
Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant

Michael Kostoff

Case Number: 04-04259

Names of the Respondents

Vincent Cervone

Yankee Financial, Inc.

Fleet Securities, Inc.

Hearing Site: Orlando, Florida

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

REPRESENTATION OF PARTIES

For Michael Kostoff, hereinafter referred to as "Claimant": Theodore M. Davis, Esq., Brooklyn, New York.

For Vincent Cervone, hereinafter referred to as "Respondent Cervone": Timothy Feil, Esq., Finkelstein & Feil, LLP, Garden City, New York.

For Yankee Financial, Inc., hereinafter referred to as "Respondent Yankee": Lawrence R. Gelber, Esq., Brooklyn, New York.

For Fleet Securities, Inc., hereinafter referred to as "Respondent Fleet": David L. Becker, Esq., Davidson & Grannum, LLP., Orangeburg, New York.

CASE INFORMATION

Statement of Claim filed on or about: June 9, 2004.

Claimant signed the Uniform Submission Agreement: June 9, 2004.

Statement of Answer and Motion to Dismiss filed by Respondent Yankee on or about: July 15, 2004.

Statement of Answer filed by Respondent Fleet on or about: August 3, 2004.

Statement of Answer filed by Respondent Cervone on or about: August 24, 2004.

Respondent Cervone signed the Uniform Submission Agreement: August 24, 2004

Respondent Fleet signed the Uniform Submission Agreement: September 20, 2004.

Respondent Yankee did not file an executed Uniform Submission Agreement.

Motion for Default of Respondent Cervone filed by Claimant on or about: August 25, 2004.

Amended Answer and Motion to Dismiss filed by Respondent Fleet on or about: September 14, 2004.

Motion in Support of Claimant's Amendment to the Statement of Claim with Amended

Statement of Claim filed by Claimant on or about: November 5, 2004.

Answer to Amended Statement of Claim filed by Respondent Cervone on or about: November 12, 2004.

Opposition to Claimant's Motion to Amend and Reply in Support of Respondent Fleet's Motion to Dismiss filed by Respondent Fleet on or about: November 22, 2004.

Motion to Quash Respondent Fleet's Opposition to Claimant's Amended Statement of Claim filed by Claimant on or about: November 22, 2004.

Response to Claimant's Motion to Quash filed by Respondent Fleet on or about: November 23, 2004.

Answer and Reply to Claimant's Amended Statement of Claim filed by Respondent Yankee on or about: December 6, 2004.

Motion to Quash Respondent Yankee's Tardy Answer to Claimant's Amendment to Statement of Claim filed by Claimant on or about: December 8, 2004.

Response to Claimant's Motion to Quash filed by Respondent Yankee on or about: December 8, 2004.

Motion to Supplement Statement of Claim with Supplement to the Amendment to the Statement of Claim and Motion to Add Richard F. Kresge as a Fourth Respondent filed by Claimant on or about: February 4, 2005.

Opposition to Claimant's Supplemental Motion to Amend the Statement of Claim filed by Respondent Yankee on or about: February 11, 2005.

Motion to Strike Claimant's Statement of Claim filed by Respondent Yankee on or about: February 14, 2005.

Opposition to Claimant's Supplemental Motion to Amend and its Support for Fleet's Motion to Dismiss filed by Respondent Fleet on or about: February 18, 2005.

Motion to Dismiss Damage Claim in Excess of \$3,500.00 filed by Respondent Yankee on or about: April 22, 2005.

Claimant's Memorandum Concerning April 29, 2005 Pre-hearing Conference filed on or about: April 28, 2005.

Supplement to Respondent Yankee's Motion to Dismiss Damage Claims in Excess of \$3,500.00 filed by Respondent Yankee on or about: May 2, 2005.

Reply to Claimant's Memorandum Concerning April 29, 2005 Pre-hearing Conference filed by Respondent Fleet on or about: May 10, 2005.

CASE SUMMARY

Claimant asserted the following causes of action: 1) suitability; 2) failure to supervise; 3) negligent misrepresentation; 4) unauthorized trading; 5) churning; 6) *respondeat superior*; 7) fair dealing; and 8) breach of fiduciary duty. The causes of action relate to the purchase and sale of highly speculative shares of stocks including Neomagic Corp., Netmanage Inc., Pointe Communications Corp., Pro-Dex Inc., Cypress Biosciences Inc., and Netcurrences Inc.

