

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Susan L. Monaco and the Marcia Rose Monaco Supplemental Needs Trust, (Claimants) vs.
Marshall D. May, (Respondent)

Case Number: 99-04451

Hearing Site: New York, New York

REPRESENTATION OF PARTIES

Claimants Susan L. Monaco ("Monaco") and the Marcia Rose Monaco Supplemental Needs Trust ("Trust"), hereinafter collectively referred to as "Claimants": Paul R. Williams, Esq., Schupbach, Williams & Pavone, LLP, Garden City, NY.

Respondent Marshall D. May, hereinafter referred to as "Respondent": James A. Prestiano, Esq., a sole practitioner, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: September 29, 1999.

Opposition to Motion to Dismiss filed on or about: October 27, 2000.

Monaco signed the Uniform Submission Agreement: September 24, 1999.

Trust signed the Uniform Submission Agreement: September 24, 1999.

Statement of Answer filed by Respondent on or about: April 27, 2000.

Amended Statement of Answer and Motion to Dismiss filed by Respondent on or about: July 7, 2000.

Respondent signed the Uniform Submission Agreement: April 27, 2000.

CASE SUMMARY

Claimants asserted the following causes of action: NYSE and NASD rule violations; violations of the Securities Act of 1933 and the Securities Exchange Act of 1934; breach of common law fiduciary duty; fraud; and negligence. Claimants' claim involved an investment fund known as Frost Creek Capital ("Frost Creek").

Unless specifically admitted in his Answer and Amended Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a claim upon which relief may be granted; Claimants' claims are barred by the Statute of Limitations and the equitable doctrine of laches; Monaco, as trustee of the Trust, had full responsibility for the assets of the Trust as prescribed by Section 11-2.3 of the New York State Estates, Powers, and Trusts Laws, and as such Claimants are estopped from asserting such claims against Respondent; Claimants had full knowledge of all material facts concerning their investments and the transactions made on their behalf; Claimants' claims are barred by the doctrines of ratification, waiver, estoppel, and unclean

hands; Respondent, in discharging his duties, if any, to Claimants acted in good faith and exercised at least that degree of care, diligence, and skill which ordinary prudent men would exercise in similar circumstances and like positions; Claimants authorized and directed all transactions and investments made on their behalf and, accordingly, Claimants are estopped from bringing this action; Claimants failed to mitigate their damages; Monaco is a sophisticated investor and assumed the risk of investing in the securities markets; Claimants' losses, if any, were caused by their own conduct; all risks concerning Claimants' investments were properly disclosed to them and Claimants knowingly, willingly, and voluntarily decided to assume those risks; any losses suffered by Claimants were the result of market conditions and/or fluctuations normally associated with investments in the securities markets; and there is no private right of action under the NASD or NYSE rules.

RELIEF REQUESTED

Claimant requested:

- a. Compensatory damages for actual losses sustained in the Frost Creek investment in the amount of \$385,298.00;
- b. Compensatory damages in the amount of \$12,045.32 for "management fees" allegedly earned in connection with the Trust's investment if the fund;
- c. Compensatory damages, in an amount to be determined at the hearing, equal to the return the Trust would have made had the funds been properly invested, or, alternatively, interest as determined by the Panel;
- d. Rescission of the Trust's investment in the Frost Creek fund;
- e. Disgorgement of all profits and other benefits received by Respondent (either directly or through any entity owned and/or controlled by him) with respect to the Frost Creek investment, including, without limitation, commissions, mark-ups, bonuses, management fees, and other fees and revenues earned from the Trust's account, and any profits which Respondent made on his own account from the securities purchased or sold on behalf of the Frost Creek partnership;
- f. Punitive damages in an amount to be determined by the Panel;
- g. Reasonable attorneys' fees incurred by Claimant in connection with this proceeding; and
- h. Such other and further relief as the Panel deems just and proper.

Respondent requested that the Statement of Claim be dismissed, and that he be awarded his costs, disbursements, attorneys' fees, and such other just and equitable relief as the Panel deems appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

Prior to the conclusion of the hearings in this matter, at the joint request of the parties,

arbitrator Michael Clements recused himself from the Panel. In accordance with Rule 10313 of the NASD Code of Arbitration Procedure, the parties agreed to proceed with the remaining two arbitrators.

