

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO AT TACOMA

NO. 35765-8 II

Joe and Teri Mount, H/W, plaintiff/respondent

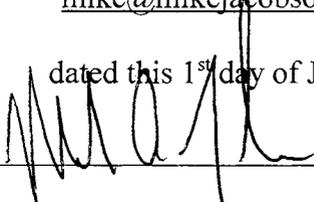
v

Tom and Kimley Nauman, H/W, defendant/appellant

APPELLANT'S REPLY BRIEF

MICHAEL A. JACOBSON, PS., Inc.
Attorney for respondent Nauman
119 Fourth Avenue, Suite 200
Seattle, WA 98104
(206) 447-1560
Fax: (206) 447- 1523
mike@mikejacobsonlaw.com

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by: Michael Jacobson, WSBA No. 13135
Attorney for Appellant

I certify that on the 1st day of June, 2007I, Katie Steinberg, a legal assistant at M.A. Jacobson, PS. Inc deposited the enclosed APPELLANT'S REPLY BRIEF to attorney Ralph Smith Esq., via ABC messenger service.

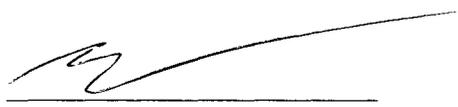

Katie Steinberg

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3. PROCEDURAL HISTORY

Premised upon Nauman's status (CP 200 ¶ 2,3) investment advice (CP 200-202, ¶ 4, 4a, 8, 9, 10) or record keeping (CP 201-02 ¶ 6,7,9,10) the trial court imposed liability upon Nauman for fraudulently selling a security purchased by Respondent Mount ("Mount") under RCW 21.20.010 . The trial court also made the legal judgments that

3. the funds of plaintiff were converted
4. defendants' counterclaims had no factual basis
5. the RCW 21.20.430(1) measure of damage to Mount was Mount's entire \$604,000 basis, plus reasonable counsel fees and interest.

(CP 202 ¶ 3,4,5) At trial, the court's only consideration of Nauman's litigation position was that Defendants Nauman "failed to appear or present any evidence." (CP 202 ¶9a) With his motion for reconsideration, Nauman pointed out signed written evidence of his trial position overlooked by the trial court (CP 252-271) and furnished reconsideration applications from pool participants Bud Nauman and Kimlely Nauman (CP 75-77; 181-85) and counsel's offers of proof. (CP 123-26) ¹

¹ The trial court considered the declaration of counsel Michael Jacobson in its orders on reconsideration (CP 63)

4. FACTS IN REPLY

Reasonable Diligence. During the week and month preceding trial Nauman's neuropsych exam showed him somewhat somnolent (CP 59) and almost obtunded (CP 59) consistent with reports Nauman was sleeping about 50% of the time. (CP 58) During the reconsideration period, Nauman could not be awakened to answer questions posed by counsel (CP181-82 ¶4) and remained too ill to participate in trial or other legal matters at any level. (CP 067) He first became able to meaningfully participate in the furnishing of his trial testimony commencing in February or March, 2007 (CP 55-56; 28-29) Until then, medical evidence of a prolonged recovery period and prolonged absence from legal proceedings equated with Nauman's condition growing worse. (CP 225-26; 210-11; 136; 90-91) Mount's brief identifies no fact which impeaches, contradicts or undercuts defendants' scientific evidence linking plaintiff's metastacizing cancer, surgically removed thoracic organs; (CP 180) unstable synthetic shoulder ball joint, (CP 136) potent chemotherapy treatments, (CP 224) peripheral neuropathy, (CP 224) Methadone disturbances, (CP 224) Nardil headaches, (CP 225) and Morphine sedation (CP 210) with required "medical postponement of legal issues." (CP 225)

Nonetheless, Mount asserted that Dr. Kunz' "recommending a

return to the mainland” (CP 58) two days before the trial began (CP 58) supported the conclusion that Nauman’s trial absence on October 25th was a voluntary choice. Participating in trial was conclusively **no** part of the treatment plan that week, which instead concerned “getting him some legal assistance as he is not capable of handling his own affairs and needs to be in a residential pain clinic.” (CP 58) Nauman “had no insurance...” to get needed treatment for his leg (CP 058) or medication management. (CP 59) Also, during the week of trial, Nauman’s two minor children were exposed to the elements, pests, animals, and periodic electrical and communication outages at his earthquake devastated home. (CP 181-85)

Mount also asserted there was evidence of “drug addiction” and “refusal to do anything about it” which illustrated Nauman’s voluntary choice to absent himself from the trial. (Smith, Brief of Respondent, 4/30/07 at 26, citing CP 57). Addiction is invention pure and simple. The record illustrates Nauman “unwittingly under the influence of medication” (CP 59) – a prescription medication Xanax, (0059) received from psychiatrist McGrath, (CP 058) and pain medications from Dr. Kunz (CP 059) which in combination were “detrimental.” (CP 059) The prescription errors were corrected by the doctor. (CP 059) Any hint that

Nauman voluntarily abused drugs for personal gain was erased once Nauman was directed to an acupunctureist in January, 2007 and discontinued morphine and nardil drug treatments. (CP 28-29)

Alleged Fraudulent Schemes.

