

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Names of the Claimants

Michael G. McDonald IRA
Joan A. McDonald IRA
Michael G. McDonald and
Joan A. McDonald Ten/Com

Case Number: 03-03402

Names of the Respondents

Charles Schwab & Co., Inc.
Steven F. Manfredonia
Gary D. Rubin

Hearing Site: Atlanta, Georgia

Nature of the Dispute: Customer vs. Member and Associated Person.

REPRESENTATION OF PARTIES

For Michael G. McDonald IRA, Joan A. McDonald IRA and Michael G. McDonald and Joan A. McDonald Ten/Com, hereinafter collectively referred to as "Claimants": James Richard Hooper, Esq., Michael Brady Lynch, Esq. and Maureen G. Cajoux, Esq., Hooper & Weiss, L.L.C., Orlando, Florida.

For Charles Schwab & Co., Inc. ("Schwab"), Steven F. Manfredonia ("Manfredonia") and Gary D. Rubin ("Rubin"), hereinafter collectively referred to as "Respondents": Sean B. Meehan, Corporate Counsel, Schwab, San Francisco, California.

CASE INFORMATION

Statement of Claim filed on or about: April 22, 2003.

Claimants signed the Uniform Submission Agreement: March 21, 2003.

Statement of Answer filed by Respondents on or about: July 10, 2003.

Respondent Schwab signed the Uniform Submission Agreement: July 8, 2003.

Respondent Rubin signed the Uniform Submission Agreement: June 16, 2003.

Respondent Manfredonia signed the Uniform Submission Agreement: June 16, 2003.

CASE SUMMARY

Claimants asserted the following causes of action: failure to execute; breach of contract; negligence; breach of fiduciary duty-the duties of care, loyalty, full disclosure, fair dealing and good faith; violations of self regulatory organization rules; failure to supervise; and respondeat superior. The causes of action relate to transactions in shares of Berkshire Hathaway "A" in Claimants' accounts.

Specifically, Mr. McDonald testified that he began buying Berkshire Hathaway stock in 1994, and subsequently accumulated a position of some 61 shares which he sold in the mid-1990's. He closely followed the stock thereafter, and in February, 2000, it had reached the lowest point

in some four years, approximately \$43,000.00 per share. Mr. McDonald had wanted for some time an even 100-share position in Berkshire Hathaway, and in February, 2000 he had about \$5 million in liquid assets in several accounts at Respondent Schwab. One of those accounts was his IRA account; one was his wife's IRA; and another was a joint account with his wife. He determined that he had enough to acquire his 100-share position and still have some "head room" or left-over cash for a margin of safety for living and other expenses. Mr. McDonald testified that on February 14, 2000, he called from his Florida home to Mr. Manfredonia at Respondent Schwab's North Atlanta office. In that 10:14 a.m. telephone call, which lasted approximately one minute, Mr. McDonald testified that he instructed Mr. Manfredonia to purchase at market 100 shares of Berkshire Hathaway, then trading in the \$43,500.00 per share range, instructing him to use first funds from Mr. McDonald's own IRA account, but to purchase no fractional shares from that account, then to use funds from his wife's IRA account, again purchasing no fractional shares, and to take the balance of the necessary funds from the joint account. Mr. McDonald testified that, to the best of his recollection, Mr. Manfredonia read back the details of the order. Mr. McDonald testified that based upon past experience, he expected a call from Mr. Manfredonia in five or ten minutes to confirm that the trade had gone through. He did not receive such a call, and at 11:34 he again called Mr. Manfredonia and asked what the execution price had been. Mr. Manfredonia told him that no order had been placed. Mr. McDonald testified that he got upset and vented a bit, but learning that the price was still generally in the same range he said in effect, "let's get at it." He spoke again with Mr. Manfredonia some time after noon, and learned that his 100 share order had been filled at various prices but overall the buy had cost \$120,800.00 more than it would have had it been executed shortly after it was first placed at 10:14 a.m. Mr. McDonald sold his Berkshire position some four days later at a \$250,000.00 profit. He testified that Berkshire was under-priced at the \$43,000.00-\$44,000.00 range, and that Warren Buffet subsequently announced that the stock would be defended at \$45,000.00 per share. As a result, Berkshire has not since reached the low levels it was in February 2000, and in fact now sells for about twice that price. Mr. McDonald has undertaken subsequent large trades, including a Proctor and Gamble trade at Respondent Schwab in March, 2000, and later purchased an "enormous" position in Microsoft.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various defenses. Specifically, Mr. Manfredonia testified that he has been in the industry since 1992, and in February, 2000 was sales supervisor and acting branch manager of the North Atlanta office of Respondent Schwab managed by Respondent Rubin. Mr. Manfredonia now is Respondent Schwab's Norcross office branch manager. He testified that he first met Mr. McDonald in late January, 2000, some two or three weeks before the Berkshire trades in dispute herein. He set up three accounts for Claimants, two IRA's and one joint account, and completed documents necessary to transfer assets from other firms. He recalls speaking with Mr. McDonald on the morning of February 14, and testified that Mr. McDonald in that call said that he was contemplating a large trade in Berkshire Hathaway and wanted to know how Respondent Schwab would handle the trade. Mr. McDonald did not want the order "dumped" on the market in such a way to drive up the price before it was filled. Mr. Manfredonia testified he told Mr. McDonald he wasn't sure how such a large trade would be handled and that he would make some inquiries to find out. He testified Mr. McDonald did not place a buy order in that conversation. The two spoke again sometime before noon, after Mr.

