

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

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In the Matter of the Arbitration Between:

Fox & Company Investments, Inc., Claimant v. SWS Securities a/k/a Southwest Securities, Inc.,  
Respondent

Case Number: 04-08477

Hearing Site: Phoenix, Arizona

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Nature of the Dispute: Member v. Member

**REPRESENTATION OF PARTIES**

For Claimant:

Timothy J. Thomason, Esq.  
Mariscal, Weeks, McIntyre &  
Friedlander  
Phoenix, Arizona

For Respondent:

Corbet F. Bryant, Jr., Esq.  
Carrington Coleman Sloman &  
Blumenthal & Fitzgerald  
Dallas, Texas

**CASE INFORMATION**

Statement of Claim filed: December 14, 2004

Claimant's Uniform Submission Agreement signed: December 2, 2004

Statement of Answer filed by Respondent: February 8, 2005

Respondent Uniform Submission Agreement signed: January 9, 2005

**CASE SUMMARY**

Claimant alleged contribution, breach of contract, breach of implied covenant of good faith and fair dealing and unjust enrichment. Claimant alleged that on or about December 26, 2001, an award was entered against Claimant and Respondent and certain other named individuals in NASD Arbitration Case No. 98-03778 Clubine v. Fox and Company Investments and Southwest Securities et al. The award was joint and several in the amount of \$995,742.00. Claimant alleged

that in order to keep doing business as a broker dealer, it was forced to pay the award. Claimant alleged that Respondent breached the 1987 Agreement by failing to contribute to the payment of the award despite demand. In addition, Claimant alleged that Respondent improperly deducted its own attorneys fees totaling over \$400,000.00, from payments made to Claimants pursuant to the 1987 Agreement in direct contravention of that Agreement.

Claimant alleged that Respondent acted as its clearing agent for 17 years and that Respondent wrongfully and unlawfully refused to transfer thousands of customer accounts in accordance with the parties 1998 Fully Disclosed Clearing Agreement from Respondent to Claimant's new clearing firm.

Respondent denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim.

### **RELIEF REQUESTED**

Claimant requested unspecified compensatory damages, an order directing Respondent to pay contribution to Claimant in an unspecified amount, an order directing Respondent to transfer the Claimant's customer accounts to NFS, an order directing Respondent to repay the costs and fees improperly collected by Respondent, and costs of this arbitration, including attorney's fees pursuant to A.R.S. 12-341-01.

Respondent requested dismissal of the Claimant's Statement of Claim in its entirety, and costs, including attorney's fees.

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

On or about April 29, 2005, Claimant filed a Motion to Amend the Statement of Claim to include a claim for damages for Respondent's wrongful withholding of monies paid and to be paid under the Parties clearing agreements. In addition, Claimant included a request for an Order directing Respondent to stop deducting from its payments to Claimant under the clearing agreements, Respondent's attorneys' fees and related expenses incurred in connection with this arbitration. On May 16, 2005 Respondent filed a Statement of Non-Opposition to the Motion to Amend the Statement of Claim.

At the hearing, the Parties mutually agreed that Respondent would voluntarily audit its accounts and refund to Claimant any litigation expenses that were wrongfully withheld under the clearing agreement.

*The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.*

## **FINDINGS AND CONCLUSIONS**

### **1. CONTRIBUTION**

This concerns Claimant's attempt to require Respondent to make contribution to Claimant for the payment Claimant made pursuant to a prior NASD Arbitration Award, 98-03778, (the "Clubine" case). The Panel finds it appropriate to award a payment by Respondent to Claimant of one-half of what Claimant paid to satisfy the award. The Panel concludes that there were essentially two parties in the "Clubine" arbitration: SWS Securities and the other three Respondents. Since Claimant paid \$162,353.00, Respondent shall pay to Claimant one-half of that amount. (\$81,176.50). The Panel finds that the award was rendered in the state of New York pursuant to an arbitration, and therefore the award is not covered by Texas law on contributions. Even if the Panel found that Texas law on contribution between joint tortfeasors applied, the Panel would not apply it in this case because it is not fair and equitable under the circumstances.

### **2. ALLEGED IMPROPERLY WITHHELD ATTORNEY'S FEES AND COSTS**

The Panel finds this claim is governed by paragraph 10 of the 1998 Correspondent Agreement between Claimant and Respondent. The Panel further finds that the 1998 Agreement indemnification provisions are applicable to the time that both correspondent agreements were in effect.

Under Paragraph 10, Respondent was entitled to be indemnified for its expenses for defending the "Clubine" claims and to deduct such amounts from monies otherwise owed to Claimant. However, any deduction for attorneys' fees and expenses relating to items other than the "Clubine" defense, including Case No. 04-08477 were not covered by the indemnification provisions. Any such charges should be returned to the Claimant.

### **3. ALLEGED FAILURE BY RESPONDENT TO TRANSFER ACCOUNTS TO NEW CLEARING FIRM**

The Panel finds that this claim is properly segmented into two parts. First, as to the request for transfer of individual customer accounts, the Panel finds no improper failure or refusal to transfer. Second, as to the effort by Claimant to have Respondent effect a complete conversion of Claimant's customer accounts, the Panel concludes that Respondent had sufficient cause not to complete the conversion request. Under paragraph 12 of the 1998 Correspondent Agreement, it was the Claimant's responsibility to fully comply with all requirements set forth; it failed to do so. Therefore the Panel finds no basis for awarding damages regarding this issue.

### **4. MUTUAL CLAIMS FOR ATTORNEY'S FEES AND COSTS**

Both Claimant and Respondent sought an award against the other for attorney's fees and costs relating to the prosecution or the defense of the claims in this matter. The Panel concludes that no substantial grounds have been shown to grant either request. Each party should bear their own costs.

#### 5. INTEREST

Interest is awarded to Claimant for the amount of contribution awarded at the rate of 5% per annum, commencing on December 26, 2001 until fully paid by Respondent.

### 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) Respondent is liable to and shall pay Claimant the sum of \$81,176.50 in compensatory damages.
- 2) Respondent is liable to and shall pay Claimant interest on the sum of \$81,176.50 at the rate of 5% per annum from December 26, 2001 until this award is paid in full.
- 3) The parties shall bear their respective costs, including attorney's fees.
- 4) 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	= \$ 500.00
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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 Fox & Company Investments, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 2,200.00
<b>Total Member Fees</b>	<b>= \$ 4,450.00</b>

The member firm Southwest Securities, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 2,200.00
<b>Total Member Fees</b>	<b>= \$ 4,450.00</b>

### **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) Pre-hearing conference session with the Panel @ \$1,000.00/session	= \$1,000.00
Pre-hearing conference: April 13, 2005 1 session	
(5) Hearing sessions @ \$1,000.00/session	= \$5,000.00
Hearings: December 13, 2005 2 sessions	
December 14, 2005 2 sessions	
December 15, 2005 1 session	
<b>Total Forum Fees</b>	<b>= \$ 6,000.00</b>

1. The Panel assessed \$3,000.00 of the forum fees Claimant.
2. The Panel assessed \$3,000.00 of the forum fees to Respondent.

**Fee Summary**

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

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 4,450.00
Forum Fees	= \$ 3,000.00
Total Fees	= \$ 7,950.00
Less payments	= \$(5,950.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 2,000.00</b>

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

Member Fees	= \$ 4,450.00
Forum Fees	= \$ 3,000.00
Total Fees	= \$ 7,450.00
Less payments	= \$(4,450.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,000.00</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

Eugene R. Nielson	-	Public Arbitrator, Presiding Chair
Allan D. Breyer	-	Public Arbitrator
Dwight W. Galda	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

  
Eugene R. Nielson  
Chair, Public Arbitrator

12-22-05  
Signature Date

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Allan D. Breyer  
Public Arbitrator

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

\_\_\_\_\_  
Dwight W. Galda  
Non-Public Arbitrator

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

12/23/05  
Date of Service

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Allan D. Breyer	-	Public Arbitrator
Dwight W. Galda	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Eugene R. Nielson  
Chair, Public Arbitrator

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Signature Date

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Allan D. Breyer  
Public Arbitrator

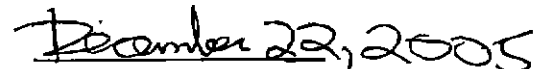
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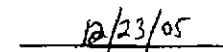
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Dwight W. Galda  
Non-Public Arbitrator

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Signature Date

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NASD Dispute Resolution  
Arbitration No. 04-08477  
Award Page 7 of 7

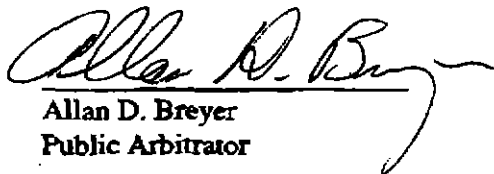
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Signature Date

  
\_\_\_\_\_  
Allan D. Breyer  
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12-27-05  
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Dwight W. Galda  
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Interest is awarded to Claimant for the amount of contribution awarded at the rate of 5% per annum, commencing on December 26, 2001 until fully paid by Respondent.

#### 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) Respondent is liable to and shall pay Claimant the sum of \$81,176.50 in compensatory damages.
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#### FEES

Pursuant to the Code, the following fees are assessed:

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<b>Total Member Fees</b>	<b>= \$ 4,450.00</b>

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Less payments	= \$(5,950.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 2,000.00</b>

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

Member Fees	= \$ 4,450.00
Forum Fees	= \$ 3,000.00
Total Fees	= \$ 7,450.00
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<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,000.00</b>

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ARBITRATION PANEL

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Chair, Public Arbitrator

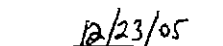
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