

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
Alice Foster

Case Number: 03-03796

Name of the Respondents
Banc One Securities Corp.;
Ellarea Vera Poeck; and,
Banc of America Investment Services, Inc.

Hearing Site: Dallas, Texas

Name of Third-Party Respondent
Ricky Joe Henager

NATURE OF DISPUTE

Public Customer v. Member Firms and Associated Person v. Public Customer

REPRESENTATION OF PARTIES

Claimant Alice Foster, hereinafter referred to as "Foster": Richard A. Lewins, Esq., of the firm of Burg Simpson Eldredge Hersh & Jardine P.C., located in Dallas, Texas.

Respondent Banc One Securities Corp. ("Banc One"): Elizabeth A. Jerdonek, Esq., of the firm of Ulmer & Berne LLP, located in Cleveland, Ohio.

Respondents Banc of America Investment Services, Inc. ("Bank of America") and Ellarea Vera Poeck ("Poeck"): Rodney Acker, Esq. of the firm of Jenkins & Gilchrist, located in Dallas, Texas.

Third-Party Respondent Ricky Joe Henager ("Henager"): Neil J. Beller, Esq. of the Law Offices of Neil J. Beller, Ltd., located in Las Vegas, Nevada.

CASE INFORMATION

Statement of Claim filed: May 27, 2003.

Claimant signed the Uniform Submission Agreement: May 21, 2003.

Claimant's Amended Statement of Claim filed: October 3, 2003.

Claimant's Reply to Respondent Banc of America's Response to Claimant's Answer and Motion to Dismiss Banc of America's Counterclaim against Henager filed: December 4, 2003.

Statement of Answer filed by Respondent Banc One on: July 21, 2003.

Respondent Banc One's representative signed the Uniform Submission Agreement: July 14, 2003.

Statement of Answer and Third-Party Claim filed by Respondent Bank of America on or about: July 21, 2003.

Respondent Banc of America signed the Uniform Submission Agreement:

Banc of America's Response to Motion to Dismiss of Henager filed: October 8, 2003.

Banc of America's Supplemental Response to Henager's Motion to Dismiss filed: January 22, 2004.

Statement of Answer to Amended Statement of Claim filed by Respondent Poeck on or about: November 21, 2003.

Respondent signed the Uniform Submission Agreement: December 1, 2003.

Statement of Answer and Motion to Dismiss filed by Third-Party Respondent Henager on or about: September 22, 2003.

Henager's Letter Brief in Support of Motion to Dismiss filed: January 15, 2004.

Third-Party Respondent Henager did not file a signed Uniform Submission Agreement.

CASE SUMMARY

Claimant asserted the following causes of action: common law fraud through misrepresentation and omission; violation of the NASD and NYSE rules, including the fair dealing rules; violations of state and federal securities laws; violations of the Texas Deceptive Trade Practices Act; negligence, including Respondents' failure to supervise; breach of contract; and, breach of fiduciary duty. These causes of action related to Respondents' alleged mishandling of Claimant's account, including investments in high risk, growth and aggressive growth mutual funds, heavy concentration in equities and utilization of margin.

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

1. Claimant fails to state a claim against Banc One upon which relief can be granted;
2. At all times, Claimant was advised of and assumed the risks of market fluctuation;
3. Claimant suffered no actual losses in her Banc One account;
4. To the extent that any losses or diminution in value of Claimant's investments occurred, such losses were the result of unforeseen market fluctuations and were within the risks assumed;
5. Immediately after each transaction, Claimant received confirmations in additions to the periodic account statements, yet made no protests to the activity, thereby ratifying each transaction in question;
6. The Claimant proximately caused the alleged losses and damages about which she complains;
7. The Claimant contributed to cause, in whole or in part, the alleged losses and damages of which she now claims;

8. Banc One owed no fiduciary duty to the Claimant;
9. Banc One, in discharging its duties, if any, to the Claimant, acted in good faith and exercised at least that degree of care, diligence and skill which ordinarily prudent persons would exercise in similar circumstances and like positions; and,
10. The Claimant failed to mitigate the losses about which she complains.

