

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

James M. Ahlstedt, Jeffrey D. Franklin, and David Unsworth, Claimants v. Broadmark Capital Corporation, Stephen J. DeGroat, and Joseph L. Schocken, Respondents

Case Number: 01-02144

Hearing Site: San Francisco, California

REPRESENTATION OF PARTIES

For Claimants:

Anthony M. Englese, Esq.
Law Offices of Anthony M. Englese
San Francisco, California

For Respondents:

Gerald Fields, Esq.
Paul, Hastings, Janofsky & Walker, LLP
New York, New York

CASE INFORMATION

Statement of Claim filed: April 30, 2001

Claimant James Ahlstedt's Uniform Submission Agreement signed: March 26, 2001

Claimant Jeffrey Franklin's Uniform Submission Agreement signed: March 26, 2001

Claimant David Unsworth's Uniform Submission Agreement signed: March 26, 2001

Statement of Answer and Counterclaim filed by Respondents: July 2, 2001

Respondent Broadmark Capital Corporation's Uniform Submission Agreement signed: June 25, 2001

Respondent Stephen J. DeGroat's Uniform Submission Agreement signed: June 25, 2001

Respondent Joseph Schocken's Uniform Submission Agreement was signed, but not dated

Reply to the Counterclaim filed by Claimants: July 12, 2001

CASE SUMMARY

Claimants alleged breach of contract and breach of fiduciary duty.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim. In their Counterclaim, the Respondents alleged breach of contract and negligence.

Claimants denied the allegations of wrongdoing set forth in the Respondents' Counterclaim.

RELIEF REQUESTED

Claimants requested \$7,000,000.00 in compensatory damages, and sought an order that Respondents Stephen J. DeGroat and Joseph L. Schocken restore property taken from Broadmark Capital Corporation for less than full and adequate consideration. Claimants also sought unspecified punitive damages and costs, including attorney's fees.

Respondents requested dismissal of the Claimants' Statement of Claim in its entirety. In their Counterclaim, Respondents requested \$105,018.00, along with interest calculated at 8% from the date of the loan or, alternatively, until the shares are cancelled on Count I of the Counterclaim, \$150,000.00 along with interest calculated at 8% from the date of the loan or, alternatively, until the shares are cancelled on Count II of the Counterclaim, and an amount not less than \$150,000.00 on Count III of the Counterclaim.

Claimants requested dismissal of the Counterclaim in its entirety plus unspecified costs, including attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

During the hearing, Respondents withdrew Count II of their Counterclaim.

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, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Broadmark Capital Corporation is liable to and shall pay Claimants the sum of \$97,267.50 in compensatory damages.

Rationale: The Panel determined that Claimants collectively owned 14.07% of the shares of Broadmark Capital Corporation and that their shares were fully paid for. Claimants were entitled to share in the profits of Broadmark Capital Corporation's San Francisco Office for the years 1999 and 2000. The Panel concludes, upon review of conflicting testimony and evidence on this issue, that the correct summary of profits and losses of the San Francisco Office is set forth on Exhibit A to "Claimants [sic] Post Hearing Brief," the sum of \$97,267.50.

2. Respondent Broadmark Capital Corporation is liable to and shall pay Claimants interest in the amount of 10% per annum on \$97,267.50 from March 15, 2001, until paid.
3. Respondent Broadmark Capital Corporation is liable to and shall pay Claimant Jeffrey D. Franklin the sum of \$4,000.00 in commissions.

Rationale: It is essentially undisputed that Jeffrey D. Franklin is due \$4,000.00 in connection with the transaction involving FiData, Inc.

4. Respondent Broadmark Capital Corporation is liable to and shall pay Claimant Jeffrey D. Franklin interest in the amount of 10% per annum on \$4,000.00 from May 1, 2000, until paid.
5. Respondent Broadmark Capital Corporation is liable to and shall deliver to Claimant David Unsworth 50,000 warrants of Altris.

Rationale: Claimants and Stephen J. DeGroat all agree that Claimant David Unsworth introduced Altris, an entity with which David Unsworth had a long-standing relationship, to Broadmark Capital Corporation for the preparation of a fairness opinion. The Panel concludes that Claimant David Unsworth is due a finder's fee of 50% of the 100,000 warrants paid by Altris to Broadmark Capital Corporation.

6. Respondents Stephen J. DeGroat and Joseph L. Schocken are jointly and severally liable to and shall pay Claimants the sum of \$1,140,166.60 in compensatory damages.

