

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

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In the Matter of the Arbitration Between:

John Martin, Claimant vs. James Fuller, Alexander Lushtak and Morgan Fuller Capital Group, LLC, Respondents

Case Number: 99-04965

Hearing Site: San Francisco, California

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**REPRESENTATION OF PARTIES**

For Claimant:

Philip J. Terry, Esq.  
Terry & Terry  
Petaluma, California

For Respondents James Fuller and  
Morgan Fuller Capital Group, LLC :

Stephen L. Porter, Esq.  
Whitehead, Porter & Gordon LLP  
San Francisco, California

For Respondent Alexander Lushtak:

Alexander Lushtak  
San Francisco, California

**CASE INFORMATION**

Statement of Claim filed on or about: November 3, 1999

Claimant's Arbitration Brief filed on or about: March 26, 2001

Claimant's Uniform Submission Agreement signed: January 24, 2000

Joint Statement of Answer filed by Respondents, James Fuller and Morgan Fuller Capital Group, LLC, on or about: September 1, 2000

Hearing Brief of Respondents, James Fuller and Morgan Fuller Capital Group, LLC, filed on or about: March 26, 2001

Respondents, James Fuller and Morgan Fuller Capital Group, LLC, signed the Uniform Submission Agreement: September 1, 2000

**CASE SUMMARY**

Claimant, John Martin ("Martin") alleged that Respondents are liable to Claimant for fraud, negligent misrepresentation, and breach of contract. Claimant further alleged that Respondents, James Fuller ("Fuller") and Alexander Lushtak ("Lushtak") induced Claimant to relocate to San Francisco to set up and run Respondents' trading operation by promising Martin and another

trader, Robert Hoffman, a \$1,000,000 trading box, staff, and suitable trading related equipment. Claimant further alleged that despite repeatedly representing to Martin that the trading funds were in fact available and that he could trade as per their agreement, Fuller and Lushtak failed to provide the trading box as promised, which resulted in significant financial losses for Martin. Claimant further alleged that Respondents induced Martin to invest his own funds in a limited liability company they controlled, Morgan Fuller Holdings ("Fuller Holdings"), by representing to Martin that members' funds would be used to invest in legitimate private placements. Claimant further alleged that contrary to Fuller and Lushtak's representations, Fuller Holdings was used as Fuller's personal slush fund from which he paid himself a \$48,000 dividend and many of the investments Respondents made, most glaringly a bank in Kazakhstan, did not involve legitimate private placements and were wholly unsuitable investments. Claimant further alleged that his investment at the urging of his employers is now virtually worthless.

Respondents Fuller and Morgan Fuller Capital Group, LLC ("MFCG") denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Fuller and MFCG alleged that Claimant's claim is brought by a former securities trader who was employed by Respondent MFCG for about five months, who received draws against trading profits which he never generated, and who quit after incurring substantial trading losses for the firm. Fuller and MFCG further alleged that Claimant has filed a claim which alleges, in essence, that if he had been given more money to lose, he might have made a profit, albeit by pursuing a short selling strategy during the great bull market of the 1990's.

### **RELIEF REQUESTED**

Claimant requested the following damages:

1. \$44,419 for the monies invested in Fuller Holdings between February and July 1996 (\$25,220). This represents the amount the \$25,220 Martin invested in Fuller Holdings in 1996 would be worth as of March 26, 2001 had it been invested in the Standard & Poor Index;
2. \$123,339 for lost income and opportunities between August 1995 and April 1996 as a result of Respondents' failure to provide the trading deck and trading equipment as agreed. Claimant alleged that he has been involved in the securities industry for approximately 14 years; when he has been able to trade with a \$500,000 trading deck, his monthly net income, after trading expenses has averaged \$23,711. Claimant further alleged that while employed by Respondents, his monthly income, because of Respondents' breaches, was approximately \$10,000;
3. An award of punitive damages as a result of Fuller and Lushtak's deliberate and fraudulent misrepresentations;
4. Interest on items 2 and 3; and
5. Attorney's fees as provided under the terms of the Fuller Holdings operating Agreement.

Respondents Fuller and MFCG requested that the Panel deny Claimant's claim in its entirety, and award Fuller and MFCG their fees and costs of this proceeding.