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

1. Claimant fails to state a claim;
2. Claimant's claims are barred by comparative and/or contributory negligence;
3. The injuries, if any, sustained by Claimant were caused by Claimant's own conduct, acts of third parties, conditions and events outside the Respondent's control, or market conditions;
4. Claimant is barred from recovery by the doctrine of estoppel;
5. Claimant, through her acts and deeds, waived her right to maintain this action against Respondent;
6. Claimant, through her acts and deeds, ratified all trading in her accounts;
7. Claimant's claims are barred by assumption and acceptance of the risk of loss;
8. Claimant's claims are barred by Claimant's failure to mitigate damages;
9. Claimant's claims are barred because Respondent acted in compliance with all applicable rules and regulations and acted in good faith and did not directly induce the act or acts, if any, constituting alleged violations of law;
10. Claimant did not reasonably rely to her detriment upon any representation or action made by Respondent;
11. There is no private cause of action for violation of the NASD, NYSE or other SRO's rules;
12. Claimant is barred from recovery, in whole or in part, by the doctrine of laches and the applicable statute of limitations;
13. An award of punitive damages is unwarranted and would violate the due process, equal protection and excessive fine clauses of the United States and Texas Constitutions;
14. Claimant's claims are barred because Respondent handled Claimant's accounts in compliance with applicable brokerage industry standards, guidelines and regulatory requirements, as well as Claimant's own stated investment objectives;
15. Claimant's claims are barred because Claimant would be unjustly enriched if she prevails on her claims and/or any of her causes of action; and,
16. Claimant's claims are barred, in whole or in part, by the agreement between the parties governing the accounts and activities at issue, including the Trust Certification, pursuant to which Claimant agreed to indemnify and hold harmless Respondent for any damages or losses arising from transactions in the Trust Account.

Banc of America asserted a Third-Party Claim against Third-Party Respondent Henager, alleging that to the extent any investment decisions violated the Trust Certification, as a Trustee, Henager was liable to Banc of America for breach of the Trust Certification. Therefore, Henager agreed to indemnify Banc of America for losses arising from transactions in the Trust Account.

Unless specifically admitted in its Answer, Respondent Poeck denied the allegations made in the Statement of Claim and adopted the answer of Respondent Banc of America in its entirety, including all factual and legal allegations, and all affirmative defenses.

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

1. Banc of America fails to state a claim upon which relief can be granted;
2. Henager seeks full protection under the Soldiers and Sailors Relief Act;
3. There was a failure of consideration;
4. There was a failure of condition precedent;
5. Henager was fraudulently induced to enter into the agreement in question;
6. Banc of America is estopped from seeking indemnity from Henager;
7. Indemnification is disallowed by the Texas Securities Act;
8. The indemnity agreement is void as unconscionable;
9. The indemnity agreement is barred by illegality; and,
10. The indemnity agreement is barred by duress.

RELIEF REQUESTED

Claimant requested:

Compensatory Damages	\$ 95,000.00
Punitive Damages	For mental anguish
Interest	Pre-judgment and post-judgment interest at the maximum rate allowed by law
Attorneys' Fees	Reasonable fees for breach of contract and violations of the Texas Deceptive Trade Practices Act
Other Costs	Cost and expenses
Other Monetary/Non-Monetary Relief if any:	Expert witness fees

Respondent Banc One requested that judgment be rendered in its favor and against Claimant, and that it receive its attorneys' fees, costs and forum fees.

Respondent Banc of America requested that the Panel deny Claimant's claims in their entirety, and grant Respondent its reasonable and necessary attorneys' fees and costs incurred in defending these claims. Banc of America further requested that the Panel award it all damages, attorneys' fees and costs arising out of Respondent's third-party claim against Third-Party Respondent Henager.

Respondent Poeck requested that the Panel deny Claimant's claims in their entirety, and grant Respondent her reasonable and necessary attorneys' fees and costs incurred in defending these claims.

Third-Party Respondent Henager requested that the claims asserted against him be dismissed.

OTHER ISSUES CONSIDERED AND DECIDED

On or about February 18, 2004, the Panel, after review and consideration of Third-Party Respondent Henager's Motion to Dismiss, denied the Motion.

