signed on May 24, 2001.

CASE SUMMARY

Claimant submitted the following summary:

In his Statement of Claim, Claimant alleged that unsuitable, concentrated, margin trading in Xerox stock in his cash and IRA accounts resulted in violations of state securities laws; misrepresentation and omission; negligence; breach of contract; and breach of fiduciary duty.

In their Statement of Answer, Defenses and Motion to Dismiss, Respondents denied each and every allegation and asserted the following affirmative defenses: The Statement of Claim fails to state a claim upon which relief may be granted; Claimant was purchasing Xerox stock based on information as a senior sales employee and/or in violation of company policy; Claimant is barred by the doctrines of estoppel and waiver; Claimant is estopped from bringing this action based on his knowledge and refusal to heed the advice of his broker and mitigate his damages; any recovery should be reduced or offset, because Claimant contributed to the damage he may have suffered; Claimant ratified each and every trade and should be precluded from recovery of damages; Claimant has failed to mitigate his damages; Respondents are entitled to an offset of the losses, because Claimant failed to take a February 2000 profit into account when calculating the damages; tort remedies are unavailable to Claimant by virtue of "economic loss" doctrine; in order to avoid double recovery, Claimant must make election of remedies between his breach of contract claim and his tort claims; and Claimant is not entitled to and cannot recover punitive damages. Respondents further asserted the following legal defenses and arguments in support of their Motion to Dismiss: Claimant failed to name Third-Party Respondent as a necessary party to this action; Respondents did not make fraudulent statements, or omit or conceal material facts under the Kansas and Missouri Securities Acts and common law; Claimant has not properly or has improperly pled his claims; Respondents are not liable to Claimant for negligence; Respondents are not liable to Claimant for breach of contract; and Respondents are not liable to Claimant for breach of fiduciary duty.

In their Third-Party Statement of Claim, Respondents asserted a claim for contribution and indemnity against Third-Party Respondent.

In his Statement of Answer and Affirmative Defenses to the Third-Party Claim and Cross-Claim against Respondents, Third-Party Respondent stated he had not committed wrongful acts which would trigger the indemnity provision of the Registered Representative Selling Agreement; and that Respondents have no claim of indemnity or contribution pursuant to the Agreement in law or equity. Third-Party Respondent asserted the following affirmative defenses: Respondents are not entitled to indemnification or contribution because the claim they filed activated an exclusion in Third-Party Respondent's E&O policy; and Respondents are guilty of bad faith in filing their claim, therefore the doctrine of clean hands prevents them from recovering under an equitable theory. Third-Party Respondent further asserted the following Cross-Claims against Respondents pursuant to Section 10313(b)(1): Respondents committed intentional misconduct by filing their Third-Party Claim; and Respondents tortiously interfered with Third-Party Respondent's policy in that they caused it to be useless by joining Third-Party Respondent in this controversy.

In their Answer and Motion to Dismiss Third-Party Respondent's Cross-Claims, Respondents denied each and every allegation set forth in Third-Party Respondent's Cross-Claims, and asserted the following defenses: The Cross-Claims fail to state a claim upon which relief may be granted; Third-Party Respondent is barred from asserting the causes of action alleged by the doctrines of estoppel and waiver, and the doctrine of unclean hands; Third-Party Respondent is estopped from bringing this action because he failed to investigate the risks associated with the trades he negotiated; and Third-Party Respondent contributed to the damage he may have suffered. In their Motion to Dismiss Third-Party Respondent's Cross-Claims, Respondents assert the following legal defenses and arguments: Respondents did not commit any acts of intentional misconduct; and Third-Party Respondent is unable to prove essential elements of his claim for tortious interference.

RELIEF REQUESTED

Claimant requested an award against Respondents Vestax Securities Corporation and Paul W. Ewing as follows:

- Compensation for trading losses of \$247,135;
- Margin interest and sales charges of no less than \$7,962;
- All taxes and penalties resulting from the distribution of IRA funds;
- Damages for the amount that Claimant's invested assets would now be worth had they been suitably managed in accordance with Claimant's investment objectives, and/or interest as provided by statute;
- Punitive damages to punish Respondents and to deter others from similar misconduct;
- Claimant's costs and expenses, including attorneys' fees;

- Such other relief as the panel deems just and proper.

In their Statement of Answer, Defenses and Motion to Dismiss Respondents Vestax Securities Corporation and Paul W. Ewing requested that Claimant's claims and demand for damages be dismissed in their entirety. Respondents further requested that costs, expenses and attorneys' fees be assessed against Claimant.

In their Third Party Statement of Claim, Vestax Securities Corporation and Paul W. Ewing requested contribution and indemnification from Robert Hoddick for any damages, if any exist, assessed against either of them by the Arbitration Panel. Vestax Securities Corporation and Paul W. Ewing also requested that costs, expenses and attorneys' fees be assessed against Robert Keith Hoddick.

In their Answer and Motion to Dismiss Third Party Robert K. Hoddick's Cross Claim, Vestax Securities Corporation and Paul W. Ewing requested that the cross claim be dismissed and that they be awarded their costs, expenses and attorneys' fees.

Third Party Respondent Cross Claim Claimant Robert K. Hoddick requested that the claims asserted against him be dismissed and that he be awarded his costs and expenses, along with any attorneys' fees expended or incurred in defense of this action.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Paul W. Ewing did not file with the NASD Dispute Resolution, Inc. a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

During the course of the hearing, Third Party Claimants Vestax Securities Corporation and Paul W. Ewing advised the undersigned arbitrators that they were withdrawing the Third Party Claim asserted against Robert Keith Hoddick. Subsequently, Robert Keith Hoddick advised the undersigned arbitrators that he was withdrawing the Cross Claim asserted against Vestax Securities Corporation and Paul W. Ewing.