The Brief of Respondent and trial record identifies but one purchase **by Mount** of a security, occurring with Mount's December 31, 1999 agreement to transfer to Nauman \$604,000 (CP 104; 128) which he completed January 10th. (Tr. Ex 5; CP 104-5) Mount did not purchase anything else from Nauman. In exchange, Nauman sold Mount "short sales" with a \$604,000 basis (CP 282) with the implicit promise these would be affected by trading "gains....minus losses." (CP 282) Mount did not purchase anything else from Nauman. This is what Mount has described as the concealed, fictitious name, unsuitable, "no-risk," fraudulent scheme. (Brf of Respondent, 30-32)

Six months later, in May 2000, (Tr. Ex. 2; CP 107) Mount's "fraudulent" investment in 4000 short sales securities worth \$381,000 (Tr. Ex 2, CP 107) and 4400 (recently purchased) long shares worth \$311,000 (Tr. Ex 2, CP 107) had an aggregate value of \$692,000—up 14%. Six months after that, in December 2000, the entire fund was wiped out, (CP 109-110) though, as Mount understood it, the fund was still invested long

in Sysco, Microsoft, and Sunworld shares and Amazon shorts just as it had been in May. (CP 111)

Unrelated to any purchase, Mount alleged a second fraudulent concealment scheme arising in December, 2000, wherein Nauman kept all Mount's stocks for himself. (CP 117) This so-called fraudulent concealment consists of a December, 2000 meeting about the total loss of the pool assets where, out of concern for Nauman, Mount didn't go into the investment loss details. (CP 110) By the time Mount asked Nauman for some kind of record of what happened, Nauman had moved away from Washington to Hawaii at which point Mount never talked much to Nauman. (CP 111) Mount never inspected the pool account records located in Washington before they became mildewed and were discarded from a flooded store room at his mother in law's home. (CP 112) Then, the brokerage house where Nauman had worked went out of business. (CP 112)

Evidence material to the defense.

Prior to transferring funds to Nauman in January, 2000 for the pooled account, (CP 102-3) Mount authorized margin trades for his own stock trading account. (Ex. 9 "Period Ending 10/29/99)(attached hereto as appendix one) Mount purchased on margin tens of thousands of dollars

worth of Vodaphone and Amoco shares in 1999. (Id.) He paid margin interest and repaid margin deficits with his other sales. (Id) Mount was also then actively engaged in quizzing his brother and other advisors about strategies for making gains in a volatile market. (CP 101) Based upon his own experience valuing, buying, and selling business assets, (CP 101-02) and his own comparison of Amazon's modest \$5/share net asset value in comparison to its lofty \$90 price, (CP 102) Mount formed the judgement that "this looks like a real good thing to short." (CP 102) Shopping for an adviser, Mount asked if Nauman could experience another loss like he had at his former brokerage and Nauman told him

No. They don't even let us do those kind of transactions, and we always have the stocks in three or four shorts or stocks and three or four different companies. ... No. We don't want to put all of our eggs in one basket. We want to play it safe and have it in multiple stocks. (CP 114)

Commencing in 1999, Mount began prodding Nauman for information about Nauman's trading success with the family investment pool in a down market and asked Nauman more than once to invest his money as well. (CP 75-75 ¶3-4) Mount's argument for admission to the pool was knowing "he can't get returns like these in a standard account." (CP 75-76 ¶ 3)

In December, 1999, Mount agreed to transfer to Nauman his title to

all funds deposited to Nauman. (CP 128-29; 124¶6;) This was the same as with other participants. (CP 131, 124; 75 ¶2) Mount then made \$604,000 in transfers, (CP 102) at which time Nauman purchased the short sales with a \$604,000 basis. (CP 282; Tr. Ex. 3; 115-16, lines 1-9) Mount said he made the transfer based upon his understanding that Nauman would only short stocks or make other hedge trades in his own name. (CP 77¶ 9) Nauman periodically recorded and reported his calculation of the participants' changing basis in order to keep accounts straight and keep each participant informed. (CP 258) Mount periodically reviewed revised lists which identified his changing investment. (CP 107)

Mount's instructions to Nauman were to "keep trading Joe's money just as Tom was trading his own." (CP 76 ¶ 5) Mount stuck by these instructions even when told the investments were risky business and advised to take at least his winnings off the table to lessen risk. (CP 76 ¶5) Nauman's acceptance of funds did not serve the usual commercial purposes associated with securities issuers or sellers: Nauman received no reimbursement or fee or profit share or consideration whatever for his participation; (CP 253-54, 103-4, 279-80; Tr. Ex. 1) and obligated himself to return on demand (CP 76 ¶5, 282) Mount's full basis plus gains minus losses. (CP 282)

In November and December, 2000, the Bush vs Gore litigation created market uncertainty. (CP 125 ¶ 8) Mout's portion of Microsoft, Cisco, Sunworld Microsystems, and Oracle shares had lost nearly two thirds of its \$311,000 cost basis, retaining only \$116,400 in value during December, 2000 market "lows."² When Bush was declared the election winner in December, Nauman sensed an imminent market rise as often accompanies Republican Party election victories and "averaged down" the pool's long holdings by buying more of them at what seemed like bargain prices. (CP 125 ¶8) Inadvertently, Nauman's intended sales orders to raise the capital to finance the purchases did not get executed. (CP 125 ¶8) The extra pool shares were consequently purchased on margin. (CP 125 ¶8 CP 76 ¶6) The selections made by Nauman for the pool continued to drop in value (CP 76 ¶ 6; 125 ¶8) and dropped so low that they did not cover the margin loans and were sold by the broker to pay the loan. (CP 77 ¶7) During the ensuing 36 months, which included effects from the "September 11th" disasters, the pool shares lost 50% more of their value

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The Court shall take judicial notice of adjudicative facts ascertainable from unquestionably accurate sources when called to its attention at any stage in proceedings, under FRE 201(b).

