

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

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**In the Matter of the Arbitration Between:**

Joseph S. Scher, as an individual, and as Trustee and Representative for, and on behalf of, The Joseph S. Scher Trust; Trust U/W of Eleanor Scher CL A; Marilyn Habermas-Scher GST Trust; Mark S. Scher GST Trust; Julie Lynn Nebel GST Trust; James A. Scher GST Trust; Marilyn Habermas-Scher Present Interest Trust; Mark S. Scher Present Interest Trust; Julie Lynn Nebel Present Interest Trust; James A. Scher Present Interest Trust; Anika Habermas-Scher Present Interest Trust; Samantha C. Scher Present Interest Trust dtd 1/1/96; Alexandra M. Scher Present Interest Trust dtd 1/1/96; Maxwell R. Scher Present Interest Trust dtd 1/1/96, Claimants v. Banc of America Securities, LLC and Bank of America, N.A., Respondents

Case Number: 03-04783

Hearing Site: San Francisco, California

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Nature of the Dispute: Customers vs. Member and Non-Member of NASD

**REPRESENTATION OF PARTIES**

For Claimants:

Michael Q. Eagan, Esq.  
Law Offices of Michael Q. Eagan  
San Francisco, California

For Respondent:

Robert T. Sullwold, Esq.  
Sullwold & Hughes  
San Francisco, California

**CASE INFORMATION**

Statement of Claim filed: June 30, 2003

Claimant Joseph S. Scher's Pre-Hearing Brief filed: October 25, 2004

Claimants' Uniform Submission Agreement signed: July 30, 2003

Statement of Answer filed by Respondent Banc of America Securities, LLC ("BAS"):  
September 25, 2003

Respondent BAS' Arbitration Brief filed: October 25, 2004

### **CASE SUMMARY**

Claimants alleged the following claims with respect to investments in various unspecified high tech and telecommunications stocks and bonds: 1) Negligent Misrepresentation; 2) Breach of Fiduciary Duty; 3) Constructive Fraud; 4) Negligence; and 5) Breach of Contract.

Respondent BAS denied Claimants' allegations of wrongdoing and denied any liability to Claimants. Respondent BAS also asserted affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested:

1. Compensatory damages in an amount subject to proof at hearing, including interest thereon;
2. Costs, including attorneys' fees to the extent allowable by law; and
3. Such other and further relief as the Panel deems just and proper.

Respondent BAS requested:

1. That the Statement of Claim be dismissed with prejudice, and Claimants take nothing thereby;
2. Costs, including reasonable attorneys' fees; and
3. Such other and further relief as the Panel may deem proper.

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

On October 2, 2003, Claimants and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Bank of America, N.A. was removed as a party in this matter as it is not an NASD member and did not sign an agreement to arbitrate.

Respondent BAS did not file with NASD Dispute Resolution ("NASD-DR") a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the NASD-DR Code of Arbitration Procedure ("the Code") and, having answered the Claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

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

1. All claims by Claimants are dismissed.
2. Each party shall bear its own costs, including attorney's fees.
3. 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 | = \$250.00 |
|--------------------------|------------|

#### **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           | = \$1,500.00        |
| Pre-Hearing Process Fee    | = \$ 750.00         |
| <u>Hearing Process Fee</u> | <u>= \$2,200.00</u> |
| Total Member Fees          | = \$4,450.00        |

#### **Adjournment Fees**

The following adjournment fees are assessed:

On or about May 26, 2004, the Panel granted the parties' request to postpone the June 21-25, 2004, hearing dates and assessed the \$1,000.00 postponement fee as follows: 50% to Claimants; and 50% to Respondent BAS.

#### **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 session with a single arbitrator @ \$450.00/session | =          | \$450.00    |
| Pre-hearing conference: November 4, 2004                                       | 1 session  |             |
| (2) Pre-hearing conference sessions with the Panel @ \$1,000.00/session        | =          | \$2,000.00  |
| Pre-hearing conferences: December 16, 2003                                     | 1 session  |             |
| June 22, 2004  | 1 session  |             |
| (17) Hearing sessions @ \$1,000.00/session                                     | =          | \$17,000.00 |
| Hearings: November 8, 2004   | 2 sessions |             |
| November 9, 2004   | 2 sessions |             |
| November 10, 2004  | 2 sessions |             |
| November 11, 2004  | 2 sessions |             |
| November 12, 2004  | 2 sessions |             |
| December 1, 2004   | 2 sessions |             |
| December 3, 2004   | 3 sessions |             |
| December 5, 2004   | 2 sessions |             |

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|                         |          |                    |
|-------------------------|----------|--------------------|
| <b>Total Forum Fees</b> | <b>=</b> | <b>\$19,450.00</b> |
|-------------------------|----------|--------------------|

The Panel assessed \$9,725.00 in forum fees jointly and severally to Claimants.

The Panel assessed \$9,725.00 in forum fees to Respondent BAS.

#### Fee Summary

1. Claimants are charged jointly and severally with the following fees and costs:

|                     |      |            |
|---------------------|------|------------|
| Initial Filing Fee  | = \$ | 250.00     |
| Adjournment Fee     | = \$ | 500.00     |
| Forum Fees          | = \$ | 9,725.00   |
| Total Fees          | = \$ | 10,475.00  |
| Less Payments       | = \$ | (1,250.00) |
| Balance Due NASD-DR | = \$ | 9,225.00   |

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

|                     |      |            |
|---------------------|------|------------|
| Member Fees         | = \$ | 4,450.00   |
| Adjournment Fee     | = \$ | 500.00     |
| Forum Fees          | = \$ | 9,725.00   |
| Total Fees          | = \$ | 14,675.00  |
| Less Payments       | = \$ | (4,450.00) |
| Balance Due NASD-DR | = \$ | 10,225.00  |

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**

|                           |   |                                    |
|---------------------------|---|------------------------------------|
| Gerald E. Ambinder        | - | Public Arbitrator, Presiding Chair |
| Marc Patrick Bouret, J.D. | - | Public Arbitrator                  |
| Linda H. Perry-Cabrera    | - | Non-Public Arbitrator              |

**Concurring Arbitrators' Signatures**



Gerald E. Ambinder  
Chair, Public Arbitrator

DEC 13 2004

Signature Date

Linda H. Perry-Cabrera  
Non-Public Arbitrator

Signature Date

**Dissenting Arbitrator's Signature**

Marc Patrick Bouret, J.D.  
Public Arbitrator

Signature Date

12/14/04  
Date of Service

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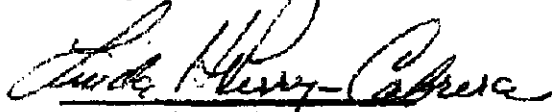
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Chair, Public Arbitrator

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

  
\_\_\_\_\_  
Linda H. Perry-Cabrera  
Non-Public Arbitrator

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

**Dissenting Arbitrator's Signature**

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Marc Patrick Bouret, J.D.  
Public Arbitrator

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Chair, Public Arbitrator

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Signature Date

\_\_\_\_\_  
Linda H. Perry-Cabrera  
Non-Public Arbitrator

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

**Dissenting Arbitrator's Signature**

*Marc Patrick Bouret, J.D.*

\_\_\_\_\_  
Marc Patrick Bouret, J.D.  
Public Arbitrator

*12-9-2004*  
\_\_\_\_\_  
Signature Date

*12/14/04*  
\_\_\_\_\_  
Date of Service