

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

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In the Matter of the Arbitration Between:

Hilary Shane (Claimant) v. First New York Securities, Inc. (Respondent)

Case Number: 03-02756

Hearing Site: New York, New York

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Nature of the Dispute: Associated Person v. Member.

**REPRESENTATION OF PARTIES**

Claimant Hilary Shane ("Shane") hereinafter referred to as "Claimant": David P. Gillett, Esq., Derfner & Gillett, LLP, formerly Derfner & Mahler, LLC, New York, NY.  
Previously represented by: Craig J. Albert, Esq., Reitler Brown, LLC, New York, NY.

Respondent First New York Securities, LLC ("First New York") hereinafter referred to as "Respondent": Arthur H. Aufses, III, Esq., Kramer Levin Naftalis & Frankel, LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: April 10, 2003.  
Reply to Counterclaims filed on or about: October 8, 2003.  
Claimant signed the Uniform Submission Agreement: April 9, 2003.

Statement of Answer and Counterclaims filed by Respondent on or about: June 10, 2003.  
Respondent signed the Uniform Submission Agreement: June 10, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of contract; and failure to provide owed compensation, distribution of cash/assets. Unless specifically admitted in her Reply to Counterclaims, Claimant denied the allegations made in the Counterclaims.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In its Counterclaims, Respondent asserted the following causes of action: unjust enrichment; improper trading; and breach of fiduciary duty.

**RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$4,766,745.00, plus interest

at the rate of 9% per annum from November 30, 2002; punitive damages in the amount of \$2,500,000.00; an accounting; a declaration that any losses sustained in Claimant's trading account were caused by the gross negligence or recklessness of Donald Erenberg, and are therefore not attributable to Claimant; and costs, including reasonable attorneys' fees. In her Reply to Counterclaims, Claimant requested that the Counterclaims be dismissed, and that she be awarded her costs, attorneys' fees, and expenses, and such other and further relief as the Panel deems just and proper.

Respondent requested that the claim be dismissed, an award on its Counterclaims in the amount of \$231,638.05; costs, attorneys' fees, and expenses; and such other and further relief as the Panel deems to be just and proper.

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

Claimant's objection to the fairness of the discovery process is noted for the record.

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, and 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 is liable for and shall pay to Claimant return of capital in the amount of \$3,460,228.70, plus interest at the rate of 9% from November 30, 2002 through November 30, 2004.
2. Respondent is liable for and shall pay to Claimant additional earned capital in the amount of \$760,029.89, plus interest at the rate of 9% from November 30, 2002 through November 30, 2004.
3. Both sides have requested attorneys' fees and have cited, in their exhibits, cases in support of their respective positions. Therefore, the Arbitrators have determined that they have the authority to award attorneys' fees, and thus award to Claimant the sum of \$157,093.00. This sum represents the net figure of the Claimant's request for a total of \$230,725.00 minus \$31,335.00 representing Claimant's fees for issues arising from a dispute K-1 plus Respondent's related fees of \$42,297.00.
4. Claimant's request for additional consequential damages is denied.
5. Claimant's request for punitive damages is denied.

6. Respondent's Counterclaim for a return of \$201,638.00 in payments previously made to Claimant is denied, and those monies remain with Claimant.
7. Respondent's request for attorneys' fees is granted and has been addressed in Paragraph 3 above.
8. Respondent shall reimburse Claimant for NASD filing fees previously deposited and shall be responsible for all NASD forum fees associated with this matter.
9. 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	= \$ 600.00
Counterclaim filing fee	= \$1,000.00

##### **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, First New York Securities, LLC is a party.

Member surcharge	= \$3,350.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,500.00

##### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

March 10-11, 2004, adjournment	=	Waived	= Waived
Claimant's share	=	Waived	
Respondent's share	=	Waived	
April 27-28, 2004, adjournment			= \$1,200.00
Claimant's share	=	\$600.00	
Respondent's share	=	\$600.00	

### **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:

Two (2) Pre-hearing sessions with Panel @ \$1,200.00 = \$ 2,400.00

Pre-hearing conferences:      September 22, 2003      1 session  
   December 8, 2003      1 session

Fourteen (14) Hearing sessions @ \$1,200.00 = \$16,800.00

Hearing Dates:              June 1, 2004              2 sessions  
   June 2, 2004              2 sessions  
   September 13, 2004      2 sessions  
   September 14, 2004      2 sessions  
   October 13, 2004        2 sessions  
   October 14, 2004        2 sessions  
   November 8, 2004       2 sessions

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Total Forum Fees = \$19,200.00

1. The Panel has assessed \$19,200.00 of the forum fees against Respondent.

### **Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 600.00
<u>Adjournment Fee</u>	= \$ 600.00
Total Fees	= \$ 1,200.00
<u>Less payments</u>	= \$ 1,800.00
Refund Due Claimant	= \$ 600.00

*As stated in the "Award" section above, Respondent is liable for and shall reimburse Claimant for the \$600.00 filing fee previously paid to NASD Dispute Resolution.*

2. Respondent is solely liable for:

Counterclaim Filing Fee	= \$ 1,000.00
Member Fees	= \$ 9,600.00
Adjournment Fee	= \$ 600.00
<u>Forum Fees</u>	= \$19,200.00
Total Fees	= \$30,400.00
<u>Less payments</u>	= \$11,725.00
Balance Due NASD Dispute Resolution	= \$18,675.00

NASD Dispute Resolution  
Arbitration No. 03-02756  
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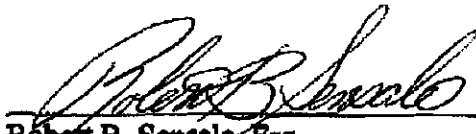
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Robert B. Sensale, Esq.	-	Non-Public Arbitrator, Presiding Chairperson
Christal J. Henner	-	Non-Public Arbitrator
Theodor Brown	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument is which is my award.

  
Robert B. Sensale, Esq.  
Non-Public Arbitrator, Presiding Chairperson

12-1-04  
Signature Date

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Christal J. Henner  
Non-Public Arbitrator

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

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Theodor Brown  
Non-Public Arbitrator

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Signature Date

December 1, 2004

Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

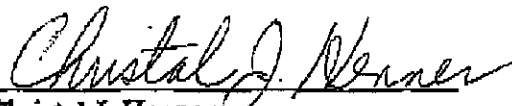
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