The commercial website TD Ameritrade.com's monthly compilation of stock closing price, low, and high, spanning 10 years for Sun Micro Systems, Oracle, Microsoft, Cisco and the Nasdaq composite index (set forth in appendix 2) is a resource of unquestioned accuracy in determining the market value of Mout's share of the investment pool during the lows experienced in the month ending January 1, 2001.

and did not again attain their December, 2000 levels. (App. 2)

Brokerage account records were reviewed by named account owner Bud Nauman (CP 75 ¶2) and reflected the account deficiency and payment of deficiency with the funds's remaining assets. (CP 77 ¶8)³ Once the family nest egg was lost, when the senior Naumans needed money, defendant Nauman sent money; when the defendant Nauman were short on money, the senior Naumans sent money. (CP 77 ¶ 8) When the Mounts were hurting for money, the Naumans sent them money. (CP 263)

There is no evidence that Nauman disregarded Mount's instructions to "keep trading Joe's money, just as Tom was trading his own;" (CP 76 ¶5) no evidence that Nauman "placed all of (Mount's) eggs in one basket;" (CP 114) and no evidence that Nauman obstructed access to account records in the hands of third parties. (CP 112; 77 ¶7)

5. ISSUES IN REPLY

1. DOES THE REOPENING APPLICATION FURNISH GOOD CAUSE FOR THE ABSENCE OF NAUMAN'S EVIDENCE AT TRIAL DESPITE DUE DILIGENCE IN ITS PROCUREMENT AND MATERIALITY TO THE ISSUES DECIDED?

- A. Did Nauman exhibit diligence in proportion to his capacity?
- B. Does the reopening evidence establish a material defense?

³ The account owner's records were destroyed by melt water following an ice storm, before Mount asked to review them. (CP 77 ¶8)

(i) Does the reopening application negate fraud-in-connection-with-sale?

(ii) Does the reopening application negate the full refund plus counsel fee measure of damage imposed?

(iii) Does the reopening application negate liability for RCW 21.20.020 paid stock adviser violations?

(iv) Does the reopening application negate Mount's title to the funds in Nauman's possession?

6. ARGUMENTS IN REPLY

A. REASONABLE DILIGENCE IN PROPORTION TO ONE'S CAPACITY

Mount apparently concedes that a party's reasonable diligence in procuring evidence is measured in relation to the "whole record" Strom, 78 Wash. At 229. The record as a whole illustrates Nauman behaved reasonably to mail a letter to the trial judge requesting continuance, rather than disregard his doctors' advice, given objective medical impairments which prevented travel or his meaningful legal preparations; a treatment plan that forbade such; a moral imperative to shelter, feed, and protect from animals and pests his minor children during the earthquake disaster, and earthquake damaged electronic communications to the outside world.

B. MATERIAL EVIDENCE OF DEFENSE

(i) The reopening application negates fraud-in-connection-with-sale

Washington's Security Act, RCW 20.21 et seq ("WSSA") furnishes a civil remedy in favor of purchasers whose investments "in connection with the offer, sale or purchase of any security" are damaged by a seller's fraudulent acts or artifices. RCW 21.20.430(1); RCW 20.21.010(1,2,3) outlaws fraudulent devices, schemes, artifices, material falsities, material omissions, or series' of such "in connection with the offer purchase or sale...of securities." RCW 21.20.010(1,2,3); See also 15 USC 77q ("fraud...in connection with the offer, sale or purchase of securities")⁴ The WSSA is interpreted to "achieve harmony between it, federal law, and the securities laws of those other states that have also modeled their law after the Uniform Securities Act." Brin v Stutzman,

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15 USCS § 77q (also rule 10b-5)

5 USC § 77q. Fraudulent interstate transactions

(a) Anti-fraud and anti-manipulation enforcement authority. It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

89 Wn App. 809, 832, 951 P. 2d 291, rev den 136 Wn 2d 1004, 966 P.2d 901 (1998).

The elements of a seller's fraud case under the federal rules are

(1) conduct by the defendants proscribed by the rule; (2) a purchase or sale of securities by the plaintiffs "in connection with" such proscribed conduct; (3) and resultant damages to the plaintiffs

Huddleston v. Herman & MacLean, 640 F.2d 534, 549 (5th Cir. 1981) aff'd in part, rev'd in part on other grounds, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983). "Plaintiff's claim must of course find justification in the language of Rule 10b-5 which requires that any damage be 'in connection with the purchase or sale of security.'" Mutual Shares Corp v Genesco, Inc., 384 F.2d 540, 546 (2d Cir. 1967); accord, Rochelle v Marine Midland Grace Trust co., 535 F.2d 523, 529 (9th Cir. 1976)("the 'in connection with' requirement bleeds into the requirement that plaintiff suffer some damage."); accord, Re Fortune Systems Sec. Litigation, 680 F. Supp. 1360, 1365 (N.D. Cal., 1987); ("If the omissions are not the proximate reason for plaintiff's pecuniary loss, recovery under the Rule is not permitted....") Accordingly, the claim must fail where "**market conditions**"⁵ and not any representation or omission of appellees, caused

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Accord, Ryan v. Wersi Elec. GmbH, 59 F.3d 52, 54 (7th Cir., 1997) ("Ryan fails to show that his business losses were caused by the lack of exclusive distributorship rights, as opposed to a general downturn in the market for pre-assembled musical

the losses suffered.” Fryling v Merrill Lynch, 593 F. 2d 736, 743 (6th Cir., 1979). Accord, In re Catanella & E.F. Hutton & Co., Sec. Litigation, 583 F. Supp 1388, 1417 (E.D. Pa., 1984) (“...the ebbs and flows of the stock market intervened” between misrepresentation and harm) In Ray v. Citigroup Global Mkts., 482 F.3d 991, 995 (7th Cir 2007) the court granted summary judgment dismissal for failure to prove fraud-in-connection-with-sale, despite seller telling plaintiffs to hang onto their stock, saying things like "it was a *certain money winner* because Smith Barney was going to include it in all their divisions." The court found:

There is no evidence that Spatz and Citibank fraudulently assured the plaintiffs that the SSOL stock would survive the collapse in the market that the other stocks in that sector were experiencing.... Spatz said nothing about how long someone would need to be prepared to hang onto the SSOL stock in order to reap the expected benefits, nor did he say anything about investments in the data services business being risk-free.

