

NASD REGULATION, INC.  
AWARD

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In the Matter of the Arbitration Between

Name of Claimant

Andrew Kowalczyk

96-05226

Name of Respondents

Descap Securities, Inc.  
Michael C. Cammarota  
Robert M. Fine  
John T. Macklin  
Robert Tirschwell

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**REPRESENTATION**

For Claimant Andrew Kowalczyk ("Claimant") appeared Richard A. Roth, Esq., from the firm of Littman Krooks Roth & Ball, P.C., with offices located in New York, New York.

For Respondents Descap Securities, Inc. ("Descap"), Michael C. Cammarota ("Cammarota"), Robert N. Fine ("Fine"), John T. Macklin ("Macklin"), and Robert Tirschwell ("Tirschwell") (collectively referred to as "Respondents") appeared Thomas Flemming, Esq., from the firm of Olshan Grundman Frome & Rosenzweig, LLP, with offices located in New York, New York.

**CASE INFORMATION**

Claimant's Statement of Claim was filed on November 20, 1996.  
Claimant's Submission Agreement signed on November 19, 1996.  
Claimant's Reply to Counterclaims was filed on February 26, 1997.

Respondents' Joint Statement of Answer was filed on January 30, 1997.  
Respondents' Submission Agreements were signed on January 29, 1997.

**HEARING INFORMATION**

Pre-Hearing Conferences:	December 2, 1997	One Session	Panel
	December 3, 1997	One Session	

	December 10, 1997	One Session
	January 6, 1998	One Session
	January 9, 1998	One Session
	January 30, 1998	One Session
Hearing Date/Sessions:	February 10, 1998	Two Sessions
	February 11, 1998	Two Sessions
	February 12, 1998	Two Sessions
	February 20, 1998	Two Sessions
	March 23, 1998	Two Sessions
	March 25, 1998	Two Sessions
	May 1, 1998	Two Sessions
	June 29, 1998	Two Sessions
	July 1, 1998	Two Sessions
	July 2, 1998	Two Sessions
	July 24, 1998	Two Sessions

The hearings were conducted at the offices of NASD Regulation, Inc. located in New York, New York.

### CASE SUMMARY

Claimant alleged wrongful termination, breach of contract and breach of fiduciary duty. Claimant further alleged that Respondents, individually and collectively, acted intentionally and in bad faith and contrary to the terms of the stockholders agreement entered into by the parties dated as of August 20, 1991 (the "Stockholders' Agreement") when they terminated him as a partner, officer and employee of Descap.

In calculating his damages, Claimant argued that his total ownership interest in Descap approximated 28 1/3% for the following reasons: (i) he owned 13 1/3% of Descap shares pursuant to the Stockholders' Agreement and other agreements; (ii) he was entitled to receive an additional 10 % of Descap Shares upon a partially unfulfilled oral promise made by Cammarota to him; and (iii) he was entitled to exercise his option under the Stockholders' Agreement to purchase his proportionate share of 10% of Descap shares, (5%) which he would have exercised had he not been wrongfully terminated.

Respondents maintained that on May 17, 1996, Claimant, a Descap shareholder and the firm's "Head Trader", was terminated for cause pursuant to the Descap Shareholders' Agreement dated as of August 20, 1991 (the "Agreement"). Descap further maintained that it terminated Claimant because, among other things, he failed to obtain a principal's license as he was required to do pursuant to paragraph 16a(xiv) of the Agreement and he failed to "use his best efforts, skill and abilities" as required by paragraph 19 of the Agreement. Respondents asserted that Descap provided Claimant with notice of his breach in February, 1995 and he failed to cure, by failing to take the principal's examination and by failing to use his best efforts, skills and abilities. Respondents further asserted that, upon a termination for cause, under the Agreement, a shareholder, such

as Claimant, forfeits all interests in Descap, including any shares previously issued.

Respondents denied Claimant's charges of wrongful behavior, breach of fiduciary duty and breach of contract as well as his claim that he was promised 10% of the Descap's shares as a gift by Cammarota. Respondents contend that under the Agreement, they were entitled to terminate Claimant without cause and that, if they did so, they would be obligated to pay Claimant \$50,000 plus an additional \$209,092.00 as payment for his Descap shares, as calculated by Descap's independent accountants under the Agreement.

### **RELIEF REQUESTED**

Claimant requested the following relief:

- a. An award of \$2,763,818 in compensatory damages based upon the buy-out formula in paragraph 14(d) of the Stockholders Agreement, the profits withheld from him by Respondents, the value of his capital contribution and certain interest income withheld from him.
- b. An award of punitive damages in an amount to be determined by the Panel.
- c. An award of \$230,000 in attorneys' fees and costs.
- d. An award of interest at 9%, the statutory rate under New York Law.

Respondents requested that the panel dismiss the complaint in all respects and award Descap judgment on its counterclaims in an amount to be determined at trial, but in no event less than \$1,024,255.03.

### **OTHER ISSUES CONSIDERED & DECIDED**

The Parties have agreed to receive conformed copies of the Award while the original remains on file with NASD Regulation, Inc.

Claimant withdrew his application for interim injunctive relief.

The panel determined to deny Respondents' Motion to Dismiss.

### **AWARD**

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

1. Respondents, Descap Securities Inc., and Michael C. Cammarota, are hereby jointly and severally liable and shall pay Claimant the sum of \$591,000.00, plus interest at the rate of 9%, accruing from May 17, 1996

until payment.

2. Claimant's request for punitive damages is denied.
3. Respondents' counterclaims are dismissed in their entirety.
4. The parties shall bear their own costs, including attorneys' fees.
5. All other requests are hereby denied.

#### **OTHER COSTS**

Pursuant to Rule 10333 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 member surcharge paid by Descap Securities, Inc.

#### **FORUM FEES**

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fee paid by the Claimants, and the \$500.00 non-refundable filing fee paid by Respondents, and have assessed the following Forum Fees:

1 Pre-hearing conferences x \$1000.00 (Panel)	=	\$ 1,000.00
5 Pre-hearing conferences x \$300.00 (One Arbitrator)	=	\$ 1,500.00
22 Hearing sessions x \$1000.00	=	\$ 22,000.00
Total Forum Fees	=	\$24,500.00

1. Claimant is hereby liable for the sum of \$12,250.00 representing one half of the total forum fees assessed. Claimant previously deposited \$1,000.00, and, therefore shall pay the balance of 11,250.00.
2. Respondents Descap and Cammarota are hereby jointly and severally liable for the sum of \$12,250.00 representing one half of the total forum fees assessed. Respondent previously deposited \$5,600.00 and, therefore shall pay the balance of \$6,650.00.

Fees are payable to NASD Regulation, Inc.

**ARBITRATION PANEL**

Richard D. DeVita, Esq.-Public Chairperson  
John J. O'Neill, Esq.- Public Arbitrator  
Sheldon I. Levy, Esq.-Public Arbitrator


**CONCURRING ARBITRATOR'S SIGNATURES**



John J. O'Neill, Esq.  
Public Arbitrator

Date of decision: NOVEMBER 23, 1998

I, John J. O'Neill, Esq., 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.



John J. O'Neill, Esq.

**ARBITRATION PANEL**

Richard D. DeVita, Esq.-Public Chairperson  
John J. O'Neill, Esq.- Public Arbitrator  
Sheldon I. Levy, Esq.-Public Arbitrator

**CONCURRING ARBITRATOR'S SIGNATURES**



Richard D. DeVita, Esq.  
Chairperson-Public Arbitrator

Date of decision: NOVEMBER 23, 1998

I, Richard D. DeVita, Esq., 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.



Richard D. DeVita, Esq.