

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

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In the Matter of the Arbitration Between:

Name of the Claimants

Joseph L. Vanderhamm; and  
Gene and Charline Upshaw

Case Number: 03-01901

Name of the Respondents

Brookstreet Securities Corporation;  
National Planning Corporation;  
Dana Niles Frankfort; and,  
James H. Simmons, Jr.

Hearing Site: Dallas, Texas

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**NATURE OF THE DISPUTE**

Public Customer v. Member Firms and Associated Persons

**REPRESENTATION OF PARTIES**

Claimants Joseph L. Vanderhamm ("Vanderhamm") and Gene and Charline Upshaw ("Upshaws"), hereinafter collectively referred to as "Claimants": Joseph L. Vanderhamm of Arlington, Texas. Claimants were originally represented by Christopher E. Baker, Esq., of the firm of Pennington, Hill & Baker, LLP, which withdrew as counsel on May 5, 2004.

Respondents Brookstreet Securities Corporation ("Brookstreet"), Dana Niles Frankfort ("Frankfort") and James H. Simmons, Jr. ("Simmons"), hereinafter collectively referred to as the "Brookstreet Respondents": Elizabeth Lowery, Esq. and H. Thomas Fehn, Esq. of the firm of Fields, Fehn & Sherwin, located in Los Angeles, California.

Respondent National Planning Corporation ("National"): D. Craig Brinker, Esq. of the firm of Henslee Fowler Hepworth & Schwartz, located in Dallas, Texas.

**CASE INFORMATION**

Statement of Claim filed: March 17, 2003.

Claimant Joseph L. Vanderhamm signed the Uniform Submission Agreement: April 25, 2003.  
Claimants Gene and Charline Upshaw signed the Uniform Submission Agreement: April 25, 2003.

Statement of Answer filed by Respondent Brookstreet: August 26, 2003.

Statement of Answer filed by Respondent Frankfort: August 26, 2003.

Statement of Answer filed by Respondent Simmons: August 26, 2003.

Respondent Brookstreet signed the Uniform Submission Agreement: July 9, 2003.

Respondents Frankfort and Simmons signed undated Uniform Submission Agreements on or

about: September 22, 2003.

Statement of Answer filed by Respondent National on or about: September 15, 2003.  
Respondent National signed the Uniform Submission Agreement: December 10, 2003.  
Respondent National's Motion for Leave to File Amended Statement of Answer filed on:  
February 13, 2004.  
Amended Statement of Answer filed on: March 25, 2004.

Brookstreet Respondents' Motion to Dismiss or, in the Alternative, Vacate the Hearing Dates  
filed on: June 21, 2004.

Supplement to Brookstreet Respondents' Motion to Dismiss or, in the Alternative, Vacate the  
Hearing Dates, and Request for Sanctions filed on: June 22, 2004.

Second Supplement to Brookstreet Respondents' Motion to Dismiss, and Request for Sanctions  
filed on: July 6, 2004.

Brookstreet Respondents' Request for Ruling on the Papers filed on: July 19, 2004.

#### **CASE SUMMARY**

Claimants asserted the following causes of action: unsuitability; misrepresentation; negligent hiring and retention; breach of fiduciary duty; violation of Section 27.01 of the Texas Business and Commerce Code; violation of the Texas Securities Act; common law fraud; negligence; negligent supervision; and violation of Section 10(b) and Rule 10B-5 of the Securities Exchange Act of 1934. The causes of action were related to Respondents recommending an investment in the Summit Asset Fund, which was purportedly a managed portfolio utilized to maximize profits through well diversified holding in premium growth companies through the writing of put and call option contracts.

Unless specifically admitted in its Answer, Respondent Brookstreet denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Neither Simmons nor Frankfort were registered or licensed with Brookstreet at the time the investments were introduced or purchased. Accordingly, Brookstreet can have no liability and should be dismissed;
2. Any claim is barred by the applicable Statute of Limitations; and,
3. Claimants failed to plead that the loss incurred was causally related to the representations made.

Unless specifically admitted in his Answer, Respondent Frankfort denied the allegations made in the Statement of Claim and asserted that the claims were barred by the applicable Statute of Limitations and that no misrepresentations were made when presenting the investments.

Unless specifically admitted in his Answer, Respondent Simmons denied the allegations made in the Statement of Claim and asserted the following defenses:

1. He had nothing to do with any of the events set forth in the Statement of Claim and had nothing whatsoever to do with the Summit Fund;

2. The claim was barred by the applicable statute of limitations; and,
3. Claimants failed to plead that the loss incurred was causally related to the representations made.

Unless specifically admitted in its Answer, Respondent National denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Each purchase in the Claimants' accounts were authorized by Claimants and subsequently ratified;
2. National did not violate any rules of the NASD, NYSE or any other regulatory agency; and,
3. National did not violate any federal or state securities laws.

National asserted additional defenses in its Amended Statement of Answer, including that the accounts were handled in good faith and National did not intentionally, negligently or recklessly cause any harm to Claimants.

