

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Pamela M. Claywell and Douglas A. Peck, (Claimants) vs. Bear Stearns & Co., Inc. and David Fresne, (Respondents)

Case Number: 99-03191

Hearing Site: Boston, Massachusetts

REPRESENTATION OF PARTIES

Claimants, Pamela M. Claywell ("Claywell") and Douglas A. Peck ("Peck"), hereinafter collectively referred to as "Claimants": Howard M. Rosenfield, Esq., a sole practitioner, Avon, CT.

Respondent, Bear Stearns & Co., Inc. ("Bear"): Christopher P. Litterio, Esq., Shapiro, Israel & Weiner, P.C., Boston, MA.

Respondent, David Fresne ("Fresne"), appeared *pro se*. Previously represented by: David A. Gehn, Esq., Gusrae, Kaplan & Bruno, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: July 8, 1999.

Claywell signed the Uniform Submission Agreement: June 27, 1999.

Peck signed the Uniform Submission Agreement: June 8, 1999.

Statement of Answer filed by Bear on or about: November 29, 1999.

Bear did not sign a Uniform Submission Agreement.

Statement of Answer filed by Fresne on or about: March 14, 2000.

Fresne did not sign a Uniform Submission Agreement.

CASE SUMMARY

Claimants asserted the following causes of action: violation of Rule 3040 of the NASD Rules of Conduct; selling away; misrepresentation; unsuitability; breach of fiduciary duties; failure to supervise; violations of industry rules; agency and control person liability; breach of contract; negligence and gross negligence; and common law fraud. Claimants' claim involved the securities of Grupo Sidek and Mad Martha's Ice Cream.

Unless specifically admitted in its Answer, Bear denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to assert claims upon which relief may be granted; Bear denies that it owed Claimants fiduciary duties, or that it breached such duties if owed; Claimants' contributory negligence bars their recovery in whole or in part; Bear denies that it engaged in common law fraud; Bear acted in good faith without any culpable participation and did not directly or indirectly induce the alleged acts constituting the alleged violations; Bear implemented, maintained, and diligently enforced a reasonable, adequate, and proper system of supervision and internal controls in compliance with all applicable rules and regulations; Claimants' claims are barred by the applicable statutes of limitations; and Claimants' claims are barred by the doctrines of estoppel, waiver, laches, ratification, and assumption of risk.

Unless specifically admitted in his Answer, Fresne denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a basis or claim upon which relief may be granted; Claimants were advised of and assumed the risks of market fluctuation; the doctrine of laches bars this claim; Claimants willfully and intentionally ratified the trades in their accounts by accepting the confirmations and statements without protest, and by affirmatively deciding to retain the securities purchased; to the extent that any losses or diminution in value of Claimants' securities may have occurred, such losses were the result of unforeseen market fluctuations and were within the risks assumed by Claimants; Claimants have failed to compute properly the alleged damages and, accordingly, seek a windfall; Claimants failed to mitigate damages; and Claimants' claims are barred by Claimants' own contributory negligence.

RELIEF REQUESTED

Claimants requested:

- a. Compensatory damages in the amount of \$129,382.00 for Claywell and \$68,000.00 for Peck pursuant to the Miley vs. Oppenheimer Well-Managed Account calculation, along with "make whole award" attorneys' fees of \$65,984.00 for Claywell and \$34,000.00 for Peck, for a total of \$194,073.00 for Claywell and \$102,000.00 for Peck;
- b. Pre- and post-award interest;
- c. Punitive damages in such amount as the Panel deems appropriate to deter Respondents from future acts of misconduct;

- d. Claimants' reasonable attorneys' fees with such amount to be determined by a court of competent jurisdiction in a confirmation proceeding following the Award by a Panel in this matter where applicable, pursuant to the Florida Arbitration Code and/or the Federal Arbitration Act, and as mandated by the decisions of the Supreme Court of Florida and Florida's lower appellate courts; and
- e. Payment of all of Claimants' costs, expenses, and disbursements, including reasonable attorneys' fees in pursuing this claim;

Bear requested that Claimants' claims be dismissed in their entirety.

Fresne requested an Award:

- a. Denying all claims in the Statement of Claim;
- b. Assessing the costs of this proceeding against Claimant, inclusive of Fresne's attorneys' fees; and
- c. All such other and further relief as the Panel deems just and necessary.