McDonald left a message for Mr. Manfredonia to return his call. Mr. Manfredonia testified that that call lasted some 15 minutes, during which he explained how Respondent Schwab would handle the order, and Mr. McDonald directed him to sell two positions in Target and AT&T in one of the IRA's, and then to proceed with the purchase of 100 Berkshire Hathaway. Mr. McDonald wanted to trade at \$43,500.00 per share, but was mainly concerned that he accumulate a full 100-share position. Anything less than 100 shares was not acceptable. Mr. Manfredonia ticketed sales of Target and AT&T, and placed some limit orders for Berkshire at \$43,500.00, but it quickly became clear that Berkshire volume was high and that the price was moving away and would not be filled at that level. He, therefore, converted the limit orders to market orders.

Mr. Rubin testified that he was the branch manager of Schwab's North Atlanta office, and that he was on vacation on February 14, 2000. Mr. Manfredonia informed him that Mr. McDonald was complaining about the execution and trade prices on his Berkshire buy. When Mr. Rubin returned to the office a week or so later, he spoke with Mr. McDonald who complained of untimely execution costing him on the Berkshire trade. Mr. Rubin told Mr. McDonald that he would check into the situation and subsequently requested information and documents throughout the Schwab system. He looked for telephone records that could confirm the various calls involved, but found none. Schwab branch offices do not record conversations, and these transactions occurred directly with the office, not with the Schwab toll free order number which is recorded. Mr. Rubin testified that although Mr. McDonald continued to complain about untimely execution, he did not assert that he first entered the Berkshire order at 10:14. In Mr. Rubin's opinion, it would be impossible for a registered representative to accept an order of this complexity in a one minute telephone call; that the North Atlanta office had never had a similar order and hasn't since; and that because of the share price, Respondent Schwab has special procedures for handling such orders.

Robert Taylor, manager of the equity trading hotline at Respondent Schwab, testified by telephone regarding the handling of Mr. McDonald's order. He testified that the documents developed show the orders were executed timely based upon the time they were entered into the system. In his opinion, orders entered after 11:34 were timely and properly executed. If the order had been entered at 10:14, however, it was not properly or timely executed.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested compensatory damages of not less than \$120,800.00; pre-judgment interest; attorneys' fees, and the costs and expenses of this proceeding; such other and further relief as the Panel deemed just and proper; damages allegedly arising from the subsequent appreciation in Berkshire Hathaway stock after Claimants' position was sold in mid-February, 2000; and, punitive damages. At the hearing, Claimants dismissed the requests for appreciation and punitive damages, and asked for \$120,800.00, pre-judgment interest and attorneys' fees and expenses.

Respondents requested that Claimants' claims against Respondents be denied in their entirety, and that all references to these claims be expunged from Respondent Manfredonia's Central Registration Depository ("CRD") record.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies.

Claimants moved a week prior to the hearing for a continuance in order to pursue additional discovery, which motion was denied for the reasons set out in the Panel's order of March 17, 2004. At the hearing, Claimants renewed their request for certain documents they alleged would support their claims. Specifically, they asked for commission runs or the equivalent; documents showing how the individual Respondents are compensated; and a copy of any contract between Respondent Schwab and any entities it uses or used to execute its Berkshire Hathaway orders. Respondents produced to Claimants at the hearing documents equivalent to the first request. To the extent that Claimants' motion in regard to the two other classes of documents is still pending, that motion is denied. The Panel finds that even if such documents exist and are "unfavorable" to Respondents in some sense, they would not be material to the Panel's decision.

During the evidentiary hearing, Claimants dismissed, with prejudice, all claims against Respondent Rubin and agreed with Respondents' counsel that all references to the claims herein against Respondent Rubin should be expunged from his NASD CRD record.

Claimants objected at the hearing to Mr. Taylor's testimony by telephone, which objection was overruled.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the undersigned arbitrators (the "Panel") have decided in full and final resolution of the issues submitted for determination as follows:

Respondents Schwab and Manfredonia are not liable to Claimants on any claim submitted.

Each party shall bear his own costs, including attorneys' fees.

