

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

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In the Matter of the Arbitration Between:

Harbor Advisors, LLC (Claimant) v. Miller Tabak Securities, LLC (Respondent/Third-Party Claimant) v. Arbiter Partners, Avenue Advisors, LLC, Cadogan Management, LLC, Credit Suisse Asset Management Securities, Inc., Elliott Management Corporation, Hawkeye Capital Management, LLC, Mariner Investment Group, Inc., Monarch Capital Holdings, Ltd, MSD Capital, LP, Oppenheimerfunds, Inc., Para Partners, LP, and Paul J. Isaac (Third-Party Respondents) and Paul J. Isaac, Individually and as Trustee of the Account of Marjorie S. Isaac UAW/O Irving H. Isaac, the Isaac Grandchildren Trust, as Manager of Isaac Brothers, LLC, and Arbiter Partners, L.P., and as Attorney-in-fact of the Marjorie S. Isaac Account, Thomas L. Kempner, Jr., Individually and as Trustee of the Sexton Freund 1984 Family Trust, The Account Dated 8/31/87 FBO Trevor M. Kempner, and as Fiduciary for the Account Dated 11/3/92 FBO Jessica S. Kempner, the Kathryn C. Patterson Account, the Kathryn Clews Patterson IRA, and Thomas L. Kempner, Jr. Foundation, Inc. (Third-Party Counterclaimants) v. Miller Tabak Roberts Securities, LLC (Respondent/Third-Party Claimant/Third-Party Counterrespondent)

Case Number: 03-03291

Hearing Site: New York, New York

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Nature of the Dispute: Customer v. Member (Initial Claim).  
Member v. Member and Non-Members (Third-Party Claim)  
Customers v. Members (Third-Party Counterclaim)

**REPRESENTATION OF PARTIES**

Claimant Harbor Advisors, LLC ("Harbor Advisors") hereinafter referred to as "Claimant":  
Thomas L. Seifert, Esq., Thomas L. Seifert, P.C., New York, NY.

Respondent Miller Tabak Roberts Securities, LLC ("Miller Tabak") hereinafter referred to as "Respondent": J. Peter Coll, Esq. and James W. Deacon, Esq., Orrick Herrington & Sutcliffe, LLP, Washington, D.C.

Third-Party Respondent Credit Suisse Asset Management Securities, Inc. ("CSAM Securities"):  
Bradley J. Butwin, Esq., O'Melveny & Myers, LLP, New York, NY.

Third-Party Counterclaimants Paul J. Isaac, Individually and as Trustee of the Account of Marjorie S. Isaac UAW/O Irving H. Isaac, the Isaac Grandchildren Trust, as Manager of Isaac Brothers, LLC, and Arbiter Partners, L.P., and as Attorney-in-fact of the Marjorie S. Isaac Account ("Isaac"), Thomas L. Kempner, Jr., Individually and as Trustee of the Sexton Freund 1984 Family Trust, The Account Dated 8/31/87 FBO Trevor M. Kempner, and as Fiduciary for

the Account Dated 11/3/92 FBO Jessica S. Kempner, the Kathryn C. Patterson Account, the Kathryn Clews Patterson IRA, and Thomas L. Kempner, Jr. Foundation, Inc. ("Kempner"): James S. O'Brien, Jr., Esq., Pryor Cashman Sherman & Flynn, LLP, New York, NY.

Avenue Advisors, LLC ("Avenue Advisors"), Cadogan Management, LLC ("Cadogan"), Elliott Management Corporation ("Elliott"), Hawkeye Capital Management, LLC ("Hawkeye"), Mariner Investment Group, Inc. ("Mariner"), Monarch Capital Holdings, Ltd ("Monarch"), MSD Capital, LP ("MSD"), Oppenheimerfunds, Inc. ("Oppenheimerfunds"), and Para Partners, LP ("Para Partners") did not make appearances in this matter.

### **CASE INFORMATION**

Statement of Claim filed on or about: May 2, 2003.

Claimant signed the Uniform Submission Agreement: May 1, 2003.

Response to Miller Tabak's Request for Dismissal of Third-Party Respondent

Oppenheimerfunds filed on or about: September 3, 2003.

