

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

City of Joplin, Missouri,
Claimant,

v.

No. 95-00319

Westcap Securities, L.P.,
Westcap Securities Management, Inc.,
Westcap Government Securities, Inc., and
Westcap securities, Inc.,
Respondents.

REPRESENTATION OF PARTIES

City of Joplin, Missouri ("**Claimant**") was represented by W. Perry Brandt, Esq., of Stinson, Mag & Fizzell, P.C., Kansas City, Missouri.

Westcap Securities, L.P., Westcap Securities Management, Inc., Westcap Government Securities, Inc. n/k/a Westcap Securities, L.P., and Westcap securities, Inc. n/k/a Westcap Securities, L.P. ("**Westcap**") were represented by John L. Carter, Esq., of Vinson & Elkins, Houston, Texas.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about January 20, 1995. Claimant's Submission Agreement was signed on January 31, 1995. Claimant's first amended Statement of Claim was filed on or about February 13, 1995. Claimant's Second Amended Statement of Claim was filed on or about February 17, 1995. Claimant's Third Amended Statement of Claim was filed on or about March 28, 1995. Claimant's Amended Submission Agreement was signed on or about February 9, 1995.

Westcap's Statement of Answer was filed on or about March 31, 1995. Westcap's Submission Agreement was signed on March 28, 1995. Westcap's Supplemental Response to Claimant's Various Amended statements of Claim was filed on or about May 5, 1995.

HEARING INFORMATION

The hearing was held on December 18, 1995 for two (2) sessions, December 19, 1995 for three (3) sessions, and December 20, 1995 for three (3) sessions in Kansas City, Missouri for a total of eight (8) sessions.

CASE SUMMARY

Claimant alleged that Westcap: Breached its fiduciary duty through its failure to make full disclosure of all material facts, avoid misrepresentations, avoid conflicts of interest, and to act with the utmost good faith and loyalty to claimant; committed constructive fraud through its breach of the fiduciary relationship with Claimant; committed common law fraud through representations made that it either should have known were false or recklessly disregarded their truth or falsity; committed negligent misrepresentation in its recommendations to Claimant; violated §§ 10(b) and 20(a) of the Securities Exchange act of 1934 and SEC Rule 10b-5; violated §12(2) of the Securities act of 1933; recommended and purchased unsuitable investments for a municipality investing taxpayer's funds, and that were unsuited for Claimant's needs; violated the Missouri Securities Act, R.S.Mo. §409.101, et seq. and the Texas Securities act, Tex. Civ. Stat. Ann. art. 581-33; committed churning through the recommendations and sales of derivative securities which were excessive in size and frequency and which were made solely to derive commissions and profit to Westcap; violated §15(c)(1) and (2) of the Securities and Exchange Act; violated the Missouri Securities Act, R.S.Mo. §409.411; and violated the Texas Securities Act, Tex. Stat. Ann. art. 581-33. The allegations arose out of transactions in and recommendations of the following derivative securities: FNML Term Note; FNMA 93-165 SN; FHLMC 1615-SA; FHLMC 1590-N; and FHLMC 1577-SH.

Unless otherwise admitted, Westcap denied the allegations set forth in the Statement of Claim and the three amendments thereto. Westcap specifically stated that: Claimant furnished, in connection with the opening of its account, a Customer Agreement confirming its capacity and specifically representing to Westcap that it was authorized to purchase Collateralized Mortgage Obligations ("CMOs"); Claimant represented that it did not have an immediate need for payment of its investment funds that it invested in CMO securities; Westcap is not in the investment advising business and was paid no fee by the Claimant for investment advice; Westcap advised Claimant that there was both interest rate and extension risk with respect to the purchase of CMOs; Claimant did not pay the principal amount for the securities of which it complains; no loss has been occurred; Westcap disclosed the material facts known to it concerning the securities purchased by the claimant, and acted in good faith in its dealings with the Claimant; Westcap relied on Claimant's representations that it was a sophisticated and knowledgeable investor in the offer and sale of the CMOs; Westcap did not attempt to defraud nor did it defraud Claimant, did not knowingly make any untrue statements of material fact or knowingly make material omissions of fact in its statements with the Claimant; Westcap did not have any intention to defraud Claimant and did not do so; no cause of action exists under §12(2) of the Securities Act of 1933, other than those against original issuers of securities in public offerings; Claimant's management was aware that the allegations of unsuitability that it makes was false at the time it authorized this allegation to be made and the allegation is not made in good faith; and as an institutional investor, Claimant has no cause of action for unsuitability against a broker-dealer.