Respondent Manfredonia's request that all references to the claims herein be expunged from his CRD record is denied.

Any and all claims for relief not specifically addressed herein are denied.

The Panel recommends the expungement of all references to the above captioned arbitration from Respondent Rubin's registration records maintained by the NASD CRD, with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Rubin must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

FEES

Pursuant to the NASD Code of Arbitration Procedure (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 = \$300.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is a party.

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| Member surcharge | = \$1,700.00 |
| Pre-hearing process fee | = \$750.00 |
| Hearing process fee | = \$2,750.00 |

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

No requests for adjournments for which fees were assessed were granted in this matter.

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

No injunctive relief fees were incurred in this matter.

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:

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| One Pre-hearing session with a single arbitrator @ \$450.00 | = \$450.00 |
| Pre-hearing conference: January 15, 2004 1 session | |
| One Pre-hearing session with the Panel @ \$1,125.00 | = \$1,125.00 |
| Pre-hearing conference: October 29, 2003 1 session | |
| Two Hearing sessions @ \$1,125.00 | = \$2,250.00 |
| Hearing Date: March 23, 2004 2 sessions | |

Total Forum Fees = \$3,825.00

The Panel has assessed \$1,912.50 of the forum fees to Claimant Michael G. McDonald IRA.
The Panel has assessed \$1,912.50 of the forum fees to Respondent Schwab.

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 are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred in this matter.

FEE SUMMARY

Claimants are jointly and severally liable for:

Initial Filing Fee = \$300.00

Total Fees = \$300.00

Less payments = \$300.00

Balance Due NASD Dispute Resolution = \$0.00

Claimant Michael G. McDonald IRA is solely liable for:

Forum Fees = \$1,912.50

Total Fees = \$1,912.50

Less payments = \$1,125.00

Balance Due NASD Dispute Resolution = \$787.50

Respondent Schwab is solely liable for:

Member Fees = \$5,200.00

Forum Fees = \$1,912.50

Total Fees = \$7,112.50

Less payments = \$5,200.00

Balance Due NASD Dispute Resolution = \$1,912.50

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

ARBITRATION PANEL

| | | |
|-----------------------------|---|------------------------------------|
| Robert H. Putnam, Jr., Esq. | - | Public Arbitrator, Presiding Chair |
| John W. Davis, Esq. | - | Public Arbitrator |
| Sandra J. Bakalus | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures

_____/S/_____
Robert H. Putnam, Jr., Esq.
Public Arbitrator, Presiding Chair

Signature Date

_____/S/_____
John W. Davis, Esq.
Public Arbitrator

Signature Date

_____/S/_____
Sandra J. Bakalus
Non-Public Arbitrator

Signature Date

April 7, 2004
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

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ARBITRATION PANEL

Robert H. Putnam, Jr., Esq. -

John W. Davis, Esq. -

Sandra J. Bakalus -

Public Arbitrator, Presiding Chair

Public Arbitrator

Non-Public Arbitrator

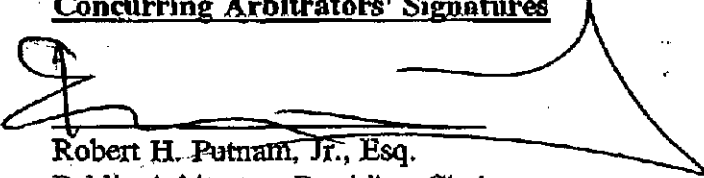
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4-01-04

Signature Date

Concurring Arbitrators' Signatures



Robert H. Putnam, Jr., Esq.

Public Arbitrator, Presiding Chair

John W. Davis, Esq.

Public Arbitrator

Signature Date

Sandra J. Bakalus

Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

Arbitration No. 03-03402

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ARBITRATION PANEL

Robert H. Putnam, Jr., Esq.

Public Arbitrator, Presiding Chair

John W. Davis, Esq.

Public Arbitrator

Sandra J. Bakalus

Non-Public Arbitrator

Concurring Arbitrators' Signatures

Robert H. Putnam, Jr., Esq.

Signature Date

Public Arbitrator, Presiding Chair



John W. Davis, Esq.

A-2-04

Public Arbitrator

Signature Date

Sandra J. Bakalus

Signature Date

Non-Public Arbitrator

Date of Service (For NASD Dispute Resolution office use only)

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ARBITRATION PANEL

Robert H. Putnam, Jr., Esq.
John W. Davis, Esq.
Sandra J. Bakalus

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concluding Arbitrators' Signatures

Robert H. Putnam, Jr., Esq.
Public Arbitrator, Presiding Chair

Signature Date

John W. Davis, Esq.
Public Arbitrator

Signature Date


Sandra J. Bakalus
Non-Public Arbitrator


Signature Date

Date of Service (For NASD Dispute Resolution office use only)