

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

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In the Matter of the Arbitration Between:

William S. Mednick, Individually and on behalf of the William S. Mednick GTC IRA, Judith A. Mednick, Individually and on behalf of the Judith A. Mednick GTC IRA, Richard Daniels, and Suzan Medrano Daniels, Claimants v. Cruttenden Roth Incorporated n/k/a Roth Capital Partners, LLC, Hagerty Stewart & Associates, LLC, The Seidler Companies Incorporated, and John A. Rosenthal, Respondents

Case Number: 03-01160

Hearing Site: Los Angeles, California

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Nature of the Dispute: Customers v. Members and Associated Person

**REPRESENTATION OF PARTIES**

For Claimants:

Jeff Dennis Ferentz, Esq.  
Law Offices of  
Jeff Dennis Ferentz, Inc.  
Newport Beach, California

For Respondent Cruttenden Roth Incorporated  
n/k/a Roth Capital Partners, LLC:

Peter Brown Dolan, Esq.  
The Dolan Law Firm  
Los Angeles, California

For Respondent Hagerty Stewart & Associates LLC:

G. Thomas Fleming, III, Esq.  
Jones, Bell, Abbott, Fleming &  
Fitzgerald L.L.P.  
Los Angeles, California

For Respondents The Seidler Companies Incorporated  
and John A. Rosenthal:

Chad Weaver, Esq.  
Matthew J. Negrin, Esq.  
Edgerton & Weaver, LLP  
Hermosa Beach, California

**CASE INFORMATION**

Statement of Claim filed: February 10, 2003

Claimants' Uniform Submission Agreements signed: January 22, 2003

Statement of Answer filed by Respondent Cruttenden Roth Incorporated n/k/a Roth Capital Partners, LLC: May 9, 2003

Joint Statement of Answer filed by Respondent Hagerty Stewart & Associates LLC, The Seidler Companies Incorporated, and John A. Rosenthal: May 29, 2003

Respondent Cruttenden Roth Incorporated n/k/a Roth Capital Partners, LLC's Uniform Submission Agreement signed: April 15, 2003

Respondent Hagerty Stewart & Associates LLC's Uniform Submission Agreement signed: May 29, 2003

Respondent The Seidler Companies Incorporated's Uniform Submission Agreement signed: May 8, 2003

Respondent John A. Rosenthal's Uniform Submission Agreement signed: May 28, 2003

### **CASE SUMMARY**

Claimants alleged recommendation of unsuitable investments, breach of contract, negligence, breach of fiduciary duties, fraud, failure to supervise, and violation of the rules and regulations of various exchanges. Claimants' allegations involved transactions in Syquest, Graphix, Gandolph Technologies, and other unspecified technology sector stocks.

Respondent Cruttenden Roth Incorporated n/k/a Roth Capital Partners, LLC denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

In their Joint Statement of Answer, Respondents Hagerty Stewart & Associates LLC, The Seidler Companies Incorporated, and John A. Rosenthal denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$567,000.00, unspecified punitive damages, pre-judgment and post-judgment interest, and costs, including attorney's fees.

Respondent Cruttenden Roth Incorporated n/k/a Roth Capital Partners, LLC requested dismissal of the Claimants' Statement of Claim in its entirety, and costs, including attorney's fees.

Respondents Hagerty Stewart & Associates LLC, The Seidler Companies Incorporated, and John A. Rosenthal requested dismissal of the Claimants' Statement of Claim in its entirety with prejudice, an order expunging these claims from Respondent John A. Rosenthal's CRD record, and costs.

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

On March 26, 2003, Claimants and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On September 10, 2003, Respondents Hagerty Stewart & Associates LLC, The Seidler Companies Incorporated, and John A. Rosenthal filed a Motion to Sever the Claimants' claims. On September 16, 2003, the Panel granted the motion to sever all claims asserted by Claimants Richard Daniels and Suzan Medrano Daniels and directed said parties to arbitrate their claims in a separate and distinct proceeding.

On April 5, 2004, Claimants dismissed Respondent Hagerty Stewart & Associates LLC with prejudice.

On April 25, 2004, Respondent The Seidler Companies Incorporated signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100, the waivers of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

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, except for the disclosure noted in the dissenting opinion, which did not affect or influence the Chair or Arbitrator Mary Cobb's decisions in any way, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Cruttenden Roth Incorporated n/k/a Roth Capital Partners and John A. Rosenthal are jointly and severally liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$130,400.00 in compensatory damages.
2. Respondents Cruttenden Roth Incorporated n/k/a Roth Capital Partners and John A. Rosenthal are jointly and severally liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$19,010.00 in interest.
3. Respondents Cruttenden Roth Incorporated n/k/a Roth Capital Partners and John A. Rosenthal are jointly and severally liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$52,139.00 in attorney's fees.
4. Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA's request for punitive damages is denied.
5. Respondent John A. Rosenthal is liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$50,000.00 in compensatory damages.
6. Respondent John A. Rosenthal is liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$7,291.00 in interest.