Ray, 482 F.3d at 996. Similarly, Bastian v Petren Resc. Corp., 892 F.2d 680 (7th Cir. 1990) dismissed the fraud-in-connection-with-sale claim of Bastian, a plaintiff who could not say why his investment was wiped out.

The plaintiffs alleged that they invested in the defendants' limited partnerships because of the defendants' misrepresentations, and that their investment was wiped out. But they suggest no reason *why* the investment was wiped out. They have alleged the cause of their entering into the transaction in which they lost money but not the

instruments or simple cash flow mismanagement”)

cause of the transaction's turning out to be a losing one. It happens that 1981 was a peak year for oil prices and that those prices declined steady in the succeeding years. ...Suppose that because of the unexpected drop in oil prices after 1981, all or the vast majority of the oil and gas limited partnerships formed in 1981 became worthless. (Plaintiffs) wanted to invest in oil and gas limited partnerships; they only wanted to be sure that the general partners were honest and competent people. Yet to be honest and competent is not to be gifted with prevision. If the alternative oil and gas limited partnerships to which these plaintiffs would have turned had the defendants leveled with them were also doomed, despite competent and honest management, to become worthless, the plaintiffs were not hurt by the fraud; it affected the place but not the time or amount of their loss.

Bastian 892 F.2d at 684. Bastian explained the reason for the rule.

Rule 10b-5 has been interpreted to authorize the creation of a federal common law of securities fraud, and common law fraud is not actionable without proof of harm.

...Like a stock-market crash, the collapse of oil prices in the early 1980s reverberated throughout the economy... Defrauders are a bad lot and should be punished, but Rule 10b-5 does not make them insurers against **national economic calamities**. If the defendants' oil and gas ventures failed not because of the personal shortcomings that the defendants concealed but because of **industry-wide phenomena that destroyed all or most such ventures**, then the plaintiffs, given their demonstrated desire to invest in such ventures, lost nothing by reason of the defendants' fraud and have no claim to damages.

Bastian, 892 F.2d at 687. (emph added)

The reopening evidence of Mount's loss is the same loss experienced in Ray and Bastian. Mount's investment was destroyed in December, 2000, during a period of industry-wide market volatility (CP

77; 125) which had gutted two thirds the value of tech stocks (appendix 2, CP 263) identified by Mount as those he favored. (CP 109; Trial Exhibit 2,6) The next three years drove those stocks to shed even more of their value. (App. 2) Mount has no claim to fraud-in-connection-with-sale, if such contentions are given credence at trial. Bastian, 892 F.2d at 687

Also, the reopening evidence asserts that the gift-deeded transfer of title to Nauman was irrelevant to Mount's loss of control over his investments. Mount instructed Nauman to "keep trading Joe's money just as Tom was trading his own" (CP 76) and to take none of the winnings off the table (CP 76) and never asked Nauman to return his investment until it was gone. (CP 261) Mount's appetite for risk and gain in a turbulent market caused his loss. The evidence absent at trial was material to Nauman's defense, justifying the grant of a CR 40e continuance.

Further, the reopening application asserts that before inception, Mount was seeking to invest in something that would make gains in a difficult market. He quizzed his brother, his friends. He prodded Nauman for information. He applied his knowledge of net asset value compared to securities price to arrive at his idea of a "good short." Mount said he couldn't get anywhere near the pooled account returns in a down market with standard trades; knew the trades were risky business, (CP 75,77) and

observed since inception that his investment basis when placed with Nauman would be returned, net of gains **minus losses**. (CP 282) Investing with Nauman “affected the place but not the time or amount of loss,…” Bastian, 892 F.2d at 684. This evidence, too, absent at trial, was material, justifying a CR 40e continuance.

A fraudulent omission- in-connection-with-sale is also too attenuated where the proceeds of the sale are “funneled into unwise investments....after the securities transactions were completed.” Bloor v Carro, Spanbock Londin, et ux., 754 F.2d 57, 61-62 (2d Cir., 1985) accord, First Interstate Bank N.A., v Chapman & Chtuler, 837 F.2d 775, 779-80 (7th Cir 1988) (“misuse of the proceeds constitutes a supervening event and is not the actual cause of plaintiff’s injury”) Rochelle, 535 F.2d at 529 (“that the directors later frittered away the funds on **losing real estate ventures** does not mean....(plaintiff) suffered a loss compensable under federal securities fraud laws”). (emp. added)

The reopening application establishes that, though Nauman’s subsequent investment choices proved disastrous, it was Nauman’s choices for which Mount specifically bargained. (CP 76) Nauman never sold anything purchased by Mount other than the December, 1999 share in the investment pool. Mount’s money was invested in exactly the same

issues as was Nauman's. (CP 258) Nauman finished with the same as Mount—a pro rata share of a “disaster” (CP 253) The evidence, absent at trial, would have been material and the reopening application should have been granted for this added reason.

(ii) The reopening application negates the full refund measure of damage imposed at trial

“ The proper measure of damages to reflect the loss proximately caused by the defendants' deceit is the out-of-pocket rule... the traditional measure of damages in a Rule 10b-5 action... (which is) to allow recovery for an amount of damages equal to the difference between the price paid and the "real" value of the security, i. e., the fair market value absent the misrepresentations, at the time of the initial purchase by the defrauded buyer.” Huddleston 640 F.2d at 60; Abell v. Potomac Ins. Co., 858 F.2d 1104, 1136 (5th Cir. 1988) (Out-of-pocket rule is the correct measure of section 10-b5 damage because it “distinguishes between losses caused by the defendants' fraud and losses caused otherwise (e.g., by market forces)”) In order to establish this differential, it is incumbent upon plaintiffs to provide evidence of the "true value" of the securities... had there been no conduct imposing liability,...“ Beissinger v. Rockwood Computer Corp., 529 F. Supp. 770, 788 (E.D.Pa, 1981).