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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent be and hereby is liable for and shall pay to Claimants the sum of \$427,343.00 as compensatory damages, plus interest at the rate of 4% per annum accruing from September 1, 1998 until the date this Award is paid in full.
2. Respondent be and hereby is ordered to rescind the Trust's investment in the Frost Creek fund.
3. Respondent be and hereby is liable for and shall pay to Claimants the sum of \$40,355.00 as attorneys' fees. The Panel awarded attorneys' fees pursuant to the following case law, as argued in Claimant's Post-Hearing Memorandum of Law: First Interregional Equity Corp. v. Haughton, 842 F.Supp. 105 (S.D.N.Y. 1994) and CS First Boston Corp. v. Schuman, N.Y.L.J., Feb.10, 1997, page 28, Col.5 (Sup.Ct. N.Y. County).
4. Claimant's request for punitive damages is hereby denied.
5. Respondent be and hereby is liable for and shall pay to Claimants the sum of \$225.00 to reimburse Claimants for 75% of the non-refundable filing fee which they previously paid.
6. 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

Adjournment Fees

Adjournments requested during these proceedings:

October 25, 2001, adjournment by Claimants = 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:

Two (2) Pre-hearing sessions with a single arbitrator x \$450.00 = \$ 900.00

Pre-hearing conferences: April 30, 2001 1 session

May 10, 2001 1 session

One (1) Pre-hearing session with Panel x \$1,125.00 = \$ 1,125.00

Pre-hearing conference: January 8, 2001 1 session

Twenty (20) Hearing sessions x \$1,125.00 = \$22,500.00

Hearing Dates: June 19, 2001 2 sessions

July 18, 2001 2 sessions

July 19, 2001 2 sessions

July 20, 2001 2 sessions

August 20, 2001 2 sessions

August 21, 2001 2 sessions

August 22, 2001 2 sessions

October 22, 2001 2 sessions

October 23, 2001 2 sessions

October 26, 2001 2 sessions

Total Forum Fees = \$24,525.00

1. The Panel has assessed \$6,131.25 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$18,393.75 of the forum fees against Respondent.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimants, requested tapes, \$165.00.
2. Respondent, requested tapes, \$90.00.

Fee Summary

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

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 6,131.25
<u>Administrative Costs</u>	= \$ 165.00
Total Fees	= \$ 6,596.25
<u>Less payments</u>	= \$ 1,425.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 5,171.25

As stated in the Award section above, Respondent is liable for and shall pay Claimants \$225.00 to reimburse them for 75% of the non-refundable filing fee.

2. Respondent be and hereby is solely liable for:

Forum Fees	= \$18,393.75
<u>Administrative Costs</u>	= \$ 90.00
Total Fees	= \$18,483.75
<u>Less payments</u>	= \$ 30.00
Balance Due NASD Dispute Resolution, Inc.	= \$18,453.75


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

ARBITRATION PANEL

Edward M. Musho, CPA	-	Public Arbitrator, Presiding Chair
Frank M. Suttell	-	Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, 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.



Edward M. Musho, CPA
Public Arbitrator, Presiding Chair

2-4-02
Signature Date

Frank M. Suttell
Public Arbitrator

Signature Date

February 6, 2002
Date of Service (For NASD office use only)

ARBITRATION PANEL

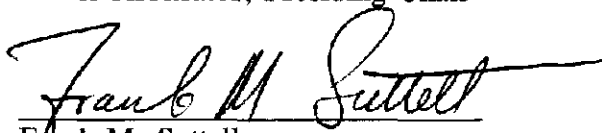
Edward M. Musho, CPA	-	Public Arbitrator, Presiding Chair
Frank M. Suttell	-	Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, 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.

Edward M. Musho, CPA
Public Arbitrator, Presiding Chair

Signature Date



Frank M. Suttell
Public Arbitrator



Signature Date

February 6, 2002
Date of Service (For NASD office use only)