

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
David S. Kurke

Case Number: 03-00749

Name of the Respondents
Oscar Gruss & Sons, Inc.
Philip Wagenheim

Hearing Site: Washington, DC

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

REPRESENTATION OF PARTIES

Claimant, David S. Kurke ("Claimant"), was represented by Richard A. Stephens, Attorney at Law, Boca Raton, Florida.

Respondent, Oscar Gruss & Sons, Inc. ("Oscar Gruss"), was represented by Robert S. Churchill, Esq., Eaton & Van Winkle, LLP, New York, New York.

Respondent, Philip Wagenheim ("Wagenheim"), was represented by Brian H. Reis, Esq., Attorney at Law, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about January 24, 2003.

Claimant signed the Uniform Submission Agreement on January 21, 2003.

Statement of Answer filed by Respondent Oscar Gruss on April 9, 2003.

A representative of Respondent Oscar Gruss signed the Uniform Submission Agreement on March 31, 2003.

Statement of Answer filed by Respondent Wagenheim on or about April 9, 2003.

Respondent Wagenheim did not file a signed Uniform Submission Agreement.

Claimant filed a Reply to Respondents' Answers and Affirmative Defenses on April 19, 2003.

Claimant filed a Motion for Summary Judgement against All Respondents on February 17, 2004.

Respondent Wagenheim filed a Response to Motion for Summary Judgment on March 2, 2004.

Respondent Oscar Gruss filed a Response to Motion for Summary Judgment on or about March 2, 2004.

Claimant filed a Reply in Support of Motion for Summary Judgment on March 10, 2004.

CASE SUMMARY

Claimant asserted the following causes of actions, among others: unauthorized trading, churning, breach of fiduciary duty, fraud, breach of contract, NASD Conduct Rule violations, negligence,

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negligent supervision, *respondeat superior*, and Securities Exchange Act violations. The causes of action relate to the purchase and sale of various securities, including Abacus Direct, Agency.com, American BioMedica, Bamboo.com, Cobalt Networks, E Tek Dynamics, Interrect Comm, Internet Capital, Metalin, Net2Phone, Red Hat, Shopnow, Starbase, Telespectrum, and Tellular.

Unless specifically admitted in its Answer, Respondent Oscar Gruss denied the allegations made in the Statement of Claim and asserted the following defenses, among others: the Statement of Claim fails to state a legally recognizable cause of action, Claimants' claims are barred by unclean hands and by his own acts, failure to mitigate damages, Claimant lacks standing to claim violations of NASD and NYSE rules as they are not private causes of action, statute of limitations, and ratification.

Unless specifically admitted in his Answer, Respondent Wagenheim denied the allegations made in the Statement of Claim and asserted the following defenses, among others: Claimant lacks standing to claim violations of NASD and NYSE rules as they are not private causes of action.

RELIEF REQUESTED

Claimant in his Statement of Claim requested:

Compensatory Damages	\$1,600,000.00
Punitive Damages	\$2,000,000.00
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified

Respondent Oscar Gruss in its Statement of Answer requested that the claims be dismissed and that the Arbitration Panel (the "Panel") award all costs to Respondent Oscar Gruss.

In his Statement of Answer Respondent Wagenheim requested an Award of attorney fees and forum fees.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Wagenheim did not file with NASD Dispute Resolution, a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

By Order dated March 16, 2004 the Panel denied Claimants' Motion for Summary Judgment.

At the hearing, at the conclusion of Claimant's case, Claimant moved to amend his pleadings to conform to the proof adduced. The Panel granted the motion.

At the hearing Respondent Wagenheim moved to dismiss the case as to Wagenheim. The Panel denied the motion.

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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.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Oscar Gruss is liable to and shall pay to Claimant compensatory damages in the amount of six hundred and forty-eight thousand dollars and no cents. (\$648,000.00), plus interest at five percent (5%) on that amount. Interest shall be calculated on a simple basis and shall accrue from May 1, 2000 through the date the Award is paid in full;
2. Respondent Wagenheim is liable to and shall pay to Claimant compensatory damages of fifty-eight thousand dollars and no cents (\$58,000.00), plus interest at five percent (5%) on that amount. Interest shall be calculated on a simple basis and shall accrue from May 1, 2000 through the date the Award is paid in full;
3. All claims for punitive damages and attorneys' fees are denied in their entirety;
4. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below; and,
5. Any and all relief not specifically addressed herein is denied in its entirety.

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 firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Oscar Gruss is a party.

Member surcharge	= \$2,800.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$5,000.00</u>
Total Member Fees	= \$8,550.00

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Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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:

Three (3) Pre-hearing sessions with panel @ \$1,200.00	= \$ 3,600.00
Pre-hearing conference: November 5, 2003 1 session	
January 9, 2004 1 session	
March 16, 2004 1 session	
Twelve (12) Hearing sessions @ \$1,200.00	= \$14,400.00
Hearing Date/s: April 26, 2004 2 sessions	
April 27, 2004 2 sessions	
April 28, 2004 2 sessions	
April 29, 2004 2 sessions	
April 30, 2004 2 sessions	
May 3, 2004 2 sessions	
May 4, 2004 2 sessions	
Total Forum Fees	= \$18,000.00

1. The Panel has assessed \$16,524.00 of the forum fees to Respondent Oscar Gruss
2. The Panel has assessed \$1,476.00 of the forum fees to Respondent Wagenheim

FEE SUMMARY

1. Claimant is assessed and shall pay the following fees:

Initial Filing Fee	= \$ 600.00
Total Fees	= \$ 600.00
Less payments	= \$ 6,600.00
Refund Due Claimant	= \$ 6,000.00
2. Respondent Oscar Gruss is assessed and shall pay the following fees:

Member Fees	= \$ 8,550.00
Forum Fees	= \$16,524.00
Total Fees	= \$25,074.00
Less payments	= \$13,350.00
Balance Due NASD Dispute Resolution	= \$11,724.00
3. Respondent Wagenheim is assessed and shall pay the following fees:

Forum Fees	= \$ 1,476.00
Total Fees	= \$ 1,476.00
Less payments	= \$ 00.00
Balance Due NASD Dispute Resolution	= \$ 1,476.00

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

ARBITRATION PANEL

Michael J. Henke, Esq.
Marvin L. Szymkowicz, Esq.
Charles L. Marinaccio, Esq.

- Public Arbitrator, Presiding Chairperson
- Public Arbitrator, Panelist
- Non-Public Arbitrator, Panelist

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Concurring Arbitrators' Signatures



Michael J. Henke, Esq.

Public Arbitrator, Presiding Chairperson

5/14/04

Signature Date

Marvin L. Szymkowicz, Esq.

Public Arbitrator, Panelist

Signature Date

Charles L. Marinaccio, Esq.

Non-Public Arbitrator, Panelist

Signature Date

5/21/04

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

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Concurring Arbitrators' Signatures

Michael J. Henke, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Marvin L. Szymkowicz
Marvin L. Szymkowicz, Esq.
Public Arbitrator, Panelist

5/17/04
Signature Date

Charles L. Marinaccio, Esq.
Non-Public Arbitrator, Panelist

Signature Date

5/21/04
Date of Service (For NASD Dispute Resolution office use only)

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Concurring Arbitrators' Signatures

Michael J. Henke, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Marvin L. Szymkowitz, Esq.
Public Arbitrator, Panelist

Signature Date

Charles L. Marinaccio
Charles L. Marinaccio, Esq.
Non-Public Arbitrator, Panelist

May 21, 2004
Signature Date

5/21/04
Date of Service (For NASD Dispute Resolution office use only)