

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

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In the Matter of the Arbitration Between:

Elliot S. Berman, Debra Berman, and Martin J. Ungar, (Claimants) vs. First United Equities Corp., Douglas K. Traynor, Frank L. Giacchetto, Jason A. Cohen, Jonathan D. Winston, and Bear Stearns & Co., Inc., (Respondents)

Case Number: 99-03625

Hearing Site: Boston, Massachusetts

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**REPRESENTATION OF PARTIES**

Claimants, Elliot S. Berman ("E. Berman"), Debra Berman ("D. Berman"), and Martin J. Ungar ("Ungar"), hereinafter collectively referred to as "Claimants": Howard M. Rosenfield, Esq., a sole practitioner, Farmington, CT.

Respondents, First United Equities Corp. ("FUEC"), Frank L. Giacchetto ("Giacchetto"), Jason A. Cohen ("Cohen"), and Jonathan D. Winston ("Winston"), did not make appearances in this matter.

Respondent, Douglas K. Traynor ("Traynor"), appeared *pro se*.

Respondent, Bear Stearns & Co., Inc. ("Bear"): Harold J. Ruvoldt, Esq., Fischbein, Badillo, Wagner, & Harding, New York, NY. Previously represented by: Darya Geetter, Esq., Bear Stearns & Co., Inc., New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: August 5, 1999.

E. Berman signed the Uniform Submission Agreement: June 13, 1999.

D. Berman signed the Uniform Submission Agreement: June 13, 1999.

Ungar signed the Uniform Submission Agreement: June 15, 1999.

FUEC did not file a Statement of Answer or sign a Uniform Submission Agreement.

Giacchetto did not file a Statement of Answer or sign a Uniform Submission Agreement.

Cohen did not file a Statement of Answer or sign a Uniform Submission Agreement.

Winston did not file a Statement of Answer or sign a Uniform Submission Agreement.

Traynor did not file a Statement of Answer or sign a Uniform Submission Agreement.

Statement of Answer and Motion to Dismiss filed by Bear on or about: October 8, 1999.  
Bear signed the Uniform Submission Agreement: September 17, 1999.

### **CASE SUMMARY**

Claimants asserted the following causes of action: misrepresentation; breach of fiduciary duty; unsuitability; violation of NASD and NYSE rules; failure to supervise; agency and control person liability; breach of contract; negligence and gross negligence; negligent supervision; common law fraud; unauthorized trades; and violation of securities laws. Claimants' claim involved the stocks and/or warrants of Aqua Care, Symbolin, Ashton Technologies, and National Medical Financial Services.

Unless specifically admitted in its Answer, Bear denied the allegations made in the Statement of Claim and asserted the following defenses: the role of Bear with respect to Claimants' accounts was to act merely as clearance agent for FUEC; Claimants were advised, at the time they opened their accounts, that FUEC would be solely responsible for the conduct of their account and ensuring that all transactions were in compliance with applicable rules and regulations; by express agreement, Claimants cannot hold Bear liable for the alleged wrongdoing of FUEC or for any employees or control persons of FUEC; Bear is not liable to Claimants under any theory of liability; and the applicable case law, as well as the written agreements signed by Claimants, compel the conclusion that Bear cannot be held liable for the alleged wrongdoing set out in Claimants' Statement of Claim.

### **RELIEF REQUESTED**

Claimants requested:

1. Compensatory damages in the amount of \$51,443.00 for the Bermans and \$66,742.00 for Ungar pursuant to the Miley v. Oppenheimer "well-managed" account calculation, along with "make-whole award" attorneys' fees in the amount of \$25,722.00 for the Bermans and \$33,371.00 for Ungar;
2. Pre- and post-award interest;
3. Punitive damages in such amount as the Panel deems appropriate to deter Respondents from future acts of misconduct such as those giving rise to this claim; and
4. Payment of all of Claimants' costs, expenses, and disbursements, including reasonable attorneys' fees, in pursuing this claim.

Bear requested that the Statement of Claim be dismissed and that the costs of this proceeding be assessed against Claimants.

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

By letter dated September 8, 1999, Claimants advised NASD Dispute Resolution, Inc. that they were dismissing all claims against Respondent Giacchetto.

Prior to a decision on the merits, Claimants entered into a settlement agreement with Respondent Bear.

During the hearing in this matter, Claimants dismissed all claims against Respondent Traynor.

