
Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
Robert S. McLeod

Case Number: 02-07664

Name of the Respondent
Fidelity Brokerage Services, Inc.

Hearing Site: Boca Raton, Florida

Nature of the Dispute: Customer vs. Member.

REPRESENTATION OF PARTIES

For Robert S. McLeod ("McLeod"), hereinafter referred to as "Claimant": Delmer C. Gowing, III, Esq., Delmer C. Gowing, P.A., Delray Beach, Florida and M. Adam Bankier, Esq., Elk Bankier and Christu, Boca Raton, Florida.

For Fidelity Brokerage Services, Inc. ("Fidelity"), hereinafter referred to as "Respondent": Mitchell E. Herr, Esq. and Tiffani G. Lee, Esq., Holland & Knight, LLP., Miami, Florida.

CASE INFORMATION

Statement of Claim filed on or about: December 18, 2002.

Claimant signed the Uniform Submission Agreement: December 18, 2002.

Statement of Answer and Motion to Dismiss filed by Respondent on or about: March 18, 2003.

Respondent did not file an executed Uniform Submission Agreement.

Response to Statement of Answer and Motion to Dismiss filed by Claimant on or about: April 9, 2003.

CASE SUMMARY

Claimant asserted the following causes of action: 1) breach of agreement; 2) negligence; and, 3) violation of Chapter 517.211 et. seq. Florida Statutes. The causes of action relate to option trading of Dell Computer stock in Claimant's account.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$34,075,290.00, costs and the right to seek attorney's fees in a court of competent jurisdiction.

Respondent requested that the Statement of Claim be dismissed in its entirety, with prejudice, and attorney's

fees.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent did not file with NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the in-person pre-hearing conference, is bound by the determination of the Panel on all issues submitted.

On October 15, 2003, an in-person pre-hearing conference was held for oral argument on Respondent's Motion to Dismiss. The Panel granted the Motion.

The parties have agreed that the Award in this matter may be entered in counterpart copies or that a signed handwritten Award may be entered.

AWARD

After considering the pleadings, the testimony, evidence and extensive argument presented at the pre-hearing conference on Respondent's Motion to Dismiss heard in Boca Raton, Florida on October 15, 2003, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

- 1) This dispute was precipitated by market changes that occurred in October of 1998. Based upon changes in the securities market, Respondent took certain steps to cover existing and potential losses, which actions were referred to at the hearing as the October 8th transactions regarding certain option positions and the October 12th transactions regarding certain common stock positions.
- 2) Claimant disputed the actions taken in his account by Respondent, and the disagreement led to the signing of an agreement entitled "CONFIDENTIAL SETTLEMENT AGREEMENT". The agreement was signed by Respondent's president and by Claimant and Claimant finalized the agreement with his signature on December 30, 1998. In December 2002, Claimant filed the Statement of Claim in this case, acknowledging the existence of the Settlement Agreement, but alleging that Respondent had continuing liability to him outside the Settlement Agreement. Thereafter, Respondent filed its Motion to Dismiss arguing that the Settlement Agreement constitutes a final disposition of all issues between the parties.
- 3) The Settlement Agreement is clear and unequivocal on its face. The first sentence confirms that the parties have reached a "resolution of the disputes and issues you have raised concerning *all* transactions in your account..." Paragraphs 1 and 5 call for immediate execution of the terms of the agreement as they benefit Claimant, that is, he is to receive certain benefits "within five business days". Paragraphs 4 and 9 reveal that the October 8th transactions were not forgotten or ignored but were in plain view as far as the Settlement Agreement was concerned. Paragraph 10 sets forth simple release language that covers "*any and all* claims of *any* type...for *any* reason...through the Effective Date of the Settlement Agreement". Paragraph 11 says the agreement "sets forth *all* of the terms and conditions..." between the parties.
- 4) The law allows only one settlement and one general release per person, and Claimant knew or should have known from the plain language of the December 30, 1998 Settlement Agreement that it was

inclusive, final and binding.

- 5) The Panel also considered Respondent's request for attorney's fees and the parol evidence surrounding that request. In that context it is noted that there is a sharp contrast between the facts as set forth in the Settlement Agreement in December 1998 and the facts as set forth in the Statement of Claim in December 2002. The Statement of Claim alleges an egregious wrong committed against Claimant by Respondent, that is, "the purpose of the settlement agreement was, by its terms, to place Claimant back where he had been prior to the 'administrative error' referred to in the settlement agreement. However, the effect of the agreement was to address only the common stock positions and not the options. The loss in the option positions caused by the 'administrative error' was \$34,075,290.00".