RELIEF REQUESTED

Claimant requested that the following relief be granted: An award that the purchases of the derivative securities be rescinded in full, and that Claimant be returned the entire principal amount of its investments; in the alternative, that claimant have an award against Westcap, and each of them, for the full amount of any and all damages it has or will suffer from its investment in the derivative

securities, in at least the amount of \$5,567,750; that Claimant be awarded punitive damages in an amount sufficient to punish and deter Westcap and others from similar conduct; that Claimant be awarded all its costs and attorneys' fees herein; and that claimant receive such other and further relief as the panel may deem appropriate.

Westcap requested that: All relief sought by the Claimant be denied and its claims be dismissed with prejudice to refiling; all costs, including attorneys' fees, incurred by Westcap in the defense of this proceeding be taxed and paid by the claimant; a suitable penalty be imposed upon the Claimant to deter it from filing other frivolous claims abusing the arbitration process established and maintained by the National Association of Securities Dealers, Inc.; and Westcap have such other and further relief, both at law and in equity, to which it may be entitled under the evidence.

OTHER ISSUES CONSIDERED & DECIDED

On or about March 31, 1995, Westcap filed a Notice of Request to Sanction Claimant. Claimant filed its response on or about May 16, 1995. After review of the pleadings, the exhibits, evidence and testimony presented at the hearing, and deliberation, the arbitrators denied Westcap's request.

On or about October 23, 1995 Westcap filed a Motion for Summary Judgement and supporting documents. Claimant filed its Memorandum in Opposition on or about November 10, 1995. After review of the motion and related supporting documentation, the response and supporting documentation, and deliberation, the arbitrators denied Westcap's motion.

On or about January 9, 1996, Westcap filed a Motion to Supplement the Record. On or about January 16, 1996, Claimant filed its Response. On or about January 18, 1996, Westcap filed a Reply to Claimant's Response to its motion. On or about February 20, 1996, Westcap filed a Second Motion to Supplement the Record. Claimant filed its Response and Countermotion to Supplement the Record on or about February 20, 1996. On or about March 1, 1996, Claimant filed a Second Motion to Supplement the Record. Westcap filed its Response and Conditional Response on or about March 7, 1996. On or about March 8, 1996, Claimant filed a Reply in support of its Second Motion to Supplement the Record. Westcap filed its response on or about March 8, 1996. After review of the aforementioned documents, and deliberation, the undersigned arbitrators granted the parties' requests/motions to supplement the record of this hearing.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims for relief/requests for damages are, and each of them, denied with prejudice.

Each party shall bear its own costs and expenses, including attorneys' fees, associated with this arbitration.

FORUM FEES

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each prehearing conference, if any. There were eight (8) sessions x \$1,500 = \$12,000 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$300 and shall **retain** as forum fees the hearing session deposit in the amount of \$1,500 previously deposited with the NASD by the Claimant.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$500 previously paid by Westcap Securities, L.P..

Additional forum fees in the amount of \$4,500 are assessed against the Claimant.

Additional forum fees in the amount of \$6,000 are assessed against Westcap.

Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

Murray S. Levin
Murray S. Levin
Public Arbitrator, Presiding Chair

s/s

April 13, 1996

Michael D. Fitzgerald
Michael D. Fitzgerald
Public Arbitrator

s/s

April 10, 1996

Will B. Tschudy
Will B. Tschudy
Industry Arbitrator

s/s

April 10, 1996