

Award
NASD Dispute Resolution

COPY

In the Matter of the Arbitration Between:

The Turriff Living Trust dtd 7/24/01, Claimant v. Banc of America Securities, LLC, Respondent

Case Number: 03-03185

Hearing Site: San Francisco, California

Nature of the Dispute: Customer vs. Member

REPRESENTATION OF PARTIES

For Claimant:

Lowell Turriff
Saratoga, California

For Respondent:

Philip A. McLeod, Esq.
Keesal, Young & Logan
San Francisco, California

CASE INFORMATION

Statement of Claim filed: April 25, 2003

Claimant's Uniform Submission Agreement filed: May 10, 2003

Statement of Answer filed by Respondent Banc of America Securities LLC ("BAS"): July 10, 2003

Respondent BAS' Uniform Submission Agreement signed: July 10, 2003

CASE SUMMARY

Claimant alleged that the above-referenced dispute involves Claimant's investments in various securities, including but not limited to investments in AT&T Wireless, Agere Systems and Broadvision. Claimant further alleged that Respondent ignored or mismanaged Claimant's account causing Claimant's account to suffer damages.

Respondent denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondent also asserted affirmative defenses.

RELIEF REQUESTED

Claimant requested:

1. Compensatory damages of \$290,000.00; and
2. Punitive damages in the amount of \$100,000.00.

OTHER ISSUES CONSIDERED AND DECIDED

Pursuant to Claimant's request, the hearing location in this matter was changed from San Francisco, California to Reno, Nevada. On or about March 11, 2004, the Panel reviewed and considered the positions of the parties relative to Respondent's request to change venue from Reno, Nevada to San Francisco, California. The Panel denied the request.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

Witnesses

Lowell Turriff
Lynda-Lee Dyer
Randall Longfield
Diane Schiefferly

AWARD

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

1. The panel reviewed the pleadings in this matter, heard oral testimony provided by the above named witnesses, reviewed the written materials admitted in evidence and heard oral argument of Mr. Lowell Turriff on behalf of Claimant and of Philip A. McLeod, Esq. on behalf of Respondent.

From the evidence presented, including Claimant's own admission, the panel finds that Claimant was comfortable with the manner in which its account was managed up until June 1999 when Mr. Randy Longfield became Respondent's agent to manage Claimants account.

Claimant alleges that from and after June 1999, Respondent breached an oral contract to sell stocks that depreciated between 10% and 20% (presumably) of its June 1999 value and (presumably) to thereafter appropriately reinvest the sale proceeds. In addition or in the alternative Claimant alleges that Respondents negligently mismanaged the Claimant's account by purchasing speculative stocks and not utilizing some form of "stop loss" system so that Claimant

was not exposed to more than a 20% value loss on any given stock.

Contract Claim. Regarding the contract claim, Claimant alleges that a meeting occurred in June 1999 between Lowell Turriff and Randy Longfield, when Mr. Longfield, as agent of Banc of America Securities, LLC, began managing Claimant's account. At that meeting, Claimant alleges that Mr. Longfield, on behalf of Banc of America Securities, LLC, agreed to sell any stock in Claimant's account if its market value decreased by 20%, as above described. Respondent denies that any such an agreement was made, but it acknowledges that Mr. Longfield's trading philosophy in June 1999 included a general practice of selling securities that experienced a 20% decrease in value. Respondent alleges that this trading philosophy evolved to address extraordinary market conditions and that its management of Claimant's account was appropriate in all respects.

The record reflects that if such an agreement was made, it was never honored and in any event Mr. Longfield's actual trading practice never coincided with the trading philosophy above described. It is noted, for example, that the value of Amazon.Com INC stock and of Iridium World Communications LTD stock fell by at least 20% between June and July 1999. Similarly, the value of Boston Scientific Corp stock and of Packaged Ice INC stock declined by at least 20% between June 1999 and August 1999.

Claimant admits that it never complained about the manner in which its account was being managed until April or May 2003. While Claimant admits that Respondent mailed all confirmation statements, monthly statements and quarterly statements to Claimant in a timely manner, Claimant asserts that its trustees, Lowell and Janet Turriff were too busy to read these statements. The arbitration panel finds that these statements contain ample information that would enable a reasonable person to determine the value of each stock in the Claimant's account and therefore to determine whether the alleged 20% rule was being followed.

Based upon all the evidence presented at the arbitration hearing, the arbitration panel concludes that the terms of the alleged contract were too vague to be enforceable and accordingly, that no contract was formed in June 1999 relating to the sale of stocks in Claimant's account that experienced a 20% value loss. Even assuming, *arguendo*, that a contract was formed and that it was breached, from and after July 1999 the Claimant consistently waived the alleged breach or series of breaches. In addition, from and after July 1999, Claimant consistently failed to mitigate its damages, if any, within a reasonable time.

Negligence Claim. Claimant alleges that Respondent managed its account in a negligent manner by failing to oversee its agents, by failing to employ a reasonable "stop loss" strategy and/or by purchasing speculative stocks.

There is conflicting oral testimony regarding whether Respondent had discretionary trading authority over Claimant's account. The documentary evidence reflects and the panel finds that Claimant granted Respondent's agents Randy Longfield and Michael Russo discretionary trading authority in September 2000 (see: page 2 of Respondent Exhibit #4), and that the discretionary authority was automatically revoked by reason of Mr. Longfield and Mr. Russo leaving Respondent's firm in August 2001 (see page 6 of Respondent's Exhibit #4, which Claimant acknowledges receiving and reading).