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 Claim asserted in this matter against Respondents Vestax Securities Corporation and Paul W. Ewing shall be and hereby are denied in their entirety.
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Paul W. Ewing's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Paul W. Ewing must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Third Party Respondent Robert Keith Hoddick's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Robert Keith Hoddick must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
4. 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.
5. 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
Third Party Claim filing fee	= \$500.00
Cross claim filing fee	= \$250.00

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 Vestax Securities Corporation.

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

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 with Panel x \$1,125.00	= \$1,125.00
Pre-hearing conference(s): October 3, 2001 1 session	
Four (4) Hearing sessions x \$1,125.00	= \$4,500.00
Hearing Date(s): December 12, 2001 2 sessions	
<u>December 13, 2001</u> <u>2 sessions</u>	
Total Forum Fees	= \$5,625.00

The Arbitration Panel has assessed \$2,812.50 of the forum fees to Jack Deem.

The Arbitration Panel has assessed \$2,812.50 of the forum fees jointly and severally to Vestax Securities Corporation and Paul W. Ewing.

Fee Summary

Claimant, Jack Deem, shall be and hereby is liable for:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	= <u>\$2,812.50</u>
Total Fees	= \$3,112.50
<u>Less payments</u>	= <u>\$1,425.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$1,687.50

Respondent, Vestax Securities Corporation, shall be and hereby is liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	= \$ 0.00
Total Fees	= \$4,600.00
<u>Less payments</u>	= \$6,100.00
Balance applied to fees below NASD Dispute Resolution, Inc.	= \$1,500.00

Respondents, Vestax Securities Corporation and Paul W. Ewing shall be and hereby are jointly and severally liable for:

Third Party Claim Filing Fee	= \$ 500.00
<u>Forum Fees</u>	= \$2,812.50
Total Fees	= \$3,312.50
<u>Less payments</u>	= \$1,500.00
Balance Due NASD Dispute Resolution, Inc.	= \$1,812.50

Robert Keith Hoddick, shall be and hereby are jointly and severally liable for:

Type Filing Fee	= \$ 250.00
Total Fees	= \$ 250.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 250.00

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Donald B. Clark - Public Arbitrator, Presiding Chair
Frances O. Beach - Public Arbitrator
Will B. Tschudy - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Donald B. Clark
Donald B. Clark
Public Arbitrator, Presiding Chair

December 22, 2001
Signature Date

/s/ Will B. Tschudy
Will B. Tschudy
Non-Public Arbitrator

December 21, 2001
Signature Date

Dissenting from the decision set forth in paragraphs 1,2 and 3 above.

/s/ Frances O. Beach
Frances O. Beach
Public Arbitrator

January 5, 2002
Signature Date

Respondent, Vestax Securities Corporation, shall be and hereby is liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	= \$ 0.00
Total Fees	= \$4,600.00
<u>Less payments</u>	= \$6,100.00
Balance applied to fees below NASD Dispute Resolution, Inc.	= \$1,500.00

Respondents, Vestax Securities Corporation and Paul W. Ewing shall be and hereby are jointly and severally liable for:

Third Party Claim Filing Fee	= \$ 500.00
<u>Forum Fees</u>	= \$2,812.50
Total Fees	= \$3,312.50
<u>Less payments</u>	= \$1,500.00
Balance Due NASD Dispute Resolution, Inc.	= \$1,812.50

Robert Keith Hoddick, shall be and hereby are jointly and severally liable for:

Type Filing Fee	= \$ 250.00
Total Fees	= \$ 250.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 250.00

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Donald B. Clark - Public Arbitrator, Presiding Chair
Frances O. Beach - Public Arbitrator
Will B. Tschudy - Non-Public Arbitrator

Concurring Arbitrators:

Donald B. Clark
Donald B. Clark
Public Arbitrator, Presiding Chair

December 22, 2001
Signature Date

Will B. Tschudy
Will B. Tschudy
Non-Public Arbitrator

Signature Date

Respondent, Vestax Securities Corporation, shall be and hereby is liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	= \$ 0.00
Total Fees	= \$4,600.00
<u>Less payments</u>	= \$6,100.00
Balance applied to fees below NASD Dispute Resolution, Inc.	= \$1,500.00

Respondents, Vestax Securities Corporation and Paul W. Ewing shall be and hereby are jointly and severally liable for:

Third Party Claim Filing Fee	= \$ 500.00
<u>Forum Fees</u>	= \$2,812.50
Total Fees	= \$3,312.50
<u>Less payments</u>	= \$1,500.00
Balance Due NASD Dispute Resolution, Inc.	= \$1,812.50

Robert Keith Hoddick, shall be and hereby are jointly and severally liable for:

Type Filing Fee	= \$ 250.00
Total Fees	= \$ 250.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 250.00

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Donald B. Clark - Public Arbitrator, Presiding Chair
Frances O. Beach - Public Arbitrator
Will B. Tschudy - Non-Public Arbitrator

Concurring Arbitrators:

Donald B. Clark
Public Arbitrator, Presiding Chair

Signature Date

✓ Will B. Tschudy
Will B. Tschudy
Non-Public Arbitrator

12/21/01
Signature Date

NASD Dispute Resolution, Inc.
Arbitration No. 01-00803
Award Page 8 of 8

Deem v. Vestax

Dec. 12, 13 - 2001
Kansas City

Dissenting from the decision set forth in paragraphs 1, 2 and 3 above.

Frances O. Beach
Frances O. Beach
Public Arbitrator

Jan 5 02
Signature Date

NASD Dispute Resolution, Inc.
R **RECEIVED** **D**
JAN 08 2002