#### **RELIEF REQUESTED**

Claimants Joseph L. Vanderhamm and Gene and Charline Upshaw requested the following damages against Respondent Brookstreet, Frankfort and Simmons:

Compensatory Damages	\$ 500,000.00
Punitive Damages	\$1,000,000.00
Interest	At the legal rate
Attorneys' Fees	Unspecified amount
Other Costs	Unspecified amount
Other Monetary/Non-Monetary Relief if any:	As the Panel deemed proper.

In addition, Claimants Joseph L. Vanderhamm and Gene and Charline Upshaw requested the following damages against Respondent National, Frankfort and Simmons:

Compensatory Damages	\$ 250,000.00
Punitive Damages	\$ 300,000.00
Interest	At the legal rate
Attorneys' Fees	Unspecified amount
Other Costs	Unspecified amount
Other Monetary/Non-Monetary Relief if any:	As the Panel deemed proper.

Respondent Brookstreet Securities Corporation requested that the case be dismissed in its entirety and that it be awarded its costs and reasonable attorneys' fees. In addition, as part of the Motion to Dismiss, Respondent Brookstreet requested sanctions for Claimants failure to provide discovery documents pursuant to the Panel's order.

Respondent Dana Niles Frankfort requested that the claim be dismissed in its entirety.

Respondent Simmons requested that the claim be dismissed in its entirety and that he be awarded his costs and reasonable attorneys' fees.

Respondent National Planning Corporation requested that the Panel dismiss the Claimants' claims against them in their entirety, and award National recovery of its attorneys' fees and grant all other relief to which it may be justly entitled.

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

On March 25, 2004, without any opposition being filed, the Panel granted Respondent National's Motion for Leave to File Amended Statement of Answer.

At the pre-hearing held July 6, 2004, Respondent National joined in the Brookstreet Respondents' Motion to Dismiss or, in the Alternative, Vacate the Hearing Dates.

On July 29, 2004, the Panel denied the Brookstreet Respondents' Request for Ruling on the Papers.

On August 3, 2004, the Panel met to hear argument from the parties in regard to Respondents' Motions to Dismiss. Despite proper notice, Claimants did not appear and were unavailable for the telephonic conference call. Upon review of the file and the representations made on behalf of the Claimants, the Panel determined that Claimants were properly served with and received due notice of the hearing, and that arbitration of the matter would proceed without said Claimants present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

After hearing the argument presented by Respondents' counsel, the Panel determined that the Motion would be granted and the claims dismissed with prejudice.

#### **AWARD**

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

1. Respondents' Motion to Dismiss is granted and the Statement of Claim filed by Claimants Joseph L. Vanderhamm and Gene and Charline Upshaw against Respondents Brookstreet Securities Corporation, National Planning Corporation, Dana Niles Frankfort and James H. Simmons, Jr. is dismissed with prejudice;
2. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerated herein; and,
3. Any and all relief not specifically addressed herein, including punitive damages, is 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 = \$ 500.00

**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 persons at the time of the events giving rise to the dispute. Accordingly, Brookstreet Securities Corporation and National Planning Corporation are both a party to this arbitration and the following member fees are assessed:

**Brookstreet Securities Corporation**

Member surcharge = \$ 2,800.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$ 5,000.00

**National Planning Corporation**

Member surcharge = \$ 2,250.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$ 5,000.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

August 4 and 5, 2004 by Respondent Brookstreet = \$1,200.00 (Waived by Panel).

**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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: July 6, 2004 1 session	
Two (2) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: February 24, 2004 1 session	
August 3, 2004 1 session	
<hr/> Total Forum Fees	<hr/> = \$ 2,850.00

The Panel has assessed \$2,850.00 of the forum fees, jointly and severally, to Claimants Joseph L. Vanderhamm and Gene and Charline Upshaw.

**EEE SUMMARY**

Claimants Joseph L. Vanderhamm and Gene and Charline Upshaw are jointly and severally liable for:

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Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 2,850.00
Total Fees	= \$ 3,350.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution	= \$ 1,650.00

Respondent Brookstreet Securities Corporation is solely liable for:

Member Fees	= \$ 8,550.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent National Planning Corporation is solely liable for:

Member Fees	= \$ 8,000.00
Less payments	= \$ 8,550.00
Balance Refunded by NASD Dispute Resolution	= \$ 550.00

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

**ARBITRATION PANEL**

Russell E. Rains, Esq. - Public Arbitrator, Presiding Chairperson  
Michael P. Geary - Public Arbitrator  
Henry Hermann - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Russell E. Rains, Esq.  
Public Arbitrator, Presiding Chairperson

8-5-04  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Michael P. Geary  
Public Arbitrator

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

\_\_\_\_\_  
Henry Hermann  
Non-Public Arbitrator

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

8/6/04 HHR Date of Service (For NASD Dispute Resolution office use only)

Received at: 4:37PM, 8/2/2004

08/04/2004 15:37 FAX

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 Arbitration No. 03-01901  
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 Russell B. Rains, Esq.  
 Public Arbitrator, Presiding Chairperson

Signature Date

  
 Michael P. Geary  
 Public Arbitrator

Signature Date

  
 Henry Hermann  
 Non-Public Arbitrator

Signature Date

8/6/04  Date of Service (For NASD Dispute Resolution office use only)

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Signature Date

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