

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant  
Robert Fraiberg

Case Number: 03-00224

Names of the Respondents  
Banc of America Investment Services, Inc.  
Daniel T. Schmidt

Hearing Site: Boca Raton, Florida

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Nature of the Dispute: Customer vs. Member and Associated Person.

**REPRESENTATION OF PARTIES**

For Robert Fraiberg ("Fraiberg"), hereinafter referred to as "Claimant": Justin Kam, Esq. and David Feingold, Esq., Feingold & Kam LLC, Palm Beach Gardens, Florida.

For Banc of America Investment Services, Inc. ("BOAIS") and Daniel T. Schmidt ("Schmidt"), hereinafter referred to as "Respondents": Scott T. Beall, Tate, Lazarini & Beall, PLC, Memphis, Tennessee.

**CASE INFORMATION**

Statement of Claim filed on or about: January 8, 2003.

Claimant signed the Uniform Submission Agreement: January 6, 2003.

Statement of Answer and Motion to Dismiss filed by Respondent BOAIS on or about: March 24, 2003.

Claimant's Response to Motion to Dismiss filed on or about: June 3, 2003.

Respondent BOAIS signed the Uniform Submission Agreement: April 29, 2003.

Claimant's Motion for Leave to File an Amended Statement of Claim filed on or about: September 3, 2003.

Claimant's Reply to Opposition to Claimant's Motion to File an Amended Statement of Claim filed on or about: September 23, 2003.

Amended Statement of Claim filed on or about: October 14, 2003.

Respondent BOAIS' Opposition to Claimant's Motion to File Amended Statement of Claim filed on or about: September 22, 2003.

Statement of Answer to Amended Statement of Claim filed by Respondents BOAIS and Schmidt on or about: November 13, 2003.

Respondent Schmidt did not file an executed Uniform Submission Agreement.

Claimant's Motion to Bar Respondent From Presenting Any Matters, Arguments or Defenses filed on or about: February 19, 2003.

Respondent BOAIS' Motion to Consolidate Cases filed on or about: March 24, 2003.

Respondent BOAIS' Memorandum in Support of Motion to Consolidate filed on or about: May 21, 2003.

Claimant's Response to Respondent BOAIS' Memorandum of Law in Support of its Motion

to Consolidate filed on or about: May 27, 2003.

Respondent BOAIS' Reply in Opposition to Motion to Consolidate filed on or about: May 27, 2003.

Respondent BOAIS' Motion to Reconsider the Motion to Consolidate filed on or about: September 16, 2003.

Claimant's Response to Respondent's Motion for Reconsideration of Motion to Consolidate filed on or about: September 22, 2003.

Respondents' Motion to Dismiss Claims Related to Consecro TOPRrS Shares filed on or about: November 7, 2003.

Respondents' Supplement to Motion to Dismiss filed on or about: December 6, 2003.

Claimant's Notice to the Panel regarding Motion to Dismiss filed on or about: December 8, 2003.

Respondents' Response to Claimant's Notice to the Panel filed on or about: December 8, 2003.

Claimant's Reply to Respondents' Response to Claimant's Notice to the Panel filed on or about: December 10, 2003.

Respondents' Notice of Filing Bankruptcy Hearing Transcripts Related to Motion to Dismiss filed on or about: December 9, 2003.

Respondents' Notice of Filing of NASD Order Granting Motion to Dismiss in NASD Case Number 03-00225 filed on or about: December 16, 2003.

Respondents' Request for Immediate Ruling on Motion to Dismiss filed on or about: December 24, 2003.

### **CASE SUMMARY**

Claimant asserted the following causes of action: 1) common law fraud; 2) violation of Section 517.301, Florida Statutes; 3) breach of fiduciary duty; and 4) negligence. The causes of action relate to the purchase of shares of stock in Consecro Trust TOPRrS, Enron and MCI/Worldcom.

Unless specifically admitted in their Answers, Respondents denied the allegations made in the Statement of Claim, and Amended Statement of Claim, and asserted various defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages of between \$110,525.00 and \$331,575.00, plus well managed account damages, interest, punitive damages, attorney's fees, costs and such other relief as is deemed just, fair and reasonable.

Respondents requested that all claims against them be dismissed with costs and attorneys' fees assessed against Claimant.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Respondent Schmidt 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 hearing, is bound by the determination of the undersigned arbitrators (the "Panel") on all issues submitted.

