

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Diana Lyn Bowles Nicholas, Claimant v. Alan Marcum and Northeast Securities, Inc.,
Respondents

Case Number: 04-05506

Hearing Site: San Francisco, California

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

REPRESENTATION OF PARTIES

For Claimant:

Leslie Schwaebe Akins, Esq.
Catherine L. Bailey, Esq.
Akins & Villavicencio, LLP
Carlsbad, California

For Respondent Alan Marcum:

William P. Torngren, Esq.
Law Offices of William P.
Torngren
Sacramento, California

For Respondent Northeast Securities, Inc.:

Charles M. O'Rourke, Esq.
O'Rourke and Lawlor
Woodbury, New York

CASE INFORMATION

Statement of Claim filed: July 29, 2004

Claimant's Uniform Submission Agreement signed: July 27, 2004

Statement of Answer filed by Respondent Alan Marcum: October 8, 2004

Respondent Alan Marcum's Uniform Submission Agreement signed: October 8, 2004

Amended Statement of Claim filed: January 20, 2005

Statement of Answer to Claimant's Amended Statement of Claim filed by Respondent Alan
Marcum: March 10, 2005

Statement of Answer to Claimant's Amended Statement of Claim filed by Respondent Northeast Securities, Inc.: April 30, 2005

Respondent Northeast Securities, Inc.'s Uniform Submission Agreement signed: March 7, 2005

CASE SUMMARY

In her initial Statement of Claim, Claimant alleged constructive fraud, negligence, fraud and deceit, and negligent misrepresentation of fact against Respondent Alan Marcum. Claimant's allegations involved various unspecified securities.

Respondent Alan Marcum denied the allegations of wrongdoing set forth in Claimant's Statement of Claim and asserted various affirmative defenses.

In her Amended Statement of Claim, Claimant made the following claims against Respondents Alan Marcum ("Marcum") and Northeast Securities, Inc. ("Northeast"):

- (1) breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing,
- (2) common law fraud/intentional misrepresentation,
- (3) constructive fraud,
- (4) fraudulent concealment,
- (5) negligent misrepresentation,
- (6) professional negligence,
- (7) breach of contract,
- (8) Sections 10(B) and 20 of the Securities Exchange Act of 1934 and Rule 10B-5 of the Securities Exchange Commission,
- (9) churning,
- (10) violation of California Corporations Code Sections 25501 and 25504,
- (11) violation of California Code of Regulations §§ 260 et seq.,
- (12) violation of California Unfair Business Practices Act, and
- (13) negligence.

Claimant's allegation involved stock including, but not limited to, Copper Mountain, I2 Technologies, Inktomi, Juniper, JDS Uniphase, Purchasepro.com, and Sandisk.

Respondent Marcum denied the allegations of wrongdoing set forth in Claimant's Amended Statement of Claim and asserted various affirmative defenses.

Respondent Northeast denied the allegations of wrongdoing set forth in Claimant's Amended Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In her Initial Statement of Claim against Respondent Marcum, Claimant requested \$600,000.00 in compensatory damages, \$1 million in exemplary damages, and costs, including attorney's fees.

Respondent Marcum requested dismissal of Claimant's Statement of Claim in its entirety, that all forum fees be assessed against Claimant, and costs.

In her Amended Statement of Claim against Respondents Marcum and Northeast, Claimant requested \$409,333.00 in compensatory damages, return of commissions and margin interest relating to the alleged churning, unspecified punitive and exemplary damages, interest and costs, including attorney's fees.

Respondent Marcum requested dismissal of Claimant's Amended Statement of Claim in its entirety, that all forum fees be assessed against Claimant, and costs.

Respondent Northeast requested dismissal of Claimant's Amended Statement of Claim in its entirety, that all forum fees be assessed against Claimant, and costs, including attorney's fees.

OTHER ISSUES CONSIDERED AND DECIDED

On October 14, 2004, Claimant and Claimant's 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 Claimant 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 January 20, 2005, Claimant filed an Amended Statement of Claim pursuant to NASD Code of Arbitration Procedure Rule 10328. The Amended Statement of Claim, among other things, added Respondent Northeast to this case. The sole respondent at that time, Marcum, did not oppose it. On February 24, 2005, the Panel consented to the filing of the Amended Statement of Claim.

On November 19, 2005, and November 23, 2005, Respondent Marcum and Respondent Northeast, respectively, filed a motion to dismiss all claims in Claimant's Amended Statement of Claim. On December 8, 2005, Claimant filed an opposition to these motions. On December 15, 2005, and December 14, 2005, Respondent Marcum and Respondent Northeast, respectively, filed a reply in support of their motions to dismiss. On December 23, 2005, the Panel held a

telephonic conference with the parties to hear oral argument on these motions. After due deliberation, the Panel made the following rulings: (1) With respect to Respondent Marcum's Motion to Dismiss, Claimant's eleventh and twelfth claims were dismissed with prejudice in this forum. (2) With respect to Respondent Northeast's Motion to Dismiss, Claimant's third, fourth, fifth, sixth, eighth, ninth (in so far as based upon Rule 10B-5 of the SEC), tenth, eleventh, twelfth and thirteenth claims were dismissed with prejudice in this forum.

