

**Award**  
**NASD Regulation, Inc.**

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In the Matter of the Arbitration Between

Names of Claimants

Stephen Goldfarb  
Birgit C. Wittkopf

Case No. 99-01176

Names of Respondents

Gruntal & Co., L.L.C.  
Michael McAfee

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**REPRESENTATION OF PARTIES**

For Stephen Goldfarb ("Goldfarb") and Birgit Wittkopf ("Wittkopf"), hereinafter collectively referred to as "Claimants": Richard A. Stephens, Esq., Boca Raton, Florida.

For Gruntal & Co., L.L.C. ("Gruntal") and Michael McAfee ("McAfee"), hereinafter collectively referred to as "Respondents": Ronald Shindler, Esq. of Fowler, White, Burnett, Hurley, Banick & Strickroot, Miami, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: April 26, 1999.

Claimants signed the Uniform Submission Agreement on: April 18, 1999.

Joint Statement of Answer filed by Respondents Gruntal and McAfee on or about: July, 16, 1999.

Respondent Gruntal's Uniform Submission Agreement signed on: July 12, 1999 by Charles Gerber, Esq., Senior Vice President, on behalf of the firm.

Respondent McAfee signed the Uniform Submission Agreement on: July 15, 1999.

**CASE SUMMARY**

Claimants alleged the following: Respondents took a valuable portfolio and after Claimant, Stephen Goldfarb, lost his business and became unemployed, wantonly used unauthorized trading in speculative stocks and other fraudulent and deceptive practices and overcharges to totally destroy Claimants' account. Among the other fraudulent practices alleged are the Respondents' failure to follow instructions on preserving a minimum balance in the account, failure to follow instructions to send copies of monthly statements to Claimants' accountant, breach of a settlement agreement, fraudulent misrepresentations and omissions, buying unsuitable securities, and churning. Based upon the foregoing, Claimants alleged the following causes of action: violations of the Securities Exchange Act of 1934, Section 10(b)

and Rule 10b-5 thereunder, common law fraud and breach of fiduciary duty, violations of NASD and New York Stock Exchange rules, churning, unsuitability, unauthorized trading, breach of contract, breach of the implied covenant of good faith and fair dealings, negligent supervision, "control person" liability, and respondeat superior.

Unless specifically admitted in their Statement of Answer, Respondents Gruntal and McAfee denied the allegations of wrongdoing contained in the Statement of Claim and asserted the following affirmative defenses: Claimants failed to state a cause of action against Respondents; Respondents acted in compliance with all applicable rules and regulations; Claimants are estopped by their conduct from maintaining this action against Respondents; the Statement of Claim is barred by the doctrines of ratification and affirmance; the injuries, if any, alleged to have been sustained by Claimants were caused, in whole or in part, by Claimants; Respondent Gruntal properly, diligently, and adequately supervised Respondent McAfee; The Statement of Claim is barred by the doctrine of laches; the Statement of Claim is barred by the applicable statutes of limitation; Claimants did not reasonably rely, to their detriment, upon any representation or action made by Respondents; the transactions complained of in the Statement of Claim were duly authorized by Claimants, who, at all times were in sole control of the assets in the account; Claimants failed to mitigate their damages; Respondent Gruntal and its agents did not make unsuitable recommendations with respect to the investment objectives of Claimants; Claimants' claims are barred, in whole or in part, by their assumption of acceptance of the risk of loss; Claimants, through their acts and deeds, waived their right to maintain this action against Respondents; Claimants are not entitled to attorneys' fees under any statute, law or contract; Claimants are not entitled to pre-judgment interest or costs; no claim for "lost profit" can be permitted as a matter of law since such damages are not reasonably certain and are based on speculative assumptions; and, Respondents' conduct was not outrageous, wanton or malicious and did not rise to the level where punitive damages should be awarded by the arbitration panel.

#### **RELIEF REQUESTED**

Claimants requested the following: compensatory damages in the amount of \$440,000.00; punitive damages in the amount of \$2,000,000.00; pre-judgment interest; attorneys' fees; other costs; referral to the NASD, NYSE, SEC, Commonwealth of Puerto Rico Attorney General and New York State Attorney General for investigation of Respondents; and, such other relief deemed appropriate by the panel. In addition, if the arbitrators render a judgment based upon fraud, Claimants requested that "actual fraud" and/or "fraud while acting in fiduciary capacity" be mentioned, specifically, as the basis in any written judgment to survive any discharge in bankruptcy (11 U.S.C. Sec. 523(a)) if the Respondents file bankruptcy petitions.

