

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Name of Claimant

J. Edward Lucas, III

and

01-02951  
Phoenix, Arizona

Name of Respondents

WestAmerica Investment Group  
Scott D. Schenck  
John M. Gersten  
William F. Groszkruger  
Paula M. Lafon  
Steven A. Rothstein and  
Robert H. Daskal

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**REPRESENTATION OF PARTIES**

J. Edward Lucas, III ("**Claimant**") was represented by Frank Lewis, Esq., Begam Lewis Marks & Wolfe, Phoenix, Arizona.

WestAmerica Investment Group ("**Respondent WestAmerica**") filed for bankruptcy on December 31, 2001.

Scott D. Schenck ("**Respondent Schenck**") was represented by Gary R. Blume, Esq., Blume Law Firm PC, Phoenix, Arizona.

John M. Gersten ("**Respondent Gersten**") passed away on March 21, 2002.

William F. Groszkruger, Paula M. Lafon, Steven A. Rothstein and Robert H. Daskal (collectively as "**Control Respondent**") were represented by Arian Colachis, Esq., Golbeck Roth & Colachis, PLLC, Seattle, Washington.

**CASE INFORMATION**

The Statement of Claim was filed on or about June 4, 2001. Amended Statement of Claim was filed on or about October 12, 2001. Claimant's Motion to Strike the Motion to Dismiss of Steven A. Rothstein, Robert H. Daskal, William F. Groszkruger and Paula LaFon was filed on or about July 17, 2002. Claimant's Reply in Support of his Motion to Strike was filed on or about August 6, 2002.

Claimant's Response to Control Defendants Mid-Hearing Motion to Dismiss was filed on or about April 3, 2003. Submission Agreement of Claimant J. Edward Lucas, III was signed on May 22, 2001.

Answer of Respondents WestAmerica Investment Group and Scott Schenck was filed by on or about August 30, 2001. Submission Agreement of Respondent WestAmerica Investment Group was signed on August 21, 2001 by James Bloch. Submission Agreement of Respondent Scott D. Schenck was signed on August 28, 2001.

Answer John Gersten was filed by Respondent John M. Gersten on or about February 14, 2002. Submission Agreement of Respondent John M. Gersten was signed on January 24, 2002.

Respondents William F. Groszkruger's, Paula M. Lafon's, Steven A. Rothstein's and Robert H. Daskal's Motion to Dismiss First Amended Statement of Claim and Request for Prehearing Conference was filed on or about December 7, 2001. Letter dated December 10, 2001 withdrawing Motion to Dismiss. Respondents William F. Groszkruger's, Paula M. Lafon's, Steven A. Rothstein's and Robert H. Daskal's Answer to First Amended Statement of Claim was filed by Respondents William F. Groszkruger, Paula M. Lafon, Steven A. Rothstein and Robert H. Daskal on or about December 13, 2001. Respondents Steven A. Rothstein, Robert H. Daskal, William F. Groszkruger, and Paula M. Lafon Motion to Dismiss was filed on or about June 19, 2002. Respondents' Reply and Opposition to Claimant's Motion to Strike was filed on or about July 26, 2002. Respondents Steven A. Rothstein, Robert H. Daskal, William F. Groszkruger, and Paula M. Lafon Mid-Hearing Motion to Dismiss was filed on or about March 3, 2003. Respondents Steven A. Rothstein, Robert H. Daskal, William F. Groszkruger, and Paula M. Lafon Reply to Claimant's Response to Mid-Hearing Motion to Dismiss was filed on or about April 10, 2003.

### **CASE SUMMARY**

Claimant asserts claims against Schenck for churning (excessive trading), unauthorized trading, breach of fiduciary duty, unsuitable trading, violation of state and federal security law and regulations including omission of material facts, and breach of contract. Claimant asserts claims against WestAmerica for all of the claims asserted against Schenck as its employee and agent and for its failure to supervise Schenck. Claimant asserts claims against William F. Groszkruger, Paula M. Lafon, Steven A. Rothstein and, Robert H. Daskal for all of the claims asserted against WestAmerica and Schenck as a result of their conduct as control persons.