Statement of Answer filed by Respondent Miller Tabak on or about: June 30, 2003.

Counter and Third-Party Statement of Claim filed by Miller Taback on or about: June 30, 2003.

Request for Dismissal of Third-Party Respondent Oppenheimerfunds filed by Miller Taback on or about: August 26, 2003.

Statement of Answer to Arbitrator Partner's, Isaac's and Kempner's Claim filed by Miller Taback on or about: October 20, 2003.

Respondent Miller Tabak signed the Uniform Submission Agreement: June 24, 2003.

Statement of Answer and Motion to Dismiss filed by CSAM Securities on or about: August 18, 2003.

CSAM Securities did not sign the Uniform Submission Agreement.

Answer and Third-Party Counterclaim of Arbitrator and Isaac to Miller Taback's Claim filed on or about: September 19, 2003.

Kempner, Individually and as Trustee of the Sexton Freund 1984 Family Trust, The Account Dated 8/31/87 FBO Trevor M. Kempner, and as Fiduciary for the Account Dated 11/3/92 FBO Jessica S. Kempner, the Kathryn C. Patterson Account, the Kathryn Clews Patterson IRA, and Thomas L. Kempner, Jr. Foundation, Inc. signed the Uniform Submission Agreement.

Arbitrator did not sign the Uniform Submission Agreement.

Isaac did not sign the Uniform Submission Agreement.

Avenue Advisors, Cadogan, Elliott, Hawkeye, Mariner, Monarch, MSD, Oppenheimerfunds and Para Partners did not file Statements of Answer or sign Uniform Submission Agreements.

### **CASE SUMMARY**

Claimant asserted the following causes of action: mistake of fact; unjust enrichment; negligence; breach of duty owed by an NASD Broker-Dealer to a customer; and breach of duties owed under Federal and State securities laws. The causes of action relate to corporate bonds.

Unless specifically admitted in its Answer, Respondent Miller Tabak denied the allegations made in the Statement of Claim. In its Counter and Third-Party Claims, Miller Taback asserted the following cause of action: certain buyers requested refunds of the accretion factor associated with the purchase and sale of the Metro Media Notes.

Unless specifically admitted in its Answer to Arbiter Partners', Isaac's, and Kempner's Statement of Claim, Miller Taback denied the allegations made in the claim.

Unless specifically admitted in its Answer and Motion to Dismiss, CSAM Securities denied the allegations made in the Third-Party Claim.

Unless specifically admitted in their Answer to the Third-Party Claims, Arbiter and Isaac denied the allegations made in the Third-Party Claim. In their Third-Party Counterclaims, Arbiter, Isaac, and Kempner asserted the following causes of action: specific performance and breach of contract.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$73,287.85; interest at the New York statutory rate of 9% from April 17, 2002 through the date of payment; damages equal to the decrease in market value of the Notes; attorneys' fees; costs and expenses; and such other relief as may be deemed to be appropriate and/or equitable under the circumstances. In its Response to Miller Tabak's Request for Dismissal of Third-Party Respondent Oppenheimerfunds, Claimant had no objection to the request for dismissal.

In its Answer, Respondent Miller Tabak requested that the Panel dismiss Claimant's Statement of Claim in its entirety and award it the relief to which it is entitled as set forth in the Answer and in its Counter and Third-Party Claims.

In its Counter and Third-Party Claims, Miller Taback requested the following relief:

- 1) An order (a) determining whether an accretion factor should have been paid with the sale of the Metro Media and (b) if an accretion factor should not have been paid, reforming Miller Taback's contracts for the purchase and sale of the Metro Media and directing the Sellers to refund to Miller Taback and Miller Taback to refund to the Buyers that portion of the price paid for the Metro Media that was based on the accretion factor.
- 2) In the alternative, an order (a) holding the Sellers liable to Miller Taback for improperly charging Miller Taback an accretion factor which the Sellers knew or should have known was not appropriate, and compensatory damages in the amount of \$2,257,860.73; pre- and post-judgment interest; costs; and such other and further relief as the Panel shall deem just and proper; and (b) directing Miller Taback to use the proceeds of such award to repay each Buyer that portion of the price it paid for the Metro Media that was based on the accretion factor.
- 3) In the alternative, a declaration that Miller Taback's contracts for the purchase and sale of the Metro Media Notes are valid and binding, and that Miller Taback neither owes nor is due any refunds thereunder.