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that FUEC, Traynor, Cohen, and Winston have been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without FUEC, Traynor, Cohen, and Winston present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

FUEC, Traynor, Giacchetto, Cohen, and Winston did not file with NASD Dispute Resolution, Inc. properly executed submissions to arbitration but are required to submit to arbitration pursuant to the Code and 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. FUEC, Cohen, and Winston be and hereby are jointly and severally liable for and shall pay to E. Berman and D. Berman, the sum of \$46,553.00 as compensatory damages.
2. FUEC, Cohen, and Winston be and hereby are jointly and severally liable for and shall pay to Ungar the sum of \$51,383.00 as compensatory damages.

3. FUEC, Cohen, and Winston be and hereby are jointly and severally liable for and shall pay to E. Berman and D. Berman, the sum of \$23,250.00 as attorneys' fees. The Panel awarded attorneys' fees pursuant to Section 36b-29 of the Connecticut Securities Act, as argued in Claimant's Statement of Claim.
4. FUEC, Cohen, and Winston be and hereby are jointly and severally liable for and shall pay to Ungar the sum of \$25,700.00 as attorneys' fees. The Panel awarded attorneys' fees pursuant to Section 36b-29 of the Connecticut Securities Act, as argued in Claimant's Statement of Claim.
5. 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 persons at the time of the events giving rise to the dispute. In this matter, Bear Stearns & Co., Inc. is a party.

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

#### Adjournment Fees

Adjournments requested during these proceedings:

June 7, 8, 18 & 19, adjournment by Bear	= \$1,125.00
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**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 Panel x \$1,125.00		= \$2,250.00
Pre-hearing conferences:	April 4, 2001	1 session
	July 27, 2001	1 session
Two (2) Hearing sessions x \$1,125.00		= \$2,250.00
Hearing Date:	August 8, 2001	2 sessions
Total Forum Fees		= \$4,500.00

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1. The Panel has assessed \$2,250.00 of the forum fees jointly and severally against Claimants.
2. - The Panel has assessed \$2,250.00 of the forum fees jointly and severally against Respondents.

**Fee Summary**

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

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$2,250.00
Total Fees	= \$2,550.00
<u>Less payments</u>	= \$1,425.00
Balance Due NASD Dispute Resolution, Inc.	= \$1,125.00

2. Bear be and hereby is solely liable for:

Member Fees	= \$4,600.00
<u>Adjournment Fee</u>	= \$1,125.00
Total Fees	= \$5,725.00
<u>Less payments</u>	= \$5,725.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

3. Respondents be and hereby are jointly and severally liable for:

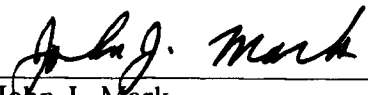
<u>Forum Fees</u>	= \$2,250.00
<u>Total Fees</u>	= \$2,250.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution, Inc.</u>	= \$2,250.00

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

**ARBITRATION PANEL**

John J. Mark	-	Public Arbitrator, Presiding Chair
John R. Thompson	-	Public Arbitrator
Thomas J. Horack	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

  
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John J. Mark  
Public Arbitrator, Presiding Chair

August 25, 2001  
Signature Date

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John R. Thompson  
Public Arbitrator

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

\_\_\_\_\_  
Thomas J. Horack  
Industry Arbitrator

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

September 10, 2001  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

John J. Mark	-	Public Arbitrator, Presiding Chair
John R. Thompson	-	Public Arbitrator
Thomas J. Horack	-	Industry Arbitrator

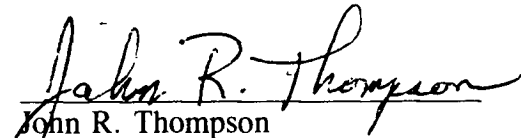
**Concurring Arbitrators' Signatures**

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John J. Mark  
Public Arbitrator, Presiding Chair

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Signature Date

  
John R. Thompson  
Public Arbitrator

8-26-01  
Signature Date

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Thomas J. Horack  
Industry Arbitrator

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Signature Date

September 10, 2001  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

John J. Mark	-	Public Arbitrator, Presiding Chair
John R. Thompson	-	Public Arbitrator
Thomas J. Horack	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

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John J. Mark  
Public Arbitrator, Presiding Chair

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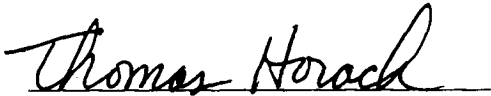
Signature Date

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John R. Thompson  
Public Arbitrator

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Signature Date

  
Thomas J. Horack  
Industry Arbitrator

9/4/01  
Signature Date

September 10, 2001  
Date of Service (For NASD office use only)