Specifically, Claimant alleged as follows:

...Schenck exercised complete control over the account. He caused heavy use of margin reaching over \$500,000 at times. Schenck rarely spoke with claimant in advance of placing a trade in the account. Claimant never signed discretionary account forms and did not realize that Schenck was acting improperly by placing trades in his account without prior authority from Claimant.

Many of the trades placed in claimant's accounts by Schenck were unsuitable for claimant based upon the information and desires for the handling of his accounts as disclosed to Schenck by claimant.

Claimant never received any telephonic communication from anyone at WestAmerica other than Schenck. Claimant never received any written communication from anyone at WestAmerica indicating that the handling of his account resulted in a high level of activity and a high level of commissions and that many transactions in the account had a high level of risk.

In the Answer filed on behalf of Respondents WestAmerica and Schenck, it was specifically stated as follows:

..., Schenck exercised no control and operated with the knowledge and authority of Claimant. Schenck and Claimant spoke telephonically regarding the account between one and five times per week, depending on market conditions. A typical communication would consist of Schenck calling Claimant to discuss market conditions and news, account value, margin, and overall account goals and planning. Schenck or his associates would then fax research reports, charts, and other news on the issues and would provide copies to Claimant. Claimant would then review this information and he and Schenck would discuss what to buy and how many shares.

..., all use of margins was solely upon the orders of Claimant. Schenck followed Claimant's instructions.

..., All trades in Claimant's account were suitable based upon the information contained in the account forms signed by Claimant.

In their Answer to First Amended Statement of Claim, Respondents William F. Groszkruger, Paula M. Lafon, Steven A. Rothstein and Robert H. Daskal specifically stated as follows:

Claimant first sued WestAmerica and Scott Schenck alleging a variety of causes of action against them. Only after Claimant's copounsel was informed that WestAmerica would be closing its operations, Claimant then amended the Statement of Claim to include every

individual named in West America's Form BD, calling each control persons of WestAmerica and Schenck and claiming they all were (somehow) vicariously liable for WestAmerica's and Schenck's conduct.

None of these newly named Respondents were members of WestAmerica's compliance department or ever supervised (or had any duty to supervise) Schenck. Notable missing from the Claim are any allegations of any facts demonstrating, or even suggesting, that any of these Respondents participated in or directly or indirectly induced the alleged improper conduct.

### **RELIEF REQUESTED**

In the Amended Statement of Claim, Claimant requested an award of damages in an amount exceeding \$500,000 but not less than \$5,000,000, which includes prejudgment interest, costs incurred and attorneys' fees. Claimant also requested an award of unspecified punitive damages.

Respondent Schenck requested that the claims asserted in this matter be denied in their entirety.

Respondents William F. Groszkruger, Paula M. Lafon, Steven A. Rothstein and Robert H. Daskal requested the following relief:

1. That the allegations and causes of action in the Claim against each of these Respondents be dismissed in their entirety with prejudice and that the Claimant take nothing thereby;
2. To the extent that Respondents, or any of them, are found liable for any damage to the Claimant, that one or more of the other respondents be ordered to indemnify such Respondents for the full amount of such liability;
3. To the extent that Respondents, or any of them, have been proximately damages by the Claimant or any respondent herein, that the Claimant and/or said respondent(s) be ordered to indemnify such injured Respondents according to the amount of their damage attributable to the Claimant and/or said respondent(s);
4. For their costs and reasonable attorneys' fees incurred herein, pursuant to statute, case law and/or agreement of the parties;
5. That the award in Respondents' favor in this matter include interest thereon at the judicial rate; and
6. For such other relief in Respondents' favor as this Panel deems just and proper.