7. Respondent John A. Rosenthal is liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$19,998.00 in attorney's fees.
8. Respondents The Seidler Companies Incorporated and John A. Rosenthal are jointly and severally liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$18,000.00 in compensatory damages.
9. Respondents The Seidler Companies Incorporated and John A. Rosenthal are jointly and severally liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith A. Mednick GTC IRA \$2,632.00 in interest.
10. Respondents The Seidler Companies Incorporated and John A. Rosenthal are jointly and severally liable to and shall pay Claimant Judith A. Mednick, Individually and on behalf of the Judith Mednick GTC IRA \$7,223.00 in attorney's fees.
11. Claimant William S. Mednick's claims are denied in their entirety.
12. Except as noted above, the parties shall bear their respective costs, including attorney's fees.
13. All other relief requested and not expressly granted is denied.

In view of the dissent, and in light of the fact that many of the same stocks which appeared in William Mednick's IRA account also appeared in his wife's IRA account, the parties should be apprised of the fact that the Panel's Award to Judith Mednick was predicated on the uncontroverted evidence that, at no time, had she ever executed proper written authorization for anyone, including her husband, to trade in her IRA account.

Accordingly, the Panel determined that any and all trades undertaken in her account were void at their inception and that she was entitled to recover the damages she sustained as a result of the unauthorized trading.

**Dissenting Opinion of Arbitrator David Menaker**

Arbitrator David Menaker, dissents, and for himself alone, would conclude as set forth below:

"Supervision: It was brought up in the hearing as admitted that "penny" stocks are defined not necessarily by their price, but as much as where they were traded, or not traded, as well as certain other characteristics. In view of the evidence presented, I have to go along with this narrow definition of a penny stock.

As one who has been in the marketplace for over 40 years, I have to think that despite many of these stocks not coming under the legal umbrella of the definition of a penny stock, I strongly feel that generically they were just that. In addition to this generic presumption, it would be customary and proper when looking at the securities to determine the quality of the majority of the stocks in the Wm. Mednick IRA account. I believe that they were woefully deficient in this respect. The general quality of the stocks in the Wm. Mednick IRA, at least to me individually, brings out the fact that a lack of Supervision rings loud and clear.

The prudent man rule dictates that IRA investments should be "light" on speculation and "heavy" on quality. This concept is furthered by the fact that IRA's are prohibited from speculative activities such as short sales, trading in "naked" puts and calls, and margin transactions. The only exception to this basic rule is where the IRA owner himself writes his own rules, allowing speculative activity, and the document is then approved by the Administrator or Trustee. There are every few of these in existence and the huge majority of IRA accounts are subject to "boilerplate" rules, which we all know about.

It was obvious from the start of the relationship between Mednick and Rosenthal that Mednick knew very little about investing. By the time Mednick started suggesting higher quality and bigger names, the damage was basically done and there was substantially less capital remaining with which to recoup. By the time that Mednick had some inkling of what was going on, it is true that he was then a somewhat "experienced" investor, but it was a very expensive lesson and he had learned the hard way.

DISCLOSURE by Arbitrator David J. Menaker: On Monday, May 24, 2004, I began to examine my own thinking process and came to the conclusion that the Wm. Mednick IRA had been handled very poorly. I then called my personal broker at Morgan Stanley to ascertain the current values of the 90 or so stocks that were at one time in the Wm. Mednick IRA account. I worked with a clerk and there was never any mention of any individuals or brokerage houses, just the names of the stocks – nothing more was provided to the Morgan Stanley clerk. I did this entirely on my own without any knowledge of this action by my fellow panelists. This was done as an "ex parte" contact on my part and solely to confirm my already 98% thinking that due to the lack of

quality of most of these stocks, they should not have been in that account. When I learned the next day that more than 40% of the stocks that were at one time in the Wm. Mednick IRA were now virtually worthless, it simply reconfirmed my original thinking and filled in the 2% possible self doubts, and thereupon solidified my dissenting opinion.

Common sense, industry standards, and fair dealing within the purview of an IRA account, seem to strongly state the message, at least to me, that the various brokerage houses were negligent and therefore, in my opinion, substantially failed to properly supervise.

Arbitration, as we all know, is not necessarily to follow in the direct footsteps of the judicial system, possibly using more of the "fairness and equity" and "fair dealing" concepts. These supervisory foundations were not, in my opinion, fully followed by the Supervisory or Compliance staff at these brokerage houses.

I dissent from the majority opinions of my fellow arbitrators as to the Wm. Mednick IRA."

### **FEES**

Pursuant to the Code of Arbitration Procedure ("Code"), the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 375.00
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#### **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.