In its Request for Dismissal of Third-Party Respondent Oppenheimerfunds, Miller Taback requested that Oppenheimerfunds be dismissed from the proceedings because it has refunded to Miller Taback that portion of the price paid for the Metro Media Notes that represented the accretion factor.

In its Answer to Arbiter Partners', Isaac's, and Kempner's Statement of Claim, Miller Taback requested that the Panel dismiss the Third-Party Counterclaimants Statement of Claim in its entirety and award Miller Taback the following:

- 1) An order (a) determining whether an accretion factor should have been paid with the sale of the Metro Media and (b) if an accretion factor should not have been paid, reforming Miller Taback's contracts for the purchase and sale of the Metro Media and directing Miller Taback's Sellers to refund to Miller Taback and Miller Taback to refund to its Buyers that portion of the price paid for the Metro Media that was based on the accretion factor; or
- 2) In the alternative, a declaration that Miller Taback's contracts for the purchase and sale of the Metro Media Notes are valid and binding, and that Miller Taback neither owes nor is due any refunds thereunder.

In its Answer and Motion to Dismiss the Third-Party Claim, CSAM Securities requested that the Third-Party Claim be dismissed.

In their Third-Party Counterclaim, Arbiter, Isaac, and Kempner requested an award be entered in their favor and against Miller Taback, as follows:

- 1) On the First Claim for Relief, for an order directing Miller Taback to provide Third-Party Respondents with the Notes that they should have provided on the settlement dates; that is, the additional Notes representing the fully accreted principal value that Third-Party Respondents purchased, plus the interest payments attributable to them;
- 2) On the Second Claim for Relief, in the alternative, for money damages calculated as the value of the additional principal amount of Notes that were to have fully accreted on March 31, 2002, plus the present value of the interest payments attributable to the aggregate principal value of Notes – including the accreted amount – for which Third-Party Respondents paid and to which they are entitled;
- 3) Attorneys' fees, costs, and expenses;
- 4) Such other and further relief as may be deemed appropriate.

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

Avenue Advisors, Cadogan, Elliott, Hawkeye, Mariner, Monarch, MSD, Oppenheimerfunds and Para Partners are not NASD members, and therefore, were not required to arbitrate in this forum and did not submit to NASD Dispute Resolution's jurisdiction.

Isaac, Arbiter, and CSAM Securities did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and, having answered the claim, are bound by the determination of the Panel on all issues submitted.



The Third-Party Claim against Oppenheimerfunds was withdrawn by Miller Taback.

On or about December 4, 2003, Miller Taback withdrew its claims against Avenue Advisors, Monarch, Elliott, Hawkeye, Mariner, MSD and Para Partners.

On or about February 24, 2004, Miller Taback withdrew its claims against CSAM Securities.

On or about October 6, 2004, Isaac, Kempner, and Arbiter withdrew their Third-Party Counterclaims against Miller Taback.

Claimant made an oral amendment to the claim to add failure to supervise as a cause of action.

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 Miller Taback shall purchase and deliver to the claimant, Harbor Advisors, of the Metro Media group bonds, hereinafter referred to as bonds, in question as a subject of this arbitration. The number of bonds to be delivered is 113, each bond having a face value of \$1,219.55.

The following conditions must be observed to be in full compliance of the decision:

- a. Miller Taback must purchase and make a good delivery to the agent of Harbor Advisors the bonds within 90 days of the postmark of this decision's mailing by NASD.
- b. Miller Taback will pay to Harbor Advisors full coupon interest from original date of purchase (4/15/02) up to the date of good delivery to the agent of Harbor Advisors.
- c. If the bonds are not delivered within the specified timeframe, Miller Taback will pay to Harbor Advisors, as a penalty the sum of \$1,000.00 per week, starting after the expiration of the 90-day period. Weeks will start on Saturday and end on Friday. The penalty will be prorated for partial weeks.
- d. If the bonds are not purchased and delivered by the redemption, call or future exchange dates, if any, Miller Taback will deliver a Letter of Protection to Harbor Advisors guaranteeing to them all of their rights and recourses as if they had possession of the bonds, including but not limited to bond value and coupon interest.