In its Pre-hearing Brief, dated January 6, 2006, Respondent Northeast requested that the Panel reconsider its decision to deny its Motion to Dismiss with respect to Claimant's Breach of Fiduciary Duty claim. At the hearing, the Panel requested that Respondent Northeast and Claimant submit post-hearing briefs addressing the statute of limitations applicable to Claimant's Breach of Fiduciary Duty claim. On February 1, 2006, the requested post-hearing briefs were submitted. On February 7, 2006, the Panel deliberated in executive session and determined that the Motion to Dismiss Claimant's Breach of Fiduciary Duty claim was moot because Respondent Northeast was found liable on other claims.

On February 7, 2006, the Panel asked Claimant to submit a statement of attorneys' fees. Respondents were given an opportunity to respond to Claimant's statement. On February 14, 2006, Claimant's counsel submitted a statement of attorneys' fees and on February 20, 2006, Respondents filed responses. On February 24, 2006, Claimant's counsel submitted a supplemental statement. On March 1, 2006, the Panel deliberated in executive session and decided to deny Claimant's request for attorneys' fees.

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

- 1) Respondents are jointly and severally liable to and shall pay Claimant the sum of \$302,251.00 in compensatory damages and interest.
- 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 = waived

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 Northeast Securities, Inc., is a party and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,750.00</u>
Total Member Fees	= \$ 6,300.00

Merrill Lynch, Pierce, Fenner & Smith Incorporated employed Respondent Alan Marcum at the time of the events giving rise to this dispute and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,750.00</u>
Total Member Fees	= \$ 6,300.00

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 or the parties and the Panel. The following fees are assessed:

(1) Decision on discovery-related motions on the papers with one arbitrator
@ \$200.00/motion = \$ 200.00
Respondents submitted one discovery-related motion

(1) Pre-hearing conference session with a single arbitrator @ \$ 450.00/session = \$ 450.00
Pre-hearing conference: November 8, 2005 1 session

(2) Pre-hearing conference sessions with the Panel @ \$1,125.00/session = \$2,250.00
Pre-hearing conferences: June 29, 2005 1 session
December 23, 2005 1 session

(10) Hearing sessions @ \$1,125.00/session = \$11,250.00

Hearings:	January 23, 2006	2 sessions
	January 24, 2006	2 sessions
	January 25, 2006	2 sessions
	January 26, 2006	2 sessions
	January 27, 2006	2 sessions

Total Forum Fees = **\$14,150.00**

1. The Panel assessed \$1,550.00 in forum fees to Claimant.
2. The Panel assessed \$225.00 in forum fees to Respondent Northeast.
3. The Panel assessed the \$12,375.00 in forum fees jointly and severally to Respondents Northeast and Marcum.

Fee Summary

1. Claimant is charged with the following fees and costs:

Forum Fees	= \$1,550.00
<u>Less payments</u>	= \$ (0.00)
Balance Due NASD Dispute Resolution	= \$1,550.00

2. Respondent Northeast Securities, Inc. is charged with the following fees and costs:

Member Fees	= \$ 6,300.00
Forum Fees	= \$ 225.00
<u>Total Fees</u>	<u>= \$ 6,525.00</u>
<u>Less payments</u>	<u>= \$(6,525.00)</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents Northeast Securities, Inc. and Alan Marcum are jointly and severally charged with the following fees and costs:

Forum Fees	= \$12,375.00
<u>Less payments by Northeast Securities, Inc.</u>	<u>= \$ (2,025.00)</u>
Balance Due NASD Dispute Resolution	= \$10,350.00

4. Merrill Lynch, Pierce, Fenner & Smith Incorporated is charged with the following fees and costs:


Member Fees	= \$ 6,300.00
<u>Less payments</u>	<u>= \$ (8,550.00)</u>
Refund Due	= \$ (2,250.00)

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

Mark R. Topper	-	Public Arbitrator, Presiding Chair
Thomas J. LoSavio	-	Public Arbitrator
Paul D. Katerndahl	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


Mark R. Topper
Chair, Public Arbitrator

3/6/06
Signature Date

Thomas J. LoSavio
Public Arbitrator

Signature Date

Paul D. Katerndahl
Non-Public Arbitrator

Signature Date

3/7/06
Date of Service

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Mark R. Topper	-	Public Arbitrator, Presiding Chair
Thomas J. LoSavio	-	Public Arbitrator
Paul D. Katerndahl	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Mark R. Topper
Chair, Public Arbitrator



Thomas J. LoSavio
Public Arbitrator

Signature Date

3-6-07
Signature Date

Paul D. Katerndahl
Non-Public Arbitrator

Signature Date

3/7/06
Date of Service

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Thomas J. LoSavio	-	Public Arbitrator
Paul D. Katerndahl	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Mark R. Topper
Chair, Public Arbitrator

Signature Date

Thomas J. LoSavio
Public Arbitrator

Signature Date



Paul D. Katerndahl
Non-Public Arbitrator

3/6/06

Signature Date

3/7/06

Date of Service