Unless specifically admitted in their Answers, Respondents denied the allegations made in the Statement of Claim and asserted various defenses.

RELIEF REQUESTED

Claimant requested: 1) compensatory damages in the amount of \$114,375.10; 2) punitive damages in the amount of \$500,000.00; 3) interest; 4) costs; 5) attorneys' fees; and 6) such other and further relief as the undersigned arbitrators (the "Panel") deemed just and proper.

Respondent Cervone requested: 1) dismissal of the claims in all respects, including the claim for punitive damages; and 2) that all disbursements and costs in defending this action be assessed

against Claimant, including NASD fees and attorneys' fees.

Respondent Yankee requested: 1) dismissal or denial of the claims; 2) reasonable costs, fees and expenses incurred, including NASD costs and surcharges, incidental costs and expenses, and reasonable attorneys' fees in an amount not less than \$12,500.00; and 3) such other and further relief as justice and equity require.

Respondent Fleet requested: 1) dismissal of all claims; and 2) costs.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about February 24, 2005, the Panel accepted Claimant's Amended Statement of Claim except Claimant's claim on abuse of the elderly.

On or about April 28, 2005, Claimant filed a notice of tentative settlement with Respondent Cervone and request to toll until the settlement terms were complete. At the evidentiary hearing, Claimant confirmed settlement with Respondent Cervone.

On or about May 18, 2005, the Panel denied Respondent Fleet's Motion to Dismiss.

On or about May 31, 2005, Claimant filed a notice of settlement as to Respondent Cervone and released Respondent Cervone as a party to the above-captioned arbitration proceeding.

On or about June 6, 2005, Respondent Yankee notified NASD Dispute Resolution that Claimant and Respondent Yankee had entered into a compromise resolution of this matter and that Respondent Yankee would no longer require the services of the Panel. At the evidentiary hearing, Claimant confirmed settlement with Respondent Yankee.

The Panel: 1) denied Claimant's Motion to Add Richard F. Kresge as a Fourth Respondent; and 2) denied Respondent Yankee's Motion to Dismiss Damage Claims in Excess of \$3,500.00.

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, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Fleet is liable and shall pay to Claimant compensatory damages in the amount of \$114,375.10, plus pre-judgment interest that shall accrue at the Florida statutory rate for the period of June 1, 2001 until paid.

2. Respondent Fleet is liable and shall pay to Claimant punitive damages in the amount of \$343,125.30. Punitive damages are awarded pursuant to Sections 517.211(6), 768.72, 786.737 and 768.725, Florida Statutes.
3. The Panel found by the testimony and exhibits presented that Respondent, U.S. Clearing, a division of Fleet Securities, Inc., contracted with Glen Michael Financial/Yankee requiring compliance with the rules of the NYSE and NASD for the handling of customers accounts. They in turn agreed to act as the clearing agent for respondents Glen Michael Financial/Yankee Financial and its broker Vincent Cervone. Under that contract Claimant became a third party beneficiary and Respondent had a duty to monitor the originating brokerage. Under the Florida "Blue Sky" Statutes, the rules and regulations of the Securities and Exchange Act, the clearing contract, and notice to this Claimant to act as the "Back Office" administrator for the former Co-Respondents, Claimant had a right to rely on Fleet for fair dealing. By this, Respondent U.S. Clearing/Fleet, had a duty to be aware of the Claimant's opening documents; and the obvious totally incompatible objectives as filed with the Respondent on a Respondent provided form. Respondent U.S. Clearing/Fleet equally had the duty to be aware of the malfunctioning of the Broker-Dealer Glen Michael Financial/Yankee Financial and Broker Vincent Cervone, and in matter of fact was so aware at all times during the duration of Claimant's Account. The enabling of this combination to continue as Yankee Financial was shown to fall squarely on Respondent U.S. Clearing/Fleet. It was a Fleet agent who, aware of the impending closing for cause of the Glen Michael office, not wishing to lose the business of this brokerage office, knowingly, willfully and wantonly conspired to bring together a successor Broker-Dealer so as to enable the offending Glen Michael Financial to change its' name to Yankee Financial to continue to defraud this Claimant. Throughout the association of U. S Clearing/ Fleet, and the offending Brokerage, Glen Michael Financial/Yankee, its' broker Vincent Cervone, Fleet was aware and under the circumstances had a duty to be aware of the constant churning of Claimant's account in unsuitable and unauthorized investments which is a statutory fraud in the State of Florida under Chapter 517. Indeed the Panel found that Fleet was the major factor in allowing the fleecing of Claimant's brokerage account and joined with the broker and broker-dealer in total violation of, Securities Exchange Act, rule 10b-5, and Florida Statutes 517, where mere negligence is the standard of liability.
4. Respondent Fleet is liable and shall pay to Claimant costs and attorneys' fees in amounts to be determined by a court of competent jurisdiction. Attorneys' fees are awarded pursuant to Chapter 517, Florida Statutes.
5. Any and all relief not specifically addressed herein 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:
The Panel waived the initial claim filing fee in the amount of \$375.00.