2. Any and all relief not specifically addressed herein 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	= \$ 225.00
Miller Taback's Counterclaim filing fee	= \$2,000.00
Isaac's, Kempner's, and Arbiter's Counterclaim filing fee	= \$ 250.00

#### **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 persons at the time of the events giving rise to the dispute. Accordingly, Miller Taback Roberts Securities, Inc. is a party.

Member surcharge	= \$1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,000.00

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Credit Suisse Asset Management Securities, Inc.. is a party.

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

#### **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:

One (1) Pre-hearing session with Panel @ \$750.00	= \$ 750.00
Pre-hearing conference: February 26, 2004 1 session	
Eight (8) Hearing sessions @ \$750.00	= \$6,000.00
Hearing Dates: June 14, 2004 2 sessions	
June 15, 2004 2 sessions	
October 5, 2004 2 sessions	
October 19, 2004 2 sessions	
Total Forum Fees	= \$6,750.00

1. The Panel has assessed \$6,750.00 of the forum fees against Respondent Miller Taback.

#### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimant Harbor Advisors requested duplication of hearing tapes = \$45.00
2. Arbiter, Isaac, and Kempner requested duplication of hearing tapes = \$105.00

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 225.00
Administrative Costs	= \$ 45.00
<hr/> Total Fees	<hr/> = \$ 270.00
Less payments	= \$ 1,725.00
<hr/> Refund Due Claimant	<hr/> = \$ 1,455.00
  
2. Respondent Miller Taback is solely liable for:

Counterclaim Filing Fee	= \$ 2,000.00
Member Fees	= \$ 6,850.00
<hr/> Forum Fees	<hr/> = \$ 6,750.00
Total Fees	= \$15,600.00
<hr/> Less payments	<hr/> = \$11,750.00
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 3,850.00
  
3. CSAM Securities is solely liable for:

Member Fees	= \$ 3,550.00
<hr/> Total Fees	<hr/> = \$ 3,550.00
Less payments	= \$ 3,550.00
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 0.00
  
4. Arbiter, Isaac, and Kempner are jointly and severally liable for:

Counterclaim filing fee	= \$ 250.00
<hr/> Administrative Costs	<hr/> = \$ 105.00
Total Fees	= \$ 355.00
<hr/> Less payments	<hr/> = \$ 1,250.00
<hr/> Refund Due	<hr/> = \$ 895.00

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


**ARBITRATION PANEL**

Alexander Forti	-	Public Arbitrator, Presiding Chairperson
William E. Smith	-	Public Arbitrator
Rick F. Suppa	-	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 which is my award.

  
Alexander Forti  
Public Arbitrator, Presiding Chairperson

NOV 3, 2004  
  
Signature Date

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William E. Smith  
Public Arbitrator

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Signature Date

\_\_\_\_\_  
Rick F. Suppa  
Non-Public Arbitrator

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Signature Date

November 5, 2004  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

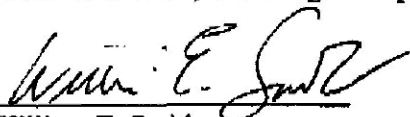
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Alexander Forti  
Public Arbitrator, Presiding Chairperson

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Signature Date

  
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William E. Smith  
Public Arbitrator

11-04-04  
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Signature Date

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Rick F. Suppa  
Non-Public Arbitrator

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Signature Date

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November 5, 2004  
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

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William E. Smith	-	Public Arbitrator
Rick F. Suppa	-	Non-Public Arbitrator

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Public Arbitrator, Presiding Chairperson

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William E. Smith  
Public Arbitrator

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Signature Date

  
\_\_\_\_\_  
Rick F. Suppa  
Non-Public Arbitrator

11/3/04  
Signature Date

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