

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Paul Mullen, Trustee, American Restoration  
& Waterproofing, Inc. Defined Benefit Pension Plan,  
Claimant/Counter-Respondent,

and

Case Number: 99-02596  
Hearing Site: Oklahoma City,  
Oklahoma

Azmi Yacoub Fakhoury and Everen Securities, Inc.,  
n/k/a First Union Securities Inc.,  
Respondents/Counter-Claimants.

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**REPRESENTATION OF PARTIES**

Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan ("Mullen"): John E. Dowdell, Esq., William W. O'Connor, Esq. and Angela Freeman Porter, Esq. of the firm of Norman Wohlgermuth Chandler & Dowdell, located in Tulsa, Oklahoma.

Respondent/Counter-Claimants Everen Securities, Inc., n/k/a First Union Securities Inc., ("Everen") and Azmi Yacoub Fakhoury ("Fakhoury"): Retta A. Miller, Esq. and James McCown, Esq. of the firm of Jackson Walker, LLP, located in Dallas, Texas.

**CASE INFORMATION**

Statement of Claim filed on or about: July 27, 1999.

Paul Mullen, as Trustee, signed the Uniform Submission Agreement on: May 28, 1999.

Everen and Fakhoury jointly filed their Statement of Answer on or about: September 16, 1999.

Janet L. Reali, Senior Executive Vice President of Everen signed the Uniform Submission Agreement on: August 9, 1999.

Fakhoury signed the Uniform Submission Agreement on August 30, 1999.

Everen and Fakhoury filed a Counterclaim on November 4, 1999.

Mullen filed a Reply to Counter Claim on November 17, 1999.

Mullen's Amended Statement of Claim was filed on or about: November 11, 1999.

### CASE SUMMARY

Mullen asserted the following causes of action: Unsuitability; Lost Opportunity; Common Law Fraud; Breach of Fiduciary Duty; Churning; Violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5; and Failure to Supervise. Mullen's causes of action relate to the purchase of common stock, the improper use of a margin account and the selection of stocks that were undiversified and risky.

Everen Securities and Fakhoury denied the allegations set forth in the Statement of Claim and asserted the following defenses:

1. Mullen authorized and approved the transactions in the account and should be estopped from contesting the trades at issue;
2. Mullen ratified the trades in his account and should be estopped from contesting the trades at issue;
3. Mullen's claims are barred by his own negligence, which exceeded any alleged negligence of Everen and Fakhoury;
4. Mullen's Statement of Claim fails to state a claim upon which relief can be granted;
5. Mullen assumed the risks associated with the securities in his account;
6. Mullen's failure to complain in a timely manner and his prior conduct was tantamount to a waiver of the claims asserted against Everen and Fakhoury;
7. Mullen's claims are barred by laches;
8. Mullen failed to take appropriate steps to mitigate his losses;
9. Mullen agreed to indemnify and hold harmless Everen and Fakhoury from negligent acts taken at his direction; and,
10. Mullen's claims are barred by the doctrine of unclean hands.

Everen and Fakhoury's counterclaim alleged that Mullen, as part of the Securities Agreement and Fiduciary Certification he signed, agreed to indemnify and hold Everen and Fakhoury harmless for all actions taken at his request.

Mullen denied the allegations set forth in the Statement of Counterclaim and asserted the following defenses:

1. The counterclaim is barred by Everen and Fakhoury's knowing and willful violation of the federal securities laws;
2. The counterclaim is barred by fraudulent conduct;
3. The wrongful nature of Everen and Fakhoury's conduct bars the counterclaim;
4. Everen and Fakhoury's counterclaim is barred by their own negligence, which exceeded any alleged negligence of Claimant.
5. The counterclaim is barred by the doctrine of unclean hands.

### **RELIEF REQUESTED**

Mullen requested:

Compensatory Damages	\$430,887.23
Loss Opportunity Damages	\$297,334.98
Punitive Damages	unspecified
Interest	unspecified
Attorneys' Fees	unspecified
Other Cost	unspecified

Mullen also requested such other relief as the panel deemed just and appropriate.

Everen Securities and Fakhoury request that Mullen's claim be denied in its entirety, and that they be awarded attorney's fees, costs, and any other relief to which they may be entitled. On their counterclaim, they requested indemnification for any damages awarded to Mullen, as well as indemnification for all costs and expenses incurred, including attorneys' fees.

Mullen requested that the counterclaim be denied in its entirety and for such other relief to which he may be entitled.

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

Mullen filed a Motion for Sanctions for failure to produce documents on or about March 8, 2001. On March 22, 2001, Everen and Fakhoury filed a response to the Motion for Sanctions. On March 23, 2001, Mullen filed a Reply. On March 28, 2001, the panel determined that both parties were to furnish all documents requested by the other side no later than April 12, 2001, unless proper objections were filed and allowed by the panel. In addition, the Motion would be given consideration at the regular hearing.

The panel determined that the Everen and Fakhoury were less responsive in furnishing documents than Mullen, and that in at least one case, a key document was withheld from Mullen. Therefore, the panel granted Mullen's Motion for Sanctions and awarded the sums below.