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. Accordingly, Respondents Fleet and Yankee are parties and member firms.

Respondent Fleet:

Member surcharge	= \$ 2,250.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 4,000.00</u>
Total Member Fees	= \$ 7,000.00

Respondent Yankee:

Member surcharge	= \$ 2,250.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 4,000.00</u>
Total Member Fees	= \$ 7,000.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

There were no adjournment fees assessed during these proceedings.

Three-Day Cancellation Fees

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

There were no three-day cancellation fees assessed during these proceedings.

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.

There were no injunctive relief fees assessed during these proceedings.

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:

Three (3) Pre-hearing sessions with Panel @ \$ 1,200.00 per session	= \$3,600.00
Pre-hearing conferences:	
December 6, 2004	1 session
February 24, 2005	1 session
May 18, 2005	1 session
Four (4) Hearing sessions @ \$1,200.00 per session	= \$4,800.00
Hearing Dates:	
June 14, 2005	2 sessions

June 15, 2005

2 sessions

Forum Fees = \$8,400.00

The Panel has assessed the total forum fees in the amount of \$8,400.00 to Respondent Fleet.

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

There were no administrative costs incurred during these proceedings.

Fee Summary

Respondent Yankee is solely liable for:

<u>Member Fees</u>	= \$7,000.00
<u>Total Fees</u>	= \$7,000.00
<u>Less payments</u>	= \$3,000.00
<u>Balance Due NASD Dispute Resolution</u>	= \$4,000.00

Respondent Fleet is solely liable for:

<u>Member Fees</u>	= \$ 7,000.00
<u>Forum Fees</u>	= \$ 8,400.00
<u>Total Fees</u>	= \$15,400.00
<u>Less payments</u>	= \$ 7,000.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 8,400.00

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

ARBITRATION PANEL

<i>W. A. Westlake</i>	-	<i>Public Arbitrator, Presiding Chairperson</i>
<i>William S. Glickfield, Esq.</i>	-	<i>Public Arbitrator</i>
<i>P. David Isenberg</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures

_____/s/_____
W. A. Westlake
Public Arbitrator, Presiding Chairperson

June 27, 2005
Signature Date

_____/s/_____
William S. Glickfield, Esq.
Public Arbitrator

June 27, 2005
Signature Date

/s/
P. David Isenberg
Non-Public Arbitrator

June 27, 2005
Signature Date

June 27, 2005
Date of Service (For NASD Dispute Resolution use only)

June 15, 2005

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William S. Glickfield, Esq.

P. David Isenberg

- *Public Arbitrator, Presiding Chairperson*
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- *Non-Public Arbitrator*

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W. A. Westlake

Public Arbitrator, Presiding Chairperson

Signature Date

William S. Glickfield, Esq.

Public Arbitrator

Signature Date

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June 15, 2005

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W. A. Westlake
Public Arbitrator, Presiding Chairperson

Signature Date

William S. Glickfield
William S. Glickfield, Esq.
Public Arbitrator

6-27-05
Signature Date

Jun. 27, 2005 11:55AM NASD

No. 1017 P. 8/8

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P. David Isenberg
Non-Public Arbitrator

6/27/05
Signature Date

Date of Service (For NASD Dispute Resolution use only)