Rationale: Stephen J. DeGroat and Joseph L. Schocken breached their fiduciary duties as majority shareholders in Broadmark Capital Corporation by diverting 1,248,246 warrants of Universal Access, Inc. (hereinafter referred to as "UAXS") to Broadmark Partners, LLC, an entity owned 50% by Stephen J. DeGroat and 50% by Joseph L. Schocken and/or for Joseph L. Schocken's benefit by Tranceka, Joseph L. Schocken's family entity. The Panel concludes, after reviewing the testimony and evidence, that no more than 50% of the total warrants (50% of 1,663,392 or 831,696) should have been transferred to Stephen J. DeGroat and Joseph L. Schocken directly, indirectly or via their entity, Broadmark Partners, LLC, as their percentage of the UAXS deal and that 831,696 warrants should have been left in, or transferred to Broadmark Capital Corporation, the entity in which Claimants had a fully paid 14.7% interest as shareholders. The Panel also concludes that the parties contemplated the transfer of 257,160 of the warrants to persons who contributed to the underlying transaction, leaving the remaining warrants, a total of 574,536, available to Broadmark Capital Corporation and subject to Claimants' 14.7% ownership interest. The panel also concludes that Stephen J. DeGroat's and Joseph L. Schocken's transfer of the 1,248,246 warrants to themselves, or to entities for their benefit, was tantamount to a declaration of a dividend to themselves, and, therefore, a dividend to Claimants on the 574,536 warrants, which the Panel concludes should have been in Broadmark Capital Corporation, is the appropriate vehicle for awarding relief to Claimants, measured by the value of the warrants at the time (the IPO price of \$14.00, less the exercise price of \$.50, or \$13.50 per warrant). Therefore, 574,536 warrants at \$13.50 per warrant equals \$7,756,236. and 14.7% thereof is \$1,140,166.60.

7. Respondents Stephen J. DeGroat and Joseph L. Schocken are jointly and severally liable to and shall pay to Claimants interest in the amount of 10% per annum on \$1,140,166.60 from November, 29, 1999 until paid.
8. Respondents shall recover nothing on their Counterclaim.
9. Each party shall bear its own costs, including attorney's fees.
10. 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 | = \$ 600.00 |
| Respondents' Counterclaim fee | = \$ 1,000.00 |

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 Broadmark Capital Corporation is a party and the following fees are assessed:

| | |
|----------------------------|---------------|
| Member Surcharge | = \$ 3,000.00 |
| Pre-Hearing Process Fee | = \$ 600.00 |
| <u>Hearing Process Fee</u> | = \$ 5,000.00 |
| Total Member Fees | = \$ 8,600.00 |

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:

| | |
|--|-----------------------|
| One (1) Pre-hearing conference session with the Panel @ \$1,200.00/session | = \$ 1,200.00 |
| Pre-hearing conference: November 27, 2001 1 session | |
| Eight (8) Hearing sessions @ \$1,200.00/session | = \$ 9,600.00 |
| Hearings: February 19, 2002 2 sessions | |
| February 20, 2002 2 sessions | |
| February 21, 2002 2 sessions | |
| February 22, 2002 2 sessions | |
| Total Forum Fees | = \$ 10,800.00 |

1. The Panel assessed \$5,400.00 of the forum fees jointly and severally to Claimants James M. Ahlstedt, Jeffrey D. Franklin and David Unsworth.
2. The Panel assessed \$5,400.00 of the forum fees jointly and severally to Respondents Broadmark Capital Corporation, Stephen J. DeGroat and Joseph L. Schocken.

NASD Dispute Resolution, Inc.

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Fee Summary

Claimants are charged jointly and severally with the following fees and costs:

| | |
|---|-----------------|
| Initial Filing Fee | = \$ 600.00 |
| Forum Fees | = \$ 5,400.00 |
| Total Fees | = \$ 6,000.00 |
| Less Payments | = \$(1,800.00) |
| Balance Due NASD Dispute Resolution, Inc. | = \$ 4,200.00 |

Respondent Broadmark Capital Corporation is charged with the following fees and costs:

| | |
|---|-----------------|
| Member Fees | = \$ 8,600.00 |
| Total Fees | = \$ 8,600.00 |
| Less Payments | = \$(8,600.00) |
| Balance Due NASD Dispute Resolution, Inc. | = \$(0.00) |

Respondents Broadmark Capital Corporation, Stephen J. DeGroat and Joseph L. Schocken are charged jointly and severally with the following fees and costs:

| | |
|--|-----------------|
| Counterclaim Filing Fee | = \$ 1,000.00 |
| Forum Fees | = \$ 5,400.00 |
| Total Fees | = \$ 6,400.00 |
| Less Payments by Broadmark Capital Corporation | = \$(2,525.00) |
| Balance Due NASD Dispute Resolution, Inc. | = \$ 3,875.00 |

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

Bruce W. Belding, Esq.

