

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

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In the Matter of the Arbitration Between:

Bryan J. Herta and Janette M. Herta, Claimants v. Donaldson, Lufkin & Jenrette Securities Corporation n/k/a Pershing LLC, Respondent

Case Number: 03-05247

Hearing Site: Los Angeles, California

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Nature of the Dispute: Customers v. Member

**REPRESENTATION OF PARTIES**

For Claimants:

Roger P. Sugarman, Esq.  
Kegler, Brown, Hill & Ritter  
Columbus, Ohio

For Respondent:

Samuel A. Keesal, Jr., Esq.  
Elizabeth H. Lindh, Esq.  
Keesal, Young & Logan  
Long Beach, California

**CASE INFORMATION**

Statement of Claim filed: July 17, 2003

Claimants' Joint Uniform Submission Agreement signed: July 11, 2003

Statement of Answer and Motion to Dismiss filed by Respondent: October 3, 2003

Respondent's Uniform Submission Agreement signed: December 19, 2003

**CASE SUMMARY**

Claimants alleged breach of fiduciary duty, breach of contract, unsuitability, churning, violation of NASD and NYSE rules, and failure to supervise. Claimants' allegations involved the improper use of margin and transactions in unspecified securities.

Respondent denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and set forth various affirmative defenses.

**RELIEF REQUESTED**

Claimants requested \$659,484.76 in compensatory damages, disgorgement and restitution of all commissions, pre- and post-judgment interest, and costs, including attorney's fees.

Respondent requested dismissal of the Claimants' Statement of Claim in its entirety and costs.

**OTHER ISSUES CONSIDERED AND DECIDED**

On November 25, 2003, Claimants Bryan J. Herta and Janette M. Herta 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.

Pursuant to the Code of Arbitration Procedure IM-10100, the waiver of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

On October 3, 2003, Respondent filed a Motion to Dismiss. On November 26, 2003, Claimants filed a Memorandum in Opposition to Respondent's Motion to Dismiss. On February 20, 2004, Respondent withdrew its Motion to Dismiss.

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) The Panel finds Respondent liable for unsuitability and lack of supervision, but not for churning. Accordingly, Respondent is liable to and shall pay Claimants the sum of \$550,000.00 in compensatory damages.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 375.00
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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, the member firm Donaldson, Lufkin & Jenrette Securities Corporation n/k/a Pershing LLC is a party and the following fees are assessed:

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 4,000.00</u>
<b>Total Member Fees</b>	<b>= \$ 7,000.00</b>

#### **Adjournment Fees**

The following adjournment fees are assessed:

March 1-3, 2005 hearing adjournment requested by Claimant	Waived
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#### **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 Panel. The following fees are assessed:

2 Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$ 2,400.00
Pre-hearing conferences:	
February 6, 2004	1 session
August 26, 2004	1 session
7 Hearing sessions @ \$1,200.00/session	= \$ 8,400.00
Hearings:	
March 8, 2005	2 sessions
March 9, 2005	2 sessions
March 10, 2005	3 sessions
<b>Total Forum Fees</b>	<b>= \$10,800.00</b>

1. The Panel assessed \$4,800.00 of the forum fees jointly and severally to Claimants.
2. The Panel assessed \$4,800.00 of the forum fees to Respondent.

3. The Panel waived the \$1,200.00 forum fee in connection with the pre-hearing conference held August 26, 2004.

**Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Claimants requested 305 photocopies @ \$0.50 each:	= \$ 152.50
Respondent requested 160 photocopies @ \$0.50 each:	= \$ 80.00

**Fee Summary**

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

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 4,800.00
<u>Administrative Costs</u>	= \$ 152.50
Total Fees	= \$ 5,327.50
Less payments	= \$( 1,575.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,752.50</b>

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

Member Fees	= \$ 7,000.00
Forum Fees	= \$ 4,800.00
<u>Administrative Costs</u>	= \$ 80.00
Total Fees	= \$11,880.00
Less payments	= \$( 7,750.00)
<u>Less Unused Mediation Deposit</u>	= \$( 2,000.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 2,130.00</b>

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

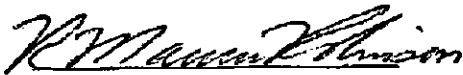
**ARBITRATION PANEL**

*R. Maurice Robinson*  
*Gloria J. Brewer*  
*June J. Vinci*

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*Public Arbitrator, Presiding Chair*  
*Public Arbitrator*  
*Non-Public Arbitrator*

**Concurring Arbitrators' Signatures**



R. Maurice Robinson  
Chair, Public Arbitrator

3-14-05

Signature Date

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Gloria J. Brewer  
Public Arbitrator

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

\_\_\_\_\_  
June J. Vinci  
Non-Public Arbitrator

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

March 15, 2005  
Date of Service

ARBITRATION PANEL

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*Public Arbitrator, Presiding Chair*

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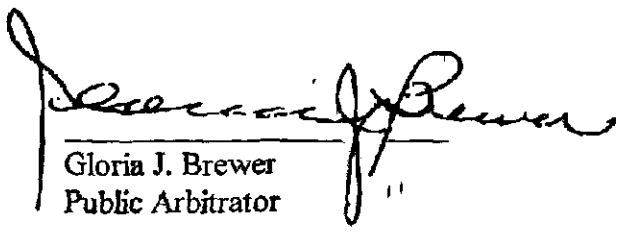
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*Non-Public Arbitrator*

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Chair, Public Arbitrator

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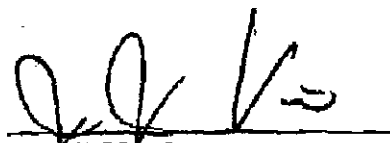
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Chair, Public Arbitrator

Signature Date

Gloria J. Brewer  
Public Arbitrator

Signature Date

  
June J. Vinci  
Non-Public Arbitrator

3/15/05  
Signature Date

March 15, 2005  
Date of Service