Respondent Henager did not file with NASD Dispute Resolution, a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and the Account Agreement, and having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

AWARD

After considering the pleadings, 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. The Statement of Claim of Alice Foster is hereby dismissed and denied in its entirety;
2. The Third-Party Claim of Banc of America Investment Services, Inc. is hereby dismissed and denied in its entirety;
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Ellarea Vera Poeck's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Ellarea Vera Poeck must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
4. The parties shall bear their own costs of arbitration, including their attorneys' fees, except for those sums specifically enumerated herein;
5. Any and all relief not specifically addressed herein, [including punitive [treble] 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	= \$ 225.00
Third Party Claim 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, Banc One Securities Corp. and Banc of America Investment Services, Inc. are both parties to the action and the following member fees are assessed against each firm:

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

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed: None.

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 Panel @ \$750.00	= \$ 750.00
Pre-hearing conference: December 8, 2003 1 session	
Eight (8) Hearing sessions @ \$750.00	= \$ 6,000.00
Hearing Dates: June 1, 2004 3 sessions	
June 2, 2004 3 sessions	
June 3, 2004 2 sessions	
<hr/> Total Forum Fees	<hr/> = \$ 6,750.00

The Panel has assessed \$3,375.00 of the forum fees to Claimant Alice Foster, \$1,687.50 of the forum fees to Respondent Banc One Securities Corp. and \$1,687.50 of the forum fees to Respondent Banc of America Investment Services, Inc.

FEE SUMMARY

Claimant Alice Foster is solely liable for:

Initial Filing Fee	= \$ 225.00
Forum Fees	= \$ 3,375.00
Total Fees	= \$ 3,600.00
Less payments	= \$ 1,425.00
Balance Due NASD Dispute Resolution	= \$ 2,175.00

Respondent Banc One Securities Corp. is solely liable for:

Member Fees	= \$ 3,550.00
Forum Fees	= \$ 1,687.50
Total Fees	= \$ 5,237.50
Less payments	= \$ 3,550.00
Balance Due NASD Dispute Resolution	= \$ 1,687.50

Respondent Banc of America Investment Services, Inc. is solely liable for:

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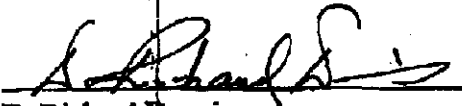
Filing Fee	= \$ 1,000.00
Member Fees	= \$ 3,550.00
Forum Fees	= \$ 1,687.50
Total Fees	= \$ 6,237.50
Less payments	= \$ 7,050.00
Balance Refunded by NASD Dispute Resolution	= \$ 812.50

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

ARBITRATION PANEL

D. Richard Dennis - Public Arbitrator, Presiding Chairperson
David N. Richardson - Public Arbitrator
R. Dan Mitchell - Non-Public Arbitrator

Concurring Arbitrators' Signatures


D. Richard Dennis
Public Arbitrator, Presiding Chairperson

6-16-04
Signature Date

David N. Richardson
Public Arbitrator

Signature Date

R. Dan Mitchell
Non-Public Arbitrator

Signature Date

6/16/04 MEM
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

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Filing Fee	= \$ 1,000.00
Member Fees	= \$ 3,550.00
Forum Fees	= \$ 1,687.50
Total Fees	= \$ 6,237.50
Less payments	= \$ 7,050.00
Balance Refunded by NASD Dispute Resolution	= \$ 812.50

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David N. Richardson - Public Arbitrator

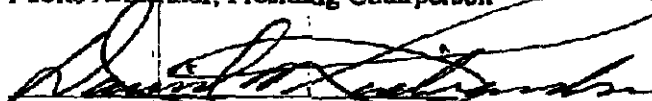
R. Dan Mitchell - Non-Public Arbitrator

Concurring Arbitrators' Signatures

D. Richard Dennis

Public Arbitrator, Presiding Chairperson

Signature Date

David N. Richardson
Public Arbitrator

Signature Date

6-15-04

R. Dan Mitchell

Non-Public Arbitrator

Signature Date

6/16/04 *Man*

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

NASD Dispute Resolution
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Filing Fee	= \$ 1,000.00
Member Fees	= \$ 3,550.00
Forum Fees	= \$ 1,687.50
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Signature Date

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 Public Arbitrator

Signature Date

R. Dan Mitchell

6/16/04

R. Dan Mitchell
 Non-Public Arbitrator

Signature Date

6/16/04 RDM
 Date of Service (For NASD Dispute Resolution office use only)