OTHER ISSUES CONSIDERED AND DECIDED

Bear and Fresne did not file with NASD Dispute Resolution, Inc. properly executed submissions to arbitration but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

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. Bear and Fresne be and hereby are jointly and severally liable for and shall pay to Claywell the sum of \$40,000.00 as compensatory damages, plus interest at the rate of 10% beginning to accrue 30 days after the date that this Award is issued until date of payment in full.
2. Peck's claims are hereby dismissed in their entirety.

3. Claimants' request for punitive damages is hereby denied.
4. All other requests for relief are hereby 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	= \$ 300.00
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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, Bear Stearns & Co., Inc. are parties.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

Adjournment Fees

Adjournments requested during these proceedings:

Sept. 25, 26 & 27, 2000, adjournment by Fresne	= \$1,125.00
Sept. 19 & 20, 2001, adjournment by all parties	= WAIVED

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 Panel x \$1,125.00	= \$1,125.00
Pre-hearing conference: June 12, 2000	1 session

Six (6) Hearing sessions x \$1,125.00		= \$6,750.00
Hearing Dates:	April 25, 2001	2 sessions
	April 26, 2001	2 sessions
	May 9, 2002	2 sessions
<hr/> Total Forum Fees		= \$7,875.00

1. The Panel has assessed \$1,312.50 of the forum fees against Claywell.
2. The Panel has assessed \$1,312.50 of the forum fees against Peck.
3. The Panel has assessed \$2,625.00 of the forum fees against Bear.
4. The Panel has assessed \$2,625.00 of the forum fees against Fresne.

Fee Summary

1. Claimants be and hereby are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 300.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00
2. Claywell be and hereby is solely liable for:

<u>Forum Fees</u>	= \$1,312.50
<u>Total Fees</u>	= \$1,312.50
<u>Less payments</u>	= \$1,050.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 262.50
3. Peck be and hereby is solely liable for:

<u>Forum Fees</u>	= \$1,312.50
<u>Total Fees</u>	= \$1,312.50
<u>Less payments</u>	= \$1,050.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 262.50
4. Bear be and hereby is solely liable for:

<u>Member Fees</u>	= \$4,600.00
<u>Forum Fees</u>	= \$2,625.00
<u>Total Fees</u>	= \$7,225.00
<u>Less payments</u>	= \$4,600.00
Balance Due NASD Dispute Resolution, Inc.	= \$2,625.00

5. Fresno be and hereby is solely liable for:

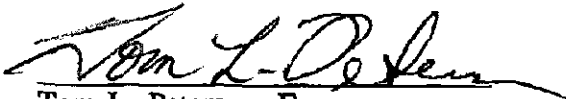
Adjournment Fee	= \$1,125.00
Forum Fees	= \$2,625.00
Total Fees	= \$3,750.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$3,750.00

All balances are due and payable to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Tom L. Peterson, Esq.	-	Public Arbitrator, Presiding Chair
June Y. Kilmarx, Esq.	-	Public Arbitrator
Amy Lampert	-	Industry Arbitrator

Concurring Arbitrators' Signatures


Tom L. Peterson, Esq.
Public Arbitrator, Presiding Chair


Signature Date

June Y. Kilmarx, Esq.
Public Arbitrator

Signature Date

Amy Lampert
Industry Arbitrator

Signature Date

June 4, 2002
Date of Service (For NASD office use only)


ARBITRATION PANEL

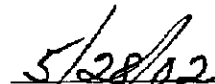
Tom L. Peterson, Esq.	-	Public Arbitrator, Presiding Chair
June Y. Kilmarx, Esq.	-	Public Arbitrator
Amy Lampert	-	Industry Arbitrator

Concurring Arbitrators' Signatures

Tom L. Peterson, Esq.
Public Arbitrator, Presiding Chair

Signature Date


June Y. Kilmarx, Esq.
Public Arbitrator


5/28/02
Signature Date

Amy Lampert
Industry Arbitrator

Signature Date

June 4, 2002
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ADMINISTRATION PANEL

Tom L. Peterson, Esq.
Juan Y. Kline, Esq.
Amy Laupret

Public Arbitrator, Presiding Chair
Public Arbitrator
Industry Arbitrator

Consenting Arbitrator, Respondent

Tom L. Peterson, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Juan Y. Kline, Esq.
Public Arbitrator

Signature Date

Amy Laupret
Amy Laupret
Industry Arbitrator

5/28/02
Signature Date

June 4, 2002

Date of Service (For NASD office use only)