-

Public Arbitrator, Presiding Chair

Ralph A. Cotton, CPA

-

Public Arbitrator

Susan M. Boudrot, Esq.

-

Non-Public Arbitrator

Concurring Arbitrators' Signatures

Bruce W. Belding, Esq.
Chair, Public Arbitrator

Signature Date

Ralph A. Cotton, CPA
Public Arbitrator

Signature Date

Susan M. Boudrot, Esq.
Non-Public Arbitrator

Signature Date

6/19/02
Date of Service

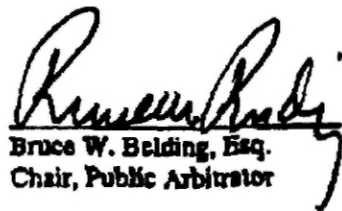
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ARBITRATION PANEL

Bruce W. Belding, Esq.
Ralph A. Cotton, CPA
Susan M. Boudrot, Esq.

- *Public Arbitrator, Presiding Chair*
- *Public Arbitrator*
- *Non-Public Arbitrator*

Concurring Arbitrators' Signatures


Bruce W. Belding, Esq.
Chair, Public Arbitrator

June 19, 2002
Signature Date

Ralph A. Cotton, CPA
Public Arbitrator

Signature Date

Susan M. Boudrot, Esq.
Non-Public Arbitrator

Signature Date

6/19/02
Date of Service

NASD Dispute Resolution, Inc.
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ARBITRATION PANEL

Bruce W. Belding, Esq.
Ralph A. Conon, CPA
Susan M. Boudrot, Esq.

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures

Bruce W. Belding, Esq.
Chair, Public Arbitrator

Signature Date


Ralph A. Conon, CPA
Public Arbitrator

6-18-02
Signature Date

Susan M. Boudrot, Esq.
Non-Public Arbitrator

Signature Date

6/19/02
Date of Service

NASD Dispute Resolution, Inc.
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ARBITRATION PANEL

| | | |
|-------------------------------|---|---|
| <i>Bruce W. Belding, Esq.</i> | - | <i>Public Arbitrator, Presiding Chair</i> |
| <i>Ralph A. Cotton, CPA</i> | - | <i>Public Arbitrator</i> |
| <i>Susan M. Boudrot, Esq.</i> | - | <i>Non-Public Arbitrator</i> |

Concurring Arbitrators' Signatures

Bruce W. Belding, Esq.
Chair, Public Arbitrator

Signature Date

Ralph A. Cotton, CPA
Public Arbitrator

Signature Date

Susan M. Boudrot
Susan M. Boudrot, Esq.
Non-Public Arbitrator

6/17/02
Signature Date

6/19/02
Date of Service



NASD Dispute Resolution, Inc.
300 South Grand Avenue, Suite 900
Los Angeles, California 90071
213-613-2680 213-613-2677 FAX

Proof of Service

State of California, County of Los Angeles

I am employed in the county of Los Angeles. I declare that I am over the age of eighteen (18) and not a party to this action. My business address is:

NASD Dispute Resolution, Inc.

300 South Grand Avenue, Suite 900

Los Angeles, California 90071.

On June 19, 2002, I served the following documents described as:

Award, Cover Letters, and Invoice Statement for Arbitration Case No. 01-02144 on the interested parties in this action by placing the true copies thereof enclosed in the sealed envelopes as follows:

Anthony M. Englese, Esq., Attorney at Law, 2845 Van Ness Avenue, #601, San Francisco, CA. 94109, Fax: 415-788-7102

Gerald Fields, Esq., Paul, Hastings, Janofsky & Walker LLP., 75 East 55th Street New York, NY. 10022, Fax : 212-318-6972

- X I deposited such envelop in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.
- ☐ By Personal Service, I caused such envelope to be delivered by hand to the individuals at the addressee(s) listed.
- ☐ By overnight courier, I caused the above-referenced documents to be delivered to an overnight courier service (Federal Express), for delivery to the above addressees.
- X By facsimile machine, I caused the above-referenced documents to be transmitted to the above-named persons at the numbers above.
- X (STATE) I declare under penalty of perjure under the laws of the State of California that the above is true and correct.
- ☐ (FEDERAL) I declare that I am employed in the office of a member of the bar on this court at whose direction the service was made.

Executed this June 19, 2002, at Los Angeles, California.

Maria P. Medina
Maria P. Medina