Claimant's Motion to Bar Respondent From Presenting Any Matters, Arguments or Defenses was ruled upon by Order of the Panel dated June 12, 2003. The Order of the Panel provided that in the event a Statement of Answer had already been filed, the Motion was deemed moot. In the event that a Statement of Answer had not yet been filed, Respondent was required to file one within ten days from the date of the Order.

Respondent BOAIS' Motion to Consolidate Cases was denied by Order dated June 2, 2003.

Respondent BOAIS' Motion to Dismiss was denied by Order dated June 23, 2003.

Claimant's Motion for Leave to File an Amended Statement of Claim was granted by Order dated October 14, 2003. Claimant's Amended Statement of Claim was deemed filed as of the date of the Order and Respondents were granted thirty days within which to respond thereto.

Respondent BOAIS' Motion to Reconsider the Motion to Consolidate was denied by Order dated October 14, 2003.

The Panel reserved ruling on Respondents' Motion to Dismiss Claims Related to Conseco TOPRrs Shares until the final hearing at which time it was denied.

The parties have agreed that the Award in this matter may be executed in counterpart copies.

### **AWARD**

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

1. Claimant's claims are dismissed in their entirety.
2. Any and all claims for relief not specifically addressed herein, including Claimant's claims for relief pursuant to Section 517.301, Florida Statutes, Claimant's request for punitive damages and the parties' requests for attorneys' fees, 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 = \$ 300.00

### **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, BOAIS is a member firm and a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00

### **Adjournment Fees**

No adjournments were granted during these proceedings for which fees were assessed.

### **Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

No injunctive relief fees were incurred during these proceedings.

### **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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: August 8, 2003	1 session

Two (2) Pre-hearing sessions with the Panel @ \$1,125.00	= \$ 2,250.00
Pre-hearing conferences: July 1, 2003	1 session
January 8, 2004	1 session

Eight (8) Hearing sessions @ \$1,125.00	= \$ 9,000.00
Hearing Dates: February 2, 2004	2 sessions
February 3, 2004	2 sessions
February 4, 2004	2 sessions
February 5, 2004	2 sessions

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Total Forum Fees	= \$11,700.00
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The Panel has assessed the total forum fees of \$11,700.00 jointly and severally to Respondents.



/s/  
Hugh N. Fryer, Esq.  
Public Arbitrator

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

/s/  
Dale Berman  
Non-Public Arbitrator

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

March 1, 2004

Date of Service (For NASD Dispute Resolution office use only)

**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 are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative fees were incurred during these proceedings.

**Fee Summary**

Claimant is solely liable for:

<u>Initial Filing Fee</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 300.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

Respondent BOAIS is solely liable for:

<u>Member Fees</u>	= \$ 5,200.00
<u>Total Fees</u>	= \$ 5,200.00
<u>Less payments</u>	= \$ 5,200.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

Respondents are jointly and severally liable for:

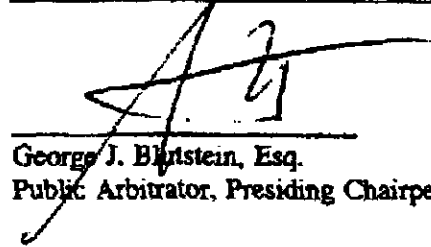
<u>Forum Fees</u>	= \$11,700.00
<u>Total Fees</u>	= \$11,700.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$11,700.00

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

**ARBITRATION PANEL**

<i>George J. Blustein, Esq.</i>	-	<i>Public Arbitrator, Presiding Chairperson</i>
<i>Hugh N. Fryer, Esq.</i>	-	<i>Public Arbitrator</i>
<i>Dale Berman</i>	-	<i>Non-Public Arbitrator</i>

**Concurring Arbitrators' Signatures**

  
George J. Blustein, Esq.  
Public Arbitrator, Presiding Chairperson

2/27/04  
Signature Date

  
\_\_\_\_\_  
Hugh N. Fryer, Esq.  
Public Arbitrator

3-2-07  
Signature Date

\_\_\_\_\_  
Dale Berman  
Non-Public Arbitrator

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

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Date of Service (For NASD Dispute Resolution office use only)



Hugh N. Pryer, Esq.  
Public Arbitrator

Signature Date

Dale Berman  
Dale Berman  
Non-Public Arbitrator

2/27/04  
Signature Date

Date of Service (For NASD Dispute Resolution office use only)

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