

**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between: )

Name of the Claimant )

John R. Gehlbach )

Case Number: 03-06129

Name of the Respondents )

First Security Investments, Inc. and )

Bryan Robert Brush )

Hearing Site: St. Louis, Missouri

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**NATURE OF DISPUTE**

Customer vs. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Phillip Montalvo, Esq. of the John R. Gehlbach Law Office, located in Lincoln, Illinois represented Claimant, John R. Gehlbach ("Gehlbach"), hereinafter referred to as "Claimant."

Brian A. Carlis, Esq. of the law firm Stark & Stark, located in Princeton, New Jersey, represented the Respondent, First Security Investments, Inc. ("First Security"), hereinafter collectively referred to as "Respondent."

Respondent Bryan Robert Brush ("Brush") did not appear in this arbitration matter.

**CASE INFORMATION**

Statement of Claim filed on or about August 22, 2003. Claimant Gehlbach signed the Uniform Submission Agreement on August 18, 2003.

Statement of Answer and Motion to Dismiss filed by Respondent First Security on October 17, 2003. Respondent First Security signed the Uniform Submission Agreement on October 15, 2003. Claimant filed a Response to Respondent First Security's Motion to Dismiss on or about October 31, 2003.

Claimant filed an Amended Statement of Claim on April 5, 2004. Respondent First Security did submit an Answer to Claimant's Amended Statement of Claim.

Respondent Brush did not submit a Statement of Answer in this matter.

### **CASE SUMMARY**

Claimant asserted the following causes of action: breach of contract, breach of fiduciary duty, failure to supervise, misrepresentations, churning and unauthorized trading. The causes of action relate to various stocks, including but not limited to, Double Click (DLCK), Creative Computers, Inc. ("MALL"), UBID, Inc. and InfoSeek Corp. (SEEK). Claimant asserted that these trades were unauthorized and were not suitable to Claimant's investment needs and objectives.

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

1. The Statement of Claim fails to state a claim upon which relief may be granted.
2. Claimant directed, approved and authorized each and every transaction in his account.
3. Claimant, by his conduct, and under all the circumstances of this case, is estopped from asserting any claims with respect to the transactions made in his account.
4. Claimant failed to mitigate any alleged damages.
5. Any alleged losses which may have occurred were the direct result of market conditions and other facts beyond the control of Respondent.
6. All transactions recommended to and made for or on behalf of Claimant were suitable for and in accordance with his investment objectives and financial condition.
7. Any duties owed by Respondent to Claimant were fully and faithfully carried out.
8. Respondent did not act with any intent to defraud Claimant or with reckless disregard of his interests.
9. There were no misrepresentations or omissions of material fact upon which Claimant relief to his detriment.
10. Claimant is barred, in whole or in part, from raising the claims asserted herein by the doctrines of ratification and affirmance or acquiescence in the conduct alleged.
11. Claimant's claims are barred, in whole or in part, by the applicable statutes of limitation.
12. At all times material herein, Claimant knew and was aware of the risks associated with his investments and voluntarily chose to assume those risks. As such, Claimant is barred and estopped from recovery. The risks which Claimant assumed were the direct and proximate result of his losses, if any.
13. To induce acceptance of Claimant's offer to purchase the investments, Claimant made various representations and warranties. Claimant is estopped from seeking recovery from Respondent on the basis of allegations that are inconsistent with these representations and warranties.
14. The Doctrine of Laches bars Claimant's claims.
15. Claimant did not reasonably rely on any matters, statements or omissions attributable to Respondent.
16. Respondent is not liable to Claimant because it had no duty, contractual or otherwise, to disclose or inform Claimant of any facts other than those which were disclosed, nor did Respondent breach any duty owed to Claimant, if such a duty existed.
17. The actions of Respondent are not the proximate cause of Claimant's alleged damages.

18. Respondent discharged its responsibilities in a professional and ethical manner and all of its actions were well within the parameters of accepted brokerage procedures and all exchange and governmental regulations.
19. To the extent any losses or diminution in the value of Claimant's account has occurred, such losses were the result of unforeseen market fluctuations and were within the risks assumed.
20. The damage alleged suffered by Claimant has no causal relationship with any act committed by or legally attributable to Respondent.
21. Respondent, at all times, discharged its responsibilities properly and in good faith in respect of all investments made by Claimant.
22. All allegations as to Respondent set forth in the Statement of Claim are specifically denied.
23. This claim is also barred by any applicable affirmative defenses as a matter of law or equity.
24. To the extent the Statement of Claim seeks damages for any alleged violation of the Rules of the NASD or any other securities industry self-regulatory organization, the Statement of Claim fails to state a claim upon which relief may be granted. There is no private right of action for any alleged violation of the rules of the self-regulatory organization.