Respondents requested a dismissal of the Statement of Claim and that Respondents be awarded their costs in defending this claim.

### **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, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents are found liable, jointly and severally, and shall pay to Claimants the sum of \$208,000.00.
2. Respondents are found liable, jointly and severally, and shall pay to Claimants pre-judgment interest in the amount of \$37,440.00.
3. Respondent Gruntal is found liable and shall pay to Claimants punitive damages in the amount of \$120,000.00, pursuant to Mastrobuono v. Shearson.
4. Respondent McAfee is found liable and shall pay to Claimants punitive damages in the amount of \$30,000.00, pursuant to Mastrobuono v. Shearson.
5. Respondent Gruntal is found liable and shall pay to Claimants their expert witness and transcription fees in the amount of \$11,609.27.
6. All other requests for relief not specifically addressed herein are denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$250.00
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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. In this matter, the member firm, Gruntal, is a party.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$300.00	= \$300.00
Pre-hearing conference date: November 16, 1999 1 session	
One (1) Pre-hearing session with the Panel x \$1,000.00	= \$1,000.00
Pre-hearing conference date: November 4, 1999 1 session	
Nineteen (19) Hearing sessions x \$1,000.00	= \$19,000.00
Hearing dates: February 22, 2000 2 sessions	
February 23, 2000 2 sessions	
February 24, 2000 2 sessions	
February 25, 2000 2 sessions	
February 28, 2000 2 sessions	
April 12, 2000 2 sessions	
April 13, 2000 1 session	
April 17, 2000 2 sessions	
April 18, 2000 2 sessions	
April 19, 2000 2 sessions	
Total Forum fees:	= \$20,300.00

The Panel has assessed the total forum fees of \$20,300.00 jointly and severally to Respondents Gruntal and McAfee.

### **Fee Summary**

Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$250.00
Total Fees	= \$250.00
Less payments	= \$250.00
Balance Due NASD Regulation, Inc.	= \$ 0.00

Respondent Gruntal be and hereby is solely liable for:

Member Fees	= \$7,600.00
Total Fees	= \$7,600.00
Less payments	= \$7,600.00
Balance Due NASD Regulation, Inc.	= \$ 0.00

Respondents Gruntal and McAfee be and hereby are jointly and severally liable for:

Forum Fees	= \$20,300.00
Total Fees	= \$20,300.00
Less payments	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$20,300.00

All balances are due and payable to NASD Regulation, Inc.

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s/\_\_\_\_\_  
Richard J. Kaplan, Esq.  
(Public Chairperson)

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

\_\_\_\_\_/s/\_\_\_\_\_  
Alex Bigelow  
(Industry Panelist)

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

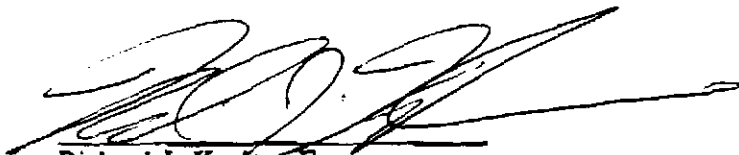
\_\_\_\_\_/s/\_\_\_\_\_  
Jerrold Levine  
(Public Panelist)

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

May 26, 2000  
Date of Service (For NASD office use only)

All balances are due and payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures



Richard J. Kaplan, Esq.  
(Public Chairperson)

5/17/00  
Signature Date

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Alex Bigelow  
(Industry Panelist)

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Signature Date

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Jerrold Levine  
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(Public Chairperson)

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Alex Bigelow  
(Industry Panelist)

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Signature Date

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Terrold Levine  
(Public Panelist)

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Signature Date

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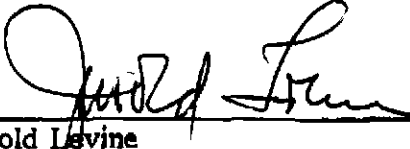
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