The original \$604,000 in shorts became \$692,000 in mixed long

and shorts 6 months after investment. “(T)he measure of damages under the out-of-pocket rule is computed at the time of the transaction.” In re Letterman Bros. Energy Sec. Litigation, 799 F.2d 967 972 (5th Cir 1986)

The reopening application shows that plaintiff cannot illustrate any differential or diminishment from his initial \$604,000 investment occurring at the time of Mount’s only purchase from Nauman. For this additional reason, the missing evidence was material to Nauman’s defense and reconsideration should have been granted.

(iii)The reopening application negates liability for RCW 21.20.020 paid stock adviser violations

WSSA also declares unlawful those fraudulent schemes, artifices, material falsities, material omissions and the like made by paid investment advisers RCW 21.20.020; See, 15 USC 80b-6.⁶ (Prohibited fraudulent “transactions by investment advisers”). The WSSA is interpreted to “achieve harmony between it, federal law, and the securities laws of those

⁶ 15 USC 80b-6. Prohibited transactions by investment advisers
It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--
(1) to employ any device, scheme, or artifice to defraud any client or prospective client;
(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
....(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative

other states that have also modeled their laws after the uniform act.” Brin, 89 Wn App at 832. (“The Legislature modeled RCW 21.20.020 after section 102 of the Uniform Securities Act”) WSSA specifies non-civil remedies for enumerated advisor violations, such as licensing suspensions for dishonest or unethical sales persons, RCW 21.20.110(g) or imprisonment of wilful violators, RCW 21.20.400. Persons who destroy or conceal records of a violation of the Act are punishable by imprisonment, RCW 21.20.400(b), but no civil remedy exists for such “paid advisor” violation. See, RCW 21.20.430. “The language of the WSSA indicates that the legislature did not intend to impose civil liability beyond the bounds of RCW 21.20.430.” Wade v. Skipper's, Inc., 915 F.2d 1324, 1332 9th Cir. `1990)(“In providing for civil liability, however, it has adopted much more restrictive language, enumerating both the provisions whose violation will give rise to a damages claim and the types of persons who may be found liable.”)⁷ The federal regulation governing

⁷ “...the language of the WSSA indicates that the legislature did not intend to impose civil liability beyond the bounds of RCW 21.20.430. In fact, the legislature has provided for criminal liability against “*any person* who wilfully violates *any provision* of this chapter” RCW 21.20.400 (emphasis added). It has also provided for injunctive relief “whenever it appears to the director that *any person* has engaged or is about to engage in any act or practice constituting a violation of *any provision* of this chapter” RCW 21.20.390 (emphasis added). “Consideration of all the circumstances influencing their decision [not to include the right of action that the appellants seek supports the] conclusion that the omission was deliberate.” Wade., 914 F.2d at 1324. See, Ludwig v Mutual Real Estate Investors, 18 Wn App 33, 44 (1977)(“...a private cause of action

sales advisers does not permit an implied remedy. Transamerica Mortg. Advisors (tama) v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242; 62 L. Ed. 2d 146; 1979 U.S. LEXIS 150 (1979)

Congress expressly authorized private suits for damages in prescribed circumstances..... "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."

....

The mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. *Touche Ross & Co. v. Redington*, supra, at 578; *Cannon v. University of Chicago*, 441 U.S., at 690-693; *Securities Investor Protection Corp. v. Barbour* 421 U.S., at 421. The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end.

Transamerica, 444 US at 19; cf. Brin, 89 Wn App at 839 ("Stutzman was not an investment adviser under RCW 21.20.005(6)... (so) we do not decide the issue of whether the Securities Act implies a private cause of action for violations of RCW 21.20.020, although we will touch on a ramification of that issue in the next section of this opinion.")

Mount raises for the first time in his response that section 20 "paid advisor" violations underlie Mount's claim of a second fraudulent

should not be implied from RCW 21.20.010.") Overruled oth grds, Kittleson v Ford, 93 Wn.2d 223, 608 P.2d 264 (1980). See, also, Zinn v Parish, , 644 F.2d 360, 363 n.3 (7th Cir 1981) ("The Securities Acts were not designed to provide a remedy for every instance of a breach of common-law fiduciary duties")

concealment scheme arising after the December, 2000 total loss. (Brief of Respondent, 30-32) However, the reopening evidence asserts that Mount's basis plus all profits (minus losses) would be repaid to him on demand. (CP 76¶ 5) and that Nauman took no cut from any participants' pro rata share of original basis, plus gains, minus losses. (CP 258, 259) or fees or charges (CP 253-54) The evidence absent at trial would show Nauman did not qualify as a RCW 21.20.020 "**paid** adviser" or RCW 21.20.030, 005(6) "investment adviser....for compensation...." Wang v. Gordon, 715 F.2d 1187, 1192 (7th Cir. 1983) ("Gordon was not compensated for the information regarding securities in the letter he sent.For these reasons, the court finds that plaintiff has failed to state a claim against Gordon under the Investment Advisors Act.") Abrahamson v. Fleschner, 568 F.2d 862, 873 (2d Cir 1976), cert den. 436 U.S. 913 (1978) ("The purpose of the Advisers Act was "to protect the public and investors against malpractice by persons paid for advising others about securities.") Nauman's **unpaid** stock selections in December, 2000 aren't encompassed within RCW 21.20.020, 030 or 110(g), even if proof existed that Nauman embarked then on a "scheme" to conceal records or defraud Mount. Furthermore, even if such a scheme existed and if Nauman were paid for his selections, the explicit remedies are RCW 21.20.110 administrative

action or RCW 21.20.400 criminal referrals, not civil trials. See, Transamerica, 444 US at 19. Nauman's evidence, absent at trial, was also material to this defense.