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

Respondents William F. Groszkruger, Paula M. Lafon, Steven A. Rothstein and Robert H. Daskal did not file with the NASD Dispute Resolution properly executed submissions to arbitration but are 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 are bound by the determination of the arbitration panel on all issues submitted.

Respondent WestAmerica Investment Group filed for bankruptcy on December 31, 2001.

Respondent John M. Gersten passed away on March 21, 2002.

By letter dated October 11, 2002, the parties were advised of the Arbitration Panel's decision to deny the Motions for Summary Judgment.

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 (the "NASD").

### **AWARD**

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

1. Neither Scott Schenk nor WestAmerica engaged in excessive trading.
2. On or about December 26, 1999 and January 9, 2000 as well as between February 28, 2000 and March 13, 2000, Scott Schenk did engage in unauthorized trading.
3. Scott Schenk did engage in a breach of fiduciary duty but only limited to the act or acts involving the unauthorized trading.
4. Scott Schenk did not engage in any unsuitable trading.
5. Scott Schenk did engage in the omission of material facts but only relative to the unauthorized trading.
6. Scott Schenk did breach his contract with the plaintiff but only insofar as the unauthorized trading was concerned.

7. Scott Schenk, with the exception of the unauthorized trading noted above, did not engage in any other violation of state and federal security law and or regulations.
8. Scott Schenk is to pay plaintiff, Edward Lucas the sum of \$54,879.00 which represents all losses and commissions from the unauthorized trades during the period from December 26, 1999 to January 9, 2000 (as noted on the January 31, 2000 statement) and between February 28, 2000 through and until March 13, 2000 (as noted on the March 31, 2000 statement).
9. Scott Schenk is to pay plaintiff, Edward Lucas, attorney's fees in the amount of \$25,000 (twenty-five thousand dollars and zero cents). Plaintiff, Mr. Lucas is responsible for any additional legal fees and costs he may have incurred over and above this amount.
10. All Respondents are responsible for their own legal fees and costs.
11. All previous rulings by the panel on costs and fees stand.
12. The action(s) against all other respondents (Daskal, LaFon, Rothstein and Groskruger) are without merit.
13. On the Mid-Hearing motion to Dismiss Control Defendants- Denied
14. On the Mid- Hearing motion to Deny Paul F. Arutt as an Expert Witness- Denied
15. On the motion for Sanctions against Claimant- Denied
16. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent William F. Groszkruger'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 William F. Groszkruger must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
17. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Paula M. Lafon'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 Paula M. Lafon must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
18. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Steven A. Rothstein'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 Steven A. Rothstein must obtain

confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

19. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Robert H. Daskal'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 H. Daskal must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
20. 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.
21. 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 will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$375.00

##### **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 WestAmerica Investment Group.

|                         |              |
|-------------------------|--------------|
| Member surcharge        | = \$2,000.00 |
| Pre-hearing process fee | = \$ 600.00  |
| Hearing process fee     | = \$3,500.00 |

### **Adjournment Fees**

Adjournments requested during these proceedings:

September 9-13, 2002 Hearing Date(s), adjournment requested by Claimant J. Edward Lucas, III  
= \$1,200.00

October 7-11, 2002 Hearing Date(s), adjournment requested by Respondents Steven A. Rothstein,  
Robert H. Daskal, William F. Groszkruger, and Paula M. Lafon  
= \$1,200.00

### **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): January 28, 2002 1 session

Twenty-two (22) Hearing sessions x \$1,200.00 = \$26,400.00

Hearing Date(s): February 3, 2003 2 sessions  
February 4, 2003 2 sessions  
February 5, 2003 3 sessions  
February 6, 2003 2 sessions  
February 7, 2003 2 sessions  
May 5, 2003 2 sessions  
May 6, 2003 2 sessions  
May 7, 2003 3 sessions  
May 8, 2003 2 sessions  
May 9, 2003 2 sessions

Total Forum Fees = \$27,600.00

The Arbitration Panel has assessed \$27,600.00 of the forum fees to Scott D. Schenck.

### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Claimant, J. Edward Lucas, III, requested the duplication of hearing tapes. = \$ 60.00



**Fee Summary**

Claimant, J. Edward Lucas, III, shall be and hereby is liable for:

|                                     |               |
|-------------------------------------|---------------|
| Initial Filing Fee                  | = \$ 375.00   |
| Adjournment Fee                     | = \$ 1,200.00 |
| Administrative Costs                | = \$ 60.00    |
| <u>Forum Fees</u>                   | = \$ 0.00     |
| Total Fees                          | = \$ 1,635.00 |
| <u>Less payments</u>                | = \$ 1,575.00 |
| Balance Due NASD Dispute Resolution | = \$ 60.00    |

Respondent, WestAmerica Investment Group, shall be and hereby is liable for:

|  |              |
|--|--------------|
| Member Fees                                    | = \$6,100.00 |
| <u>Forum Fees</u>                              | = \$ 0.00    |
| Total Fees                                     | = \$6,100.00 |
| <u>Balance waived due to bankruptcy filing</u> | = \$6,100.00 |
| Balance Due NASD Dispute Resolution            | = \$ 0.00    |

Respondent, Scott D. Schenck, shall be and hereby is liable for:

|                                     |               |
|-------------------------------------|---------------|
| <u>Forum Fees</u>                   | = \$27,600.00 |
| Total Fees                          | = \$27,600.00 |
| <u>Less payments</u>                | = \$ 0.00     |
| Balance Due NASD Dispute Resolution | = \$27,600.00 |

Respondents, William F. Groszkruger, Paula M. Lafon, Steven A. Rothstein and Robert H. Daskal, shall be and hereby are jointly and severally liable for:

|                                     |               |
|-------------------------------------|---------------|
| <u>Adjournment Fee</u>              | = \$ 1,200.00 |
| Balance Due NASD Dispute Resolution | = \$ 1,200.00 |

**All balances are due to NASD Dispute Resolution**

**ARBITRATION PANEL**

Robert F. Oberstein - Public Arbitrator, Presiding Chair  
Allan D. Breyer - Public Arbitrator  
Daniel J. Lind - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Robert F. Oberstein  
Robert F. Oberstein  
Public Arbitrator, Presiding Chair

August 19, 2003  
Signature Date

/s/ Allan D. Breyer  
Allan D. Breyer  
Public Arbitrator

August 19, 2003  
Signature Date

/s/ Daniel J. Lind  
Daniel J. Lind  
Non-Public Arbitrator

August 19, 2003  
Signature Date

NASD Dispute Resolution, Inc.

Arbitration No. 01-02951

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Concurring Arbitrators:

Robert F. Oberstein

Robert F. Oberstein

Public Arbitrator, Presiding Chair

8/19/03

Signature Date

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Allan D. Breyer

Public Arbitrator

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Signature Date

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Daniel J. Lind

Non-Public Arbitrator


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Signature Date

NASD Dispute Resolution, Inc.  
Arbitration No. 01-02951  
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Concurring Arbitrators:

Robert F. Oberstein  
Public Arbitrator, Presiding Chair

  
Allan D. Breyer  
Public Arbitrator

Daniel J. Lind  
Non-Public Arbitrator

Signature Date

08-19-03  
Signature Date

Signature Date

NASD Dispute Resolution, Inc.  
Arbitration No. 01-02951  
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Concurring Arbitrators:

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Robert F. Oberstein  
Public Arbitrator, Presiding Chair

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Signature Date

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Allan D. Breyer  
Public Arbitrator

\_\_\_\_\_  
Signature Date



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Daniel J. Lind  
Non-Public Arbitrator

8/19/03  
\_\_\_\_\_  
Signature Date