#### **RELIEF REQUESTED**

Claimant Gehlbach requested compensatory damages in the amount of \$150,000.00, interest, attorney's fees and costs.

Respondent First Security requested denial and dismissal of all claims made in the Statement of Claim with prejudice, attorney's fees, cost, and for such further relief as Panel deems just and proper.

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

Upon review of the file and the representations made on behalf of the Claimant, the undersigned arbitrators (the "Panel") determined that Respondent, Bryan Robert Brush (Brush), was not properly served with the Statement of Claim and did not receive due notice of the hearing. In a letter dated March 24, 2003, it was confirmed that Claimant did not have an alternate address to which Respondent Brush would be served, and agreed to proceed with the arbitration without Brush. As a consequence, claims against Brush were not adjudicated, and Panel now dismisses this matter against Brush without prejudice.

In an Order dated March 16, 2004, the Panel denied Respondent's Motion to Dismiss and allowed Claimant to file an Amended Statement of Claim.

At the close of hearing, Claimant requested leave to submit an affidavit for attorney's fees. The Panel denied such request.

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, 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. Any and all claims asserted by Claimant, John R. Gehlbach, are denied.
2. Respondent, First Security Investments, Inc., is solely liable for and shall pay to Claimant, John R. Gehlbach, the sum of \$300.00 as reimbursement for the non-refundable NASD Dispute Resolution filing fee.
3. Parties shall bear their own costs, including attorneys' fees, except as specified herein.
4. Any and all relief not specifically addressed herein, including punitive 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	= \$ 300.00
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#### **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, First Security Investments, Inc. is a party and is assessed the following fees:

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: 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 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 @ \$1,125.00	= \$1,125.00
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Pre-hearing conference: March 11, 2004	1 session
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Two (2) Hearing sessions @ \$1,125.00	= \$2,250.00
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Hearing Dates: January 18, 2005	2 sessions
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Total Forum Fees	= \$3,375.00
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The Panel assessed 100% of the total forum fees in the amount of \$3,375.00 solely to Respondent, First Security Investments, Inc.

**FEF SUMMARY**

1. Claimant, John R. Gehlbach, is solely liable for:

Initial Filing Fee	= \$ 300.00
<u>Less payments</u>	<u>= \$1,425.00</u>
Refund Due from NASD Dispute Resolution	= \$1,125.00

2. Respondent, First Security Investments, Inc., is solely liable for:

Member Fees	= \$5,200.00
<u>Forum Fees</u>	<u>= \$3,375.00</u>
Total Fees	= \$8,575.00
<u>Less payments</u>	<u>= \$6,700.00</u>
Balance Due NASD Dispute Resolution	= \$1,875.00

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

**ARBITRATION PANEL**

Keith D. Patten, Esq.	-	Public Arbitrator, Presiding Chairperson
Richard L. Puhl	-	Public Arbitrator
Hugh V. Murray	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Keith D. Patten, Esq.  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
1/27/05  
Signature Date

\_\_\_\_\_  
Richard L. Puhl  
Public Arbitrator

\_\_\_\_\_  
1/26/05  
Signature Date

**Dissenting Arbitrator's Signature**

\_\_\_\_\_  
Hugh V. Murray  
Non-Public Arbitrator

\_\_\_\_\_  
1/25/05  
Signature Date

\_\_\_\_\_  
1/27/05  
Date of Service (For NASD Dispute Resolution office use only)

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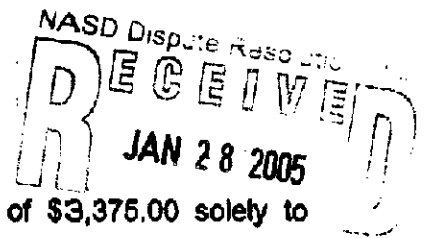
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**Dissenting Arbitrator's Signature**

*Hugh V. Murray*  
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Hugh V. Murray  
Non-Public Arbitrator

*1-25-05*  
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