### **AWARD**

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

1. The claim filed by Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan against Respondent/Counter-Claimants Everen Securities Inc., n/k/a First Union Securities Inc., and Azmi Yacoub

Fakhoury is dismissed and denied in its entirety;

2. The Counterclaim filed by Respondent/Counter-Claimants Everen Securities Inc., n/k/a First Union Securities Inc., and Azmi Yacoub Fakhoury against Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan is dismissed and denied in its entirety;
3. For the Motion for Sanctions, Respondent/Counter-Claimants Everen Securities Inc., n/k/a First Union Securities Inc., and Azmi Yacoub Fakhoury are jointly and severally liable for and shall pay to the Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan, the sum of \$50,000.00 as reasonable attorneys' fees incurred by the Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan. In deciding to award attorneys' fees as sanctions in this matter, the panel considered the arguments presented by the parties, as well as the documents filed on their behalf and the Code of Arbitration Procedure, and determined that authority existed for an award of reasonable attorneys' fees to the Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan;
4. In addition, Respondent/Counter-Claimants Everen Securities Inc., n/k/a First Union Securities Inc., and Azmi Yacoub Fakhoury are jointly and severally liable for and shall pay to the Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan, the sum of \$20,194.17 as reasonable expenses incurred in pursuing discovery and the Motion for Sanctions;
5. Except as otherwise specified herein, each party shall bear its own costs of arbitration, including any additional attorneys' fees; and,
6. Any and all relief not specifically awarded is denied.

#### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial Claim Filing Fee	= \$ 375.00
Counter Claim Filing Fee	= \$1,250.00

### **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 is a party.

Member surcharge	= \$2,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$3,500.00
Total Member Fees	= \$6,100.00

### **Adjournment Fees**

Adjournments requested during these proceedings: Adjournment by Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan for the Hearing Dates of October 4-6, 2000 = \$ 1,200.00

### **Forum Fees and Assessments**

The panel has the authority to assess 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 panel x \$1200.00	= \$ 1,200.00
Pre-hearing Conference: February 15, 2000 1 session	
Five (5) Hearing sessions x \$1200.00	= \$ 6,000.00
Hearing Dates: June 12, 2001 2 sessions	
June 13, 2001 2 sessions	
June 14, 2001 1 session	
Total Forum Fees	= \$ 7,200.00

The Panel has assessed the entire \$ 7,200.00 in Forum Fees jointly and severally against Respondent/Counter-Claimants Everen Securities Inc., n/k/a First Union Securities Inc., and Azmi Yacoub Fakhoury

### **FEE SUMMARY**

Claimant/Counter-Respondent Paul Mullen, as Trustee of the American Restoration & Waterproofing, Inc., Defined Benefit Pension Plan is solely liable for:

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Initial Filing Fee	= \$ 375.00
<u>Adjournment Fee</u>	= \$ 1,200.00
Total Fees	= \$ 1,575.00
<u>Less payments</u>	= \$ 2,775.00
Balance Refunded by NASD Dispute Resolution, Inc.	= \$ 1,200.00

Respondent/Counter-Claimants Everen Securities, Inc. n/k/a First Union Securities Inc. is solely liable for:

Member Fees	= \$ 6,100.00
<u>Less payments</u>	= \$ 6,100.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 0

Respondent/Counter-Claimants Everen Securities Inc. and Azmi Yacoub Fakhoury are jointly and severally liable for

Counterclaim Filing Fee	= \$ 1,250.00
<u>Forum Fees</u>	= \$ 7,200.00
Total Fee	= \$ 8,450.00
<u>Less Payments</u>	= \$ 0
Balance Due NASD Dispute Resolution, Inc.	= \$ 8,450.00

All balances are due to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

Robert D. Garrett, Esq. - Public Arbitrator, Presiding Chair  
Irvin L. Faught, Esq. - Public Arbitrator, Panelist  
Roger D. Minney, CPA - Non-Public Arbitrator, Panelist

**Concurring Arbitrators' Signatures**



Robert D. Garrett, Esq.  
Public Arbitrator, Presiding Chair

8/17/01  
Signature Date

Irvin L. Faught, Esq.  
Public Arbitrator, Panelist

Signature Date

Roger D. Minney, CPA  
Non-Public Arbitrator, Panelist

Signature Date

Date of Service (For NASD-Dispute Resolution office use only) August 22, 2001

NASD Dispute Resolution, Inc.  
 Arbitration Case # 99-02596  
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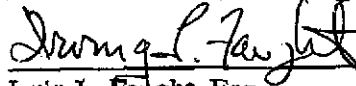
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 Public Arbitrator, Presiding Chair



Irvin L. Faught, Esq.  
 Public Arbitrator, Panelist

Signature Date

8/21/01

Signature Date

Roger D. Minney, CPA  
 Non-Public Arbitrator, Panelist

Signature Date

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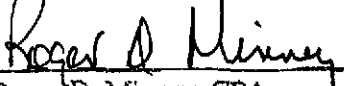
#### Concurring Arbitrators' Signatures

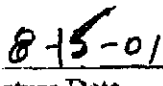
Robert D. Garrett, Esq.  
Public Arbitrator, Presiding Chair

Signature Date

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Public Arbitrator, Panelist

Signature Date

  
Roger D. Minney, CPA  
Non-Public Arbitrator, Panelist

  
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Date of Service (For NASD-Dispute Resolution office use only) August 22, 2001