The member firm Cruttenden Roth Incorporated n/k/a Roth Capital Partners, LLC is a party and the following fees are assessed:

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	= \$ 4,000.00
<b>Total Member Fees</b>	<b>= \$ 7,000.00</b>

The member firm Hagerty Stewart & Associates LLC is a party and the following fees are assessed:

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 4,000.00</u>
<b>Total Member Fees</b>	<b>= \$ 7,000.00</b>

The member firm The Seidler Companies Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 4,000.00</u>
<b>Total Member Fees</b>	<b>= \$ 7,000.00</b>

**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 Panel. The following fees are assessed:

Four (4) Pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$ 4,800.00

Pre-hearing conferences:	August 18, 2003	1 session
	September 3, 2003	1 session
	September 10, 2003	1 session
	April 15, 2004	1 session

Nine (9) Hearing sessions @ \$1,200.00/session = \$10,800.00

Hearings:	May 17, 2004	2 sessions
	May 18, 2004	2 sessions
	May 19, 2004	2 sessions
	May 20, 2004	2 sessions
	May 21, 2004	1 session

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<b>Total Forum Fees</b>	<b>= \$15,600.00</b>
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1. The Panel assessed \$4,800.00 of the forum fees to Claimant William S. Mednick.
2. The Panel assessed \$4,800.00 of the forum fees to Respondent Cruttenden Roth Incorporated n/k/a Roth Capital Partners, LLC.
3. The Panel assessed \$4,800.00 of the forum fees to Respondent The Seidler Companies Incorporated.



4. The Panel waived the \$1,200.00 forum fee for the pre-hearing conference of September 3, 2003.

**Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Claimants requested photocopies:	= \$	9.00
Respondent The Seidler Companies Incorporated requested photocopies:	= \$	77.50

**Fee Summary**

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

Initial Filing Fee	= \$	375.00
Administrative Costs	= \$	9.00
Total Fees	= \$	384.00
<u>Less payments</u>	= \$	(375.00)
<b>Balance Due NASD Dispute Resolution</b>	= \$	<b>9.00</b>

2. Claimant William S. Mednick is charged solely with the following fees and costs:

Forum Fees	= \$	4,800.00
<u>Less payments</u>	= \$	(1,200.00)
<b>Balance Due NASD Dispute Resolution</b>	= \$	<b>3,600.00</b>

3. Respondent Cruttenden Roth Incorporated n/k/a Roth Capital Partners is charged with the following fees and costs:

Member Fees	= \$	7,000.00
Forum Fees	= \$	4,800.00
Total Fees	= \$	11,800.00
<u>Less payments</u>	= \$	(7,000.00)
<b>Balance Due NASD Dispute Resolution</b>	= \$	<b>4,800.00</b>

4. Respondent Hagerty Stewart & Associates LLC is charged with the following fees and costs:

Member Fees	= \$	7,000.00
<u>Less payments</u>	= \$	(7,000.00)
<b>Balance Due NASD Dispute Resolution</b>	= \$	<b>(0.00)</b>

5. Respondent The Seidler Companies Incorporated is charged with the following fees and costs:

Member Fees	= \$ 7,000.00
Forum Fees	= \$ 4,800.00
<u>Administrative Costs</u>	<u>= \$ 77.50</u>
Total Fees	= \$ 11,877.50
<u>Less payments</u>	<u>= \$ (7,000.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 4,877.50</b>

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

**ARBITRATION PANEL**

Herbert M. Schoenberg, Esq.	-	Public, Presiding Chair
David Menaker	-	Public Arbitrator
Mary E. Cobb	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Herbert M. Schoenberg  
Herbert M. Schoenberg, Esq.  
Chair, Public Arbitrator

June 29, 2004  
Signature Date

Mary E. Cobb  
Mary E. Cobb  
Non-Public Arbitrator

Signature Date

**Concurring in Part and Dissenting in Part Arbitrator's Signature**

David Menaker  
David Menaker  
Public Arbitrator

Signature Date

7/2/04  
Date of Service


**ARBITRATION PANEL**

Herbert M. Schoenberg, Esq.	-	Public, Presiding Chair
David Menaker	-	Public Arbitrator
Mary E. Cobb	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Herbert M. Schoenberg, Esq.  
Chair, Public Arbitrator

Signature Date

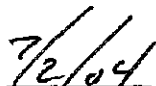
  
Mary E. Cobb  
Non-Public Arbitrator

  
Signature Date

**Concurring in Part and Dissenting in Part Arbitrators' Signatures**

David Menaker  
Public Arbitrator

Signature Date

  
Date of Service

**ARBITRATION PANEL**

<b>Herbert M. Schoenberg, Esq.</b>	-	<b>Public, Presiding Chair</b>
<b>David Menaker</b>	-	<b>Public Arbitrator</b>
<b>Mary E. Cobb</b>	-	<b>Non-Public Arbitrator</b>

**Concurring Arbitrators' Signatures**

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Herbert M. Schoenberg, Esq.  
Chair, Public Arbitrator

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Signature Date

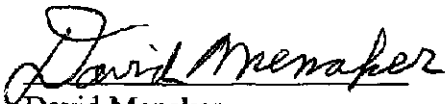
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Mary E. Cobb  
Non-Public Arbitrator

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Signature Date

**Concurring in Part and Dissenting in Part Arbitrator's Signature**

  
David Menaker  
Public Arbitrator

  
Signature Date

  
Date of Service