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

On or about December 6, 2000, the Panel denied Claimant's Motion for an order barring Respondents' Answer and denied Claimant's Motion that Respondents be barred from presenting any matter, facts, arguments or defenses at the hearing in this matter.

On or about June 29, 2001, the Panel reviewed and considered the positions of the parties relative to Claimant's request to postpone the hearing sessions scheduled on July 5-6, 2001. The Panel denied the request.

On or about July 3, 2001, the Panel reviewed and considered the positions of the parties relative to Claimant's request that the Panel reconsider its ruling denying the postponement request. The Panel denied Claimant's request for reconsideration and determined that it would permit Claimant to testify by phone.

Respondent Lushtak did not file with NASD Dispute Resolution, Inc. ("NASD-DR") a Statement of Answer or properly executed submission to arbitration. The Panel determined that Respondent Lushtak has been properly served with Claimant's Statement of Claim and further determined that Mr. Lushtak is required to submit to arbitration pursuant to the NASD-DR Code of Arbitration Procedure ("the Code") and is bound by the determination of the Panel on all issues submitted.

Respondent Lushtak did not appear at the evidentiary hearing in this matter. Pursuant to Rule 10318 of the Code, the Panel determined that Mr. Lushtak received proper notice of the hearing and ruled to proceed in his absence.

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. All claims by Claimant, including the claim for punitive damages, are dismissed.
2. Each party shall bear its own costs, including attorney's fees.
3. All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD-DR will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$300.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge = \$1,500.00

Pre-hearing process fee = \$600.00

Hearing process fee = \$2,500.00

Total Member Fees = \$4,600.00

#### **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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) Pre-hearing sessions with Panel x \$1,125.00 = \$3,375.00

Pre-hearing conferences:      December 6, 2000      1 session  
   May 11, 2001      1 session  
   July 3, 2001      1 session

Four (4) Hearing sessions x \$1,125.00 = \$4,500.00

Hearing Dates:      July 5, 2001      2 sessions  
                                 July 6, 2001      2 sessions

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Total Forum Fees = \$7,875.00

1. The Panel has assessed \$3,937.50 of the forum fees to Claimant.
2. The Panel has assessed \$3,937.50 of the forum fees jointly and severally to Respondents, Fuller, Lushtak and MFCG.
3. The Panel waived the forum fee with respect to the hearing session held April 2, 2001.

### **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.

The parties did not incur administrative costs.

### **Fee Summary**

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$3,937.50
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$4,237.50
<u>Less payments</u>	= \$ 300.00
Balance Due NASD-DR	= \$3,937.50

2. Respondent MFCG is charged with the following fees and costs:

Member Fees	= \$4,600.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$4,600.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD-DR	= \$4,600.00

3. Respondents Fuller, Lushtak and MFCG are charged with the following fees and costs:

Forum Fees	= \$3,937.50
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$3,937.50
<u>Less payments</u>	= \$ 0.00
Balance Due NASD-DR	= \$3,937.50

All balances are payable to NASD Dispute Resolution, Inc. and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Thomas J. LoSavio	-	Public Arbitrator, Presiding Chair
Samuel I. Romano, JD	-	Public Arbitrator
Barry A. Mainardi	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**



Thomas J. LoSavio, Esq.  
Public Arbitrator, Presiding Chair

7-20-01

Signature Date

Samuel I. Romano, JD  
Public Arbitrator

Signature Date

Barry A. Mainardi  
Non-Public Arbitrator

Signature Date

Date Served:

JUL 26 2001

Date of Service (For NASD office use only)

**ARBITRATION PANEL**

Thomas J. LoSavio	-	Public Arbitrator, Presiding Chair
Samuel I. Romano, JD	-	Public Arbitrator
Barry A. Mainardi	-	Non-Public Arbitrator

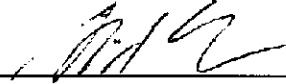
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Thomas J. LoSavio, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date



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Samuel I. Romano, JD  
Public Arbitrator

7/19/01

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Signature Date

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Barry A. Mainardi  
Non-Public Arbitrator

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Signature Date

Date Served:

**JUL 26 2001**

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