(iv) The reopening application negates Mount's title to the funds in Nauman's possession.

The Brin case defined the requisites for title to pass by gift.

The requirements for a completed gift are: (1) an intention of the donor to presently give; (2) a subject matter capable of passing by delivery; (3) an actual delivery; and (4) an acceptance by the donee. ... (O)ne who asserts title by this means must prove it by clear, convincing, strong, and satisfactory evidence

Brin, 89 Wn App at 825. There is no dispute that Mount's funds were delivered and accepted. (CP 106) The reopening application quotes admissions by Mount that he intended to pass title to Nauman by going to a notary and signing his stocks over to Tom. (CP 77) The reopening application displays Mount's signature executing this provision. (CP 128) The reopening application also contains material evidence that no "funds of plaintiff" were taken by Nauman. Nauman finished with the same as Mount: a pro rata share of a total loss (CP 77) and disaster. (CP 253) Nauman's evidence, absent at trial, was also material to this defense.

7. CONCLUSIONS AND RELIEF

Denial of continuance and reopening was reversible error.

Nauman is entitled to reopen and void the judgment and findings and

conclusions and is entitled to a new trial.

8. APPENDIX 1

Account Carried By:
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JOSEPH'S MOUNT &
 FERT ANN MOUNT JT TEN
 169 A DEVEREUSE RD
 CHEHALTS WA 98532-9048
 210,920

Period Ending 10/29/99	Account # 773-10910-18	A.E. Number 261
Last Statement 09/24/99	Taxpayer ID #	Page 1 of 3

Account Summary	Opening Balance	Closing Balance
CASH ACCOUNT	70,000.00DR	15.00DR
MARGIN ACCOUNT	.00	70,000.00DR
NET ACCOUNT BALANCE	70,000.00DR	70,015.00DR
MONEY MARKET FUNDS	70,005.01	5,481.53
PRICED PORTFOLIO VALUE	307,140.36	136,734.91
TOTAL ACCOUNT EQUITY	237,140.36	66,719.91

Income Summary	This Month	Year To Date
TAXABLE DIVIDENDS	43.04	2,477.67
CREDIT INTEREST	17.10	18.24
MARGIN INTEREST EXPENSE	65.63	65.63

"THOMAS F. WHITE & CO., INC. RELOCATED THEIR HEADQUARTERS ON 8/14/98. THE NEW ADDRESS IS 301 MISSION ST SF CA 94105."

PORTFOLIO SUMMARY

Type	Quantity	Description	Symbol	Price	Market Value	Estimated Rate	Annual Income
M. IN	5,481.53	**GALAXY PRIME RESERVES FUND	GPRXX	1.00	5,482	.044	241
MARGIN	493	***BP AMOCO P L C	T	46.75	23,048	.880	434
MARGIN	258	**BP AMOCO P L C SPONSORED ADR	BPA	57.75	14,900	1.219	315
MARGIN	245	CHEVRON CORP WITH RIGHTS TO PURCHASE PREFRD STK UNDER CERTAIN CIRCUMSTANCE	CHV	91.313	22,372	2.600	637
MARGIN	376	EXXON CORP	XON	74.063	27,848	1.760	662
MARGIN	426	LUCENT TECHNOLOGIES INC	LU	64.25	27,371	.080	34
MARGIN	330	***VODAFONE AIRTOUCH PLC SPONSORED ADR	VOD	47.625	15,716	.212	70
PRICED PORTFOLIO VALUE		CURRENT ESTIMATED YIELD		TOTAL ESTIMATED INCOME			
136,734.91		1.750%		2,393			

REGULAR ACCOUNT ACTIVITY

Type	Date	Quantity	Transaction	Description	Price	Debit	Credit
BUY/SELL TRANSACTIONS							
MARGIN	10/07	129	BOUGHT	**BP AMOCO P L C SPONSORED ADR STK SPLIT ON 129 SHS REC 10/01/99 PAY 10/04/99			
MARGIN	10/07	264	BOUGHT	***VODAFONE AIRTOUCH PLC SPONSORED ADR STK SPLIT ON 66 SHS REC 09/30/99 PAY 10/01/99			
CASH	10/13	39-	SOLD	PUGET SOUND ENERGY INC WITH RIGHTS TO PURCHASE PREFRD STK UNDER CERTAIN CIRCUMSTANCE UNSOLICITED	22 9/16		842.41
MARGIN	10/13	395-	SOLD	AMERITECH CORP NEW UNSOLICITED	66 5/8		26,278.51
MARGIN	10/13	465-	SOLD	BELL ATLANTIC CORP UNSOLICITED	65 3/8		30,360.81

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Account Number	773-10910-18	Page	2 of	3
A.E. Number	261	Period Ending	10/29/99	

REGULAR ACCOUNT ACTIVITY

Type	Date	Quantity	Transaction	Description	Price	Debit	Cred
BUY-SELL TRANSACTIONS							
MARGIN	10/13	592-	SOLD	BELLSOUTH CORP WITH RIGHTS TO PURCHASE PREFRD STK UNDER CERTAIN CIRCUMSTANCE UNSOLICITED	4211/16		25,232.
MARGIN	10/13	132-	SOLD	MEDIAONE GROUP INC UNSOLICITED	70 7/8		9,317.
MARGIN	10/13	588-	SOLD	SBC COMMUNICATIONS INC. UNSOLICITED	50 3/4		29,802.
MARGIN	10/13	135-	SOLD	U S WEST INC NEW UNSOLICITED	59 3/8		7,977.
CASH	10/14	130-	SOLD	**ALLIANCE PREMIER GROWTH FUND INC-CL C TRADE REDUCED BY \$42.27 FOR CONTINGENT DEFERRED SALES CHRG FUND CONF #004991810	33.03		4,251.

FUNDS PAID AND RECEIVED							
	10/15		WIRE	CK # LM00067573 PAYEE 325170628 A		70,000.00	
MARGIN	10/29		WIRE	CK # LM00069712 PAYEE 325171740 A		70,000.00	
CASH	10/07		CHECK	CHECK RECD SF			1,000.0

MARGIN INTEREST							
MARGIN	10/18		INTEREST	FROM 09/16 THRU 10/15 @ 8 3/4% BAL AVBAL 54,000		65.63	

CREDIT BALANCE INTEREST							
CASH	10/18		INTEREST	INTEREST ON CREDIT BALANCE AT 3.000% 09/16 THRU 10/15			17.1

OTHER TRANSACTIONS							
CASH	10/01	493	JOURNAL	AT&T CORP TRANSFER FROM ACCT 773-24338-1 PER LOA			
CASH	10/01		JOURNAL	TRANSFER FROM ACCT 773-24338-1 PER LOA			432.92
MARGIN	10/11	130	JOURNAL	**ALLIANCE PREMIER GROWTH FUND INC-CL C TRANSFER BETWEEN TYPES			
MARGIN	10/11	493	JOURNAL	AT&T CORP TRANSFER BETWEEN TYPES			
CASH	10/11	130-	JOURNAL	**ALLIANCE PREMIER GROWTH FUND INC-CL C TRANSFER BETWEEN TYPES			
	10/11	493-	JOURNAL	AT&T CORP TRANSFER BETWEEN TYPES			

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Account Number	773-10910-18	Page	3 of	3
A.E. Number	261	Period Ending	10/29/99	

REGULAR ACCOUNT ACTIVITY

Type	Date	Quantity	Transaction	Description	Price	Debit	Credit
OTHER TRANSACTIONS							
CASH	10/12	130	JOURNAL	**ALLIANCE PREMIER GROWTH FUND INC-CL C			
MARGIN	10/12	130-	JOURNAL	**ALLIANCE PREMIER GROWTH FUND INC-CL C			
MARGIN	10/14		TRANSFER	TFR MARGIN TO CASH		128,970.05	
CASH	10/14		TRANSFER	TFR MARGIN TO CASH			128,970.0
CASH	10/15		JOURNAL	WIRE FEE		15.00	
CASH	10/19		TRANSFER	TFR CASH TO MARGIN		65.63	
MARGIN	10/19		TRANSFER	TFR CASH TO MARGIN			65.6
CASH	10/29		JOURNAL	WIRE FEE		15.00	

MONEY MARKET FUNDS ACTIVITY

T	Date	Quantity	Transaction	Description	Price	Debit	Credit
C	10/14		CHECK	MONEY MARKET CHECK CLEARED REDEMPTION CHECK # 4		60,000.00	
CASH	09/27	70,000-	SWEEP	**GALAXY PRIME RESERVES FUND			70,000.0
CASH	10/04	432.92	SWEEP	**GALAXY PRIME RESERVES FUND		432.92	
CASH	10/12	1,000	SWEEP	**GALAXY PRIME RESERVES FUND		1,000.00	
CASH	10/13	842.41	SWEEP	**GALAXY PRIME RESERVES FUND		842.41	
CASH	10/14	133,221.68	SWEEP	**GALAXY PRIME RESERVES FUND		133,221.68	
CASH	10/15	60,000-	SWEEP	**GALAXY PRIME RESERVES FUND			60,000.0
CASH	10/15	70,015-	SOLD	**GALAXY PRIME RESERVES FUND	1.00		70,015.0
CASH	10/18	43.04	DIV REINV	**GALAXY PRIME RESERVES FUND MONTHLY DIVIDEND REINVESTED		43.04	
CASH	10/18		DIVIDEND	**GALAXY PRIME RESERVES FUND MONTHLY DIVIDEND			43.0
CASH	10/19	48.53-	SWEEP	**GALAXY PRIME RESERVES FUND			48.5

MONEY MARKET FUNDS CHECKWRITING PAYEE DETAIL

Check Date	Transaction Date	Check #	Payee	Check Amount	Expense Monitor
10/10	10/14	4	JOE MOUNT	60,000.00	

8. APPENDIX 2



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Sun Microsystems Inc NASDAQ:SUNW

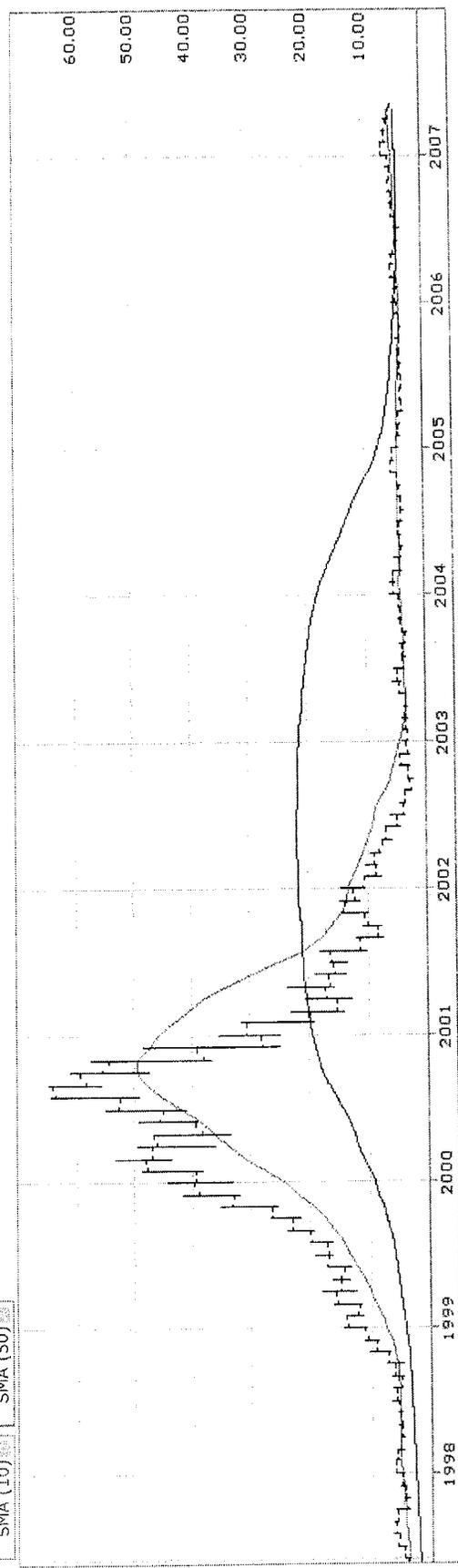
5.04 \uparrow 0.12 (2.33%) **Buy** **Sell** **Set Triggers** **View Option Chain** **Set Alert**
 Bid 5.04 Ask 5.06 B/A Size 463600 x 571400 High 5.17 Low 5.00 Vol. 72,689,500 (Above Avg)

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Upper Indicators **Add Upper Indicator** Lower Indicators **Add Lower Indicator** Events and Comparisons **Add Event or Comparison**

Chart Style OHLC Period Monthly Timeframe 1day | 2day | 5day | 10day | 1mo | 3mo | 6mo | YTD | 1yr | 3yr | 5yr | **10yr** | 20yr

Price Performance SMA (10) SMA (50) Jan 01, 2001 Open \$28.125 High \$35.125 Low \$25.00 Close \$30.5625



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Microsoft Corp NASDAQ:MSFT

30.74 ▲ **0.26 (0.85%)** [Buy](#) [Sell](#) [Set Triggers](#) [View Option Chain](#) [Set Alert](#)

Bid **30.74** Ask **30.75** B/A Size **25800 x 65600** High **30.83** Low **30.39** Vol. **33,332,934** (Below Avg)

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Chart Style
 OHLC
 Period
 Monthly

Upper Indicators
 Add Upper Indicator
 Timeframe
 1day | 2day | 5day | 10day | 1mo | 3mo | 6mo | YTD | 1yr | 3yr | 5yr | **10yr** | 20yr

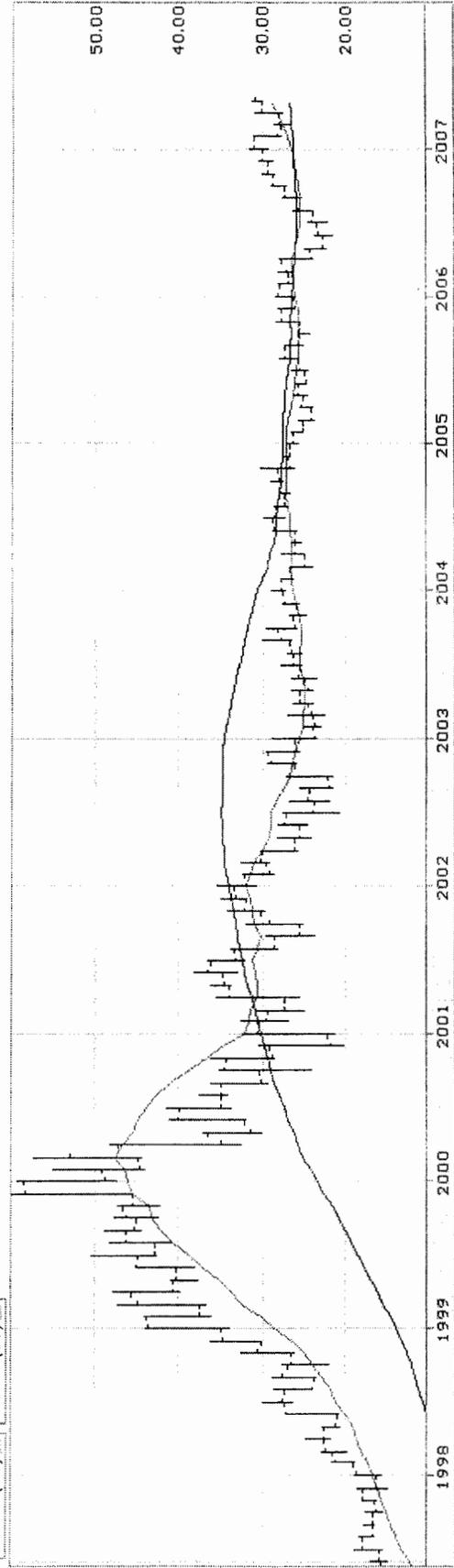
Lower Indicators
 Add Lower Indicator

Events and Comparisons
 Add Event or Comparison

Price Performance

SMA (10) SMA (50)

Jan 01, 2001 Open \$22.0626 High \$32.375 Low \$21.4376 Close \$30.5313



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Cisco Systems Inc NASDAQ:CSCO

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csc0

25.90 ▲ 0.38 (1.49%)

Bid 25.90 Ask 25.91 B/A Size 14000 x 32100 High 26.00 Low 25.55 Vol. 34,928,279 (Below Avg)

Chart Style

OHLC

Period

Monthly

Upper Indicators

