

**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

John David McBride (Claimant) vs. XCU Capital Corp., Inc. (Respondent)

Case Number: 05-06019

Hearing Site: Buffalo, New York

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

Claimant John David McBride hereinafter referred to as "Claimant": David K. Silverberg, Esq., Silverberg, McGorry, Sellers & Silverberg, Buffalo, NY.

Respondent XCU Capital Corp., Inc. hereinafter referred to, as "Respondent": Jeffrey S. Kob, Esq., Jeffrey S. Kob, APC, Coronado, CA.

**CASE INFORMATION**

Statement of Claim filed on or about: November 21, 2005.

Supplement & Addition to Statement of Claim filed on or about: December 5, 2005.

Claimant signed the Uniform Submission Agreement: November 18, 2005.

Statement of Answer filed by Respondents on or about: January 31, 2006.

Respondent signed the Uniform Submission Agreement: February 17, 2006.

**CASE SUMMARY**

Claimant asserted the following causes of action: that he was improperly assessed an \$11,000.00 charge back in relation to the Spiewak matter, commissions, misstatement on Form U-5, slander and libel.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

**RELIEF REQUESTED**

Claimant requested that:

- 1) Respondent pay to him the appropriate amount of commissions in relation to Mary Ellen Becker, Thomas Bannister and the Spiewaks, plus interest from the date the commissions came due;
- 2) Respondent refund Claimant the \$11,000.00 charge back in relation to the Spiewak matter, plus interest from the date of the charge back;

- 3) Respondent refund to Claimant the \$300.00 charge back, plus interest from the date of its assessment;
- 4) Respondent file an appropriate amended U-5 or in the alternative, that any reference to Claimant directly or obliquely be eliminated from his CRD and all records in relation to the Spiewak matter;
- 5) A finding of the arbitrators that the claim, allegation or information contained in the U-5 (Exhibit "8") and the CRD (Exhibit "4") is clearly erroneous and/or that Claimant was not involved in the alleged investment related sales practice violation in relation to the Spiewaks, and that the expungement of any reference of the Spiewak matter from Claimant's CRD would have no material adverse affect on investor protection, the integrity of the CRD system or regulatory requirements;
- 6) An appropriate direction to Respondent to require them to circulate and mail to each individual company or entity which received the original misrepresentation as to Claimant's academic credentials a correcting document, as well as an award to Claimant of punitive damages in an amount to be determined by the panel to compensate him for the wrong committed by Respondent;
- 7) An award to Claimant of a sum of money equal to the lost income and lost business opportunities resulting from his approximately five month absence from the securities industry as a result of Respondent's misstatement as to the reason for their terminated relationship;
- 8) An award of punitive damages in an amount to be determined by the arbitrators; and
- 9) Such further and different relief that the arbitrators deem just, proper and appropriate in the circumstances.

Respondent requested dismissal of the Statement of Claim and for such other relief as the arbitrators deem just and proper, such as, reasonable attorneys' fees and costs pursuant to contract.

In his Supplement and Addition to the Statement of Claim, Claimant requested that Respondent pay to him the appropriate amount of commissions due in relation to Mary Ellen Becker which is the sum of \$9,047.50, Thomas Bannister which is the sum of \$12,502.00 and the Spiewaks which is the sum of \$23,030.00, plus interest from the date the commissions came due.

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

The parties have 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. Respondent is liable for and shall pay to Claimant compensatory damages in the amount of \$12,585.00.
2. Respondent is liable for and shall pay to Claimant Attorneys' Fees in the amount of \$4,000.00 pursuant to the contractual agreement.
3. The Panel orders that the Form U-5 (Uniform Termination Notice For Securities Industry Registration), as amended, be amended by Respondent in the following respects: (i) The answer to Section 7(E)(1)(c) be changed from "yes" to "no"; (ii) The answer to Section 7(E)(3)(b) be changed from "no" to "yes"; (iii) reference to 7(E)(1)(c) in Disclosure Reporting Page (DRP) should be deleted; (iv) Item 1 of DRP should include Rosanne Spiewak; (v) describe allegations in Item 4 to read: "rollover investments were mishandled causing premature taxable events"; (vi) change product types in Item 5 as "ESOP proceeds transfer and annuity rollover".
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	= \$ 225.00
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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, XCU Capital Corp., Inc. is a party.

Member surcharge	= \$ 1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 1,700.00

#### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators that last four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel @ \$750.00/session	= \$ 750.00
Pre-hearing conference: April 21, 2006	1 session
Six (6) Hearing sessions @ \$750.00/session	= \$ 4,500.00
Hearing Dates: September 6, 2006	2 sessions
September 7, 2006	2 sessions
September 8, 2006	2 session

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Total Forum Fees = \$ 5,250.00

1. The Panel has assessed \$5,250.00 of the forum fees to Respondent.

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 225.00
Total Fees	= \$ 225.00
<u>Less payments</u>	= \$ 775.00
Refund Due Claimant	= \$ 550.00

2. Respondent is solely liable for:

Member Fees	= \$3,550.00
Forum Fees	= \$5,250.00
Total Fees	= \$8,800.00
<u>Less payments</u>	= \$2,625.00
Balance Due NASD Dispute Resolution	= \$6,175.00

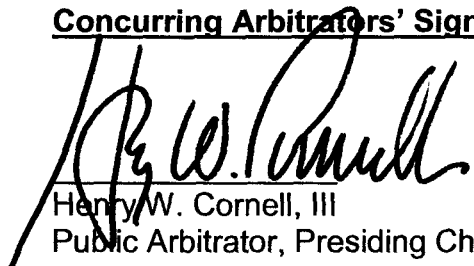
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Henry W. Cornell, III.	-	Public Arbitrator, Presiding Chairperson
F. Harris Nichols, Esq.	-	Public Arbitrator
Keith A. Maier, CFP	-	Non-Public Arbitrator

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

**Concurring Arbitrators' Signatures**

  
Henry W. Cornell, III  
Public Arbitrator, Presiding Chairperson

  
Signature Date

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F. Harris Nichols, Esq.  
Public Arbitrator

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Signature Date

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Keith A. Maier, CRP  
Non-Public Arbitrator

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Signature Date

October 4, 2006  
Date of Service (For NASD Dispute Resolution use only)

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F. Harris Nichols  
F. Harris Nichols, Esq.  
Public Arbitrator

October 3, 2006  
Signature Date

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Non-Public Arbitrator

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