However, the egregious error mentioned in 2002 is nowhere to be found in Claimant's letter to Respondent on April 26, 1999. Quite the contrary, three and a half months after signing the Settlement Agreement, Claimant's only complaint is that he finds himself out of the action as a result of the March 31, 1999 Settlement review. (See Settlement Agreement paragraph 3 and item 11 in the April letter.) His letter says he is "in the penalty box...because Respondent does not want my business". His complaint is that Respondent's administrative controls make it impossible for him "to make up what amounted to a \$41 million WHACK". He says, "I would like to very much *continue* doing excellent trades with really the *best* and only 'house' I know". In other words, he just wants "to get back in business. All I'm asking is the opportunity to *get back in the game* - with the *best 'House'* and the best stock". Claimant's April 1999 letter reveals the state of mind of a wiser but still satisfied customer and is very much at variance with his 2002 Statement of Claim, which says Respondent "has not lived up to its intent which was clearly to place Claimant back in a pre-error status" by paying him an additional \$34 million. It seems incredulous that a man with a \$34 million complaint that had been festering for three months and twenty-three days would not only have been silent on the subject - he was actually solicitous about wanting to continue doing business with the firm that had allegedly wronged him.

Based upon the contradiction between Claimant's letter of April 23, 1999 and his Statement of Claim in December 2002, the Panel finds that Claimant knew or should have known that his Statement of Claim was not supported by the material facts necessary to establish his claim and that there was no justifiable issue of law or fact between the parties. Provided however, said knowledge is not imputed to Claimant's attorneys in view of their good faith reliance upon their client's factual representations.

Accordingly, Respondent's Motion to Dismiss is granted, the Statement of Claim is dismissed, with prejudice, and Claimant is found liable to Respondent for reasonable attorney's fees, pursuant to Florida Statutes Chapter 517, in an amount that may hereafter be determined by a court of competent jurisdiction.

Any and all claims for relief not specifically addressed herein, including Claimant's claim for relief pursuant to Chapter 517.211 et. seq. Florida Statutes, are denied.

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 = \$600.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Respondent is a party to this dispute and was a member of NASD at the time the following fees were assessed:

Member surcharge = \$3,750.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$5,500.00

Adjournment Fees

No requests for adjournments were filed in this matter.

Injunctive Relief Fees

No injunctive relief fees were incurred during this proceeding.

Forum Fees and Assessments

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

Three (3) Pre-hearing sessions with the Panel @ \$1,200.00 = \$3,600.00

Pre-hearing conferences: July 29, 2003 1 session

October 15, 2003 2 sessions

Total Forum Fees = \$3,600.00

The Panel has assessed the total forum fees of \$3,600.00 to Claimant.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during this proceeding.

Fee Summary

Claimant is solely liable for:

Initial Filing Fee = \$ 600.00

Forum Fees = \$ 3,600.00

Total Fees = \$ 4,200.00

Less payments = \$ 1,850.00

Balance Due NASD Dispute Resolution = \$ 2,350.00

Respondent is solely liable for:

Member Fees = \$ 10,000.00

Total Fees = \$ 10,000.00

Less payments = \$ 4,750.00

Balance Due NASD Dispute Resolution = \$ 5,250.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

<i>James W. Geiger, Esq.</i>	-	<i>Public Arbitrator, Presiding Chairperson</i>
<i>Burton Katz, Esq.</i>	-	<i>Public Arbitrator</i>
<i>John A. Palermo</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures

/s/
James W. Geiger, Esq.
Public Arbitrator, Presiding Chairperson

11/3/03
Signature Date

/s/
Burton Katz, Esq.
Public Arbitrator

10/28/03
Signature Date

/s/
John A. Palermo
Non-Public Arbitrator

10/29/03
Signature Date

11/4/03
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

Arbitration No.02-07664

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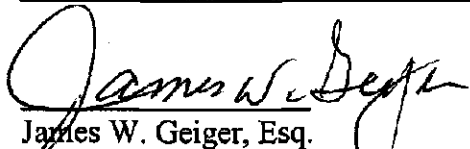
Public Arbitrator

John A. Palermo

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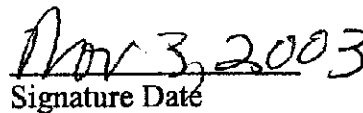
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- Public Arbitrator

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Public Arbitrator, Presiding Chairperson

Signature Date



Burton Katz, Esq.

Public Arbitrator

Oct. 28, 2003

Signature Date

John A. Palermo

Non-Public Arbitrator

Signature Date

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Burton Katz, Esq.

Public Arbitrator

Signature Date


John A. Palermo

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10/29/03
Signature Date

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