From the time that Claimant granted Mr. Longfield discretionary trading authority in September 2000 until Respondent updated Claimant's account in February 2002, Claimant's primary investment objective was "speculative capital gain". On or about February 4, 2002, Claimant changed its primary investment objective to "conservation of capital".

So long as Claimant's account was non-discretionary, the Claimant was responsible for directing all trading activity in the account. Respondent's duty in this context was to document and execute orders in a professional and timely manner. The record reflects that this occurred. Accordingly, any negligence claim fails during the time period when Claimant managed its own account.

Thus, any negligence claim must exist, if at all, during a time period when Respondent exercised trading discretion over Claimant's account. The parties admit that such discretion existed at least from late September 2000 until Mr. Longfield discontinued working for Respondent in late August 2001. Any negligence claim based on the purchase of speculative stocks fails because during that time period, Claimant's primary investment objective was "speculative capital gain". Any negligence claim based on failure to supervise the management of Claimant's account during that time period fails for the same reason.

Thus, the only alleged basis for a negligence claim during this period arises, if at all, by Respondent's failure to employ a "stop loss" strategy to avoid losses beyond 20% of some benchmark value. No expert testimony or other evidence was presented at the hearing establishing that a duty of this kind would apply to the management of Claimant's account. Accordingly, the panel finds that no duty of the kind existed, and no negligence occurred. In the alternative, even if Respondent's conduct during this time period was negligent, the said negligence was not the proximate cause of damages, if any, incurred by Claimant. Moreover, Claimant's damages, if any, could have been avoided for the most part if its mail was reviewed in a timely manner and if its representatives maintained better contact with Respondent.

The Panel is assessing all forum fees against Respondent for the following reasons. The panel considers that it would have been helpful in Respondent's (Stephen Benke) letter of August 20, 2001 (page 6 of Respondent's Exhibit #4) to describe the meaning and consequence of discretionary trading authority no longer being in effect. The panel considers that it would have been helpful if Respondent's Trading Authorization form (page 2 of Respondent's Exhibit #4)

included a paragraph explaining how discretionary trading authorization could be terminated by Respondent or by operation of law as well as describing the consequence of such a termination. The panel also considers that after Claimant's investment objectives changed in February 2002, Respondent could have done more to gain authority to move Claimant's account into line with the new objectives. The panel finds, however, that Respondent's failure to include the "helpful" additions referenced above and Respondent's failure to more aggressively seek Claimant's consent to alter Claimant's investment portfolio after the investment objectives changed in 2003 did not proximately cause damage to Claimant in this case.

Accordingly, it is hereby **ORDERED** that all claims advanced herein by Claimant Lowell Turriff and Janet Turriff Living Trust, including the claim for punitive damages, against Respondent Banc of America Securities LLC are hereby dismissed with prejudice.

2. Respondent is liable for and shall pay to Claimant the sum of \$300.00 as reimbursement for Claimant's filing fee.
3. Except as mentioned in paragraph 2 above, each party shall bear all other respective costs and attorney's fees.
4. All other relief not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$300.00
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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. Accordingly, BAS is a party and the following fees are assessed:

Member Surcharge	= \$1,700.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$2,750.00
Total Member Fees	= \$5,200.00

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 Chair/Panel. The following fees are assessed:

(1) Pre-hearing conference with a single arbitrator @ \$450.00/session	=	\$450.00
Pre-hearing conference: May 26, 2004	1 session	
(2) Pre-hearing conference sessions with the Panel @ \$1,125.00/session	=	\$2,250.00
Pre-hearing conferences: January 20, 2004	1 session	
March 11, 2004	1 session	
(4) Hearing sessions @ \$1,125.00/session	=	\$4,500.00
Hearing: June 9, 2004	2 sessions	
June 10, 2004	2 sessions	
Total Forum Fees	=	\$7,200.00

The Panel assessed the \$7,200.00 in forum fees to Respondent.

Fee Summary

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
<u>Less Payments</u>	= \$ (1,425.00)
Refund Due Claimant	= \$ (1,125.00)

2. Respondent is charged with the following fees and costs:

Member Fees	= \$ 5,200.00
<u>Forum Fees</u>	= \$ 7,200.00
Total Fees	= \$12,400.00
<u>Less Payments</u>	= \$(5,200.00)
Balance Due NASD-DR	= \$ 7,200.00

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

ARBITRATION PANEL

Joseph C. Roberts	-	Public Arbitrator, Presiding Chair
Michael R.E. Sanders, Esq.	-	Public Arbitrator
Barry A. Mainardi	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Joseph C. Roberts
Chair, Public Arbitrator

06/29/04

Signature Date

Michael R.E. Sanders, Esq.
Public Arbitrator

Signature Date

Barry A. Mainardi
Non-Public Arbitrator

Signature Date

7/01/04

Date of Service

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Barry A. Mainardi	-	Non-Public Arbitrator

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Chair, Public Arbitrator

Signature Date



Michael R.E. Sanders, Esq.
Public Arbitrator



Signature Date

Barry A. Mainardi
Non-Public Arbitrator

Signature Date



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Chair, Public Arbitrator

Signature Date

Michael R.E. Sanders, Esq.
Public Arbitrator

Signature Date



Barry A. Mainardi
Non-Public Arbitrator

6-30-04

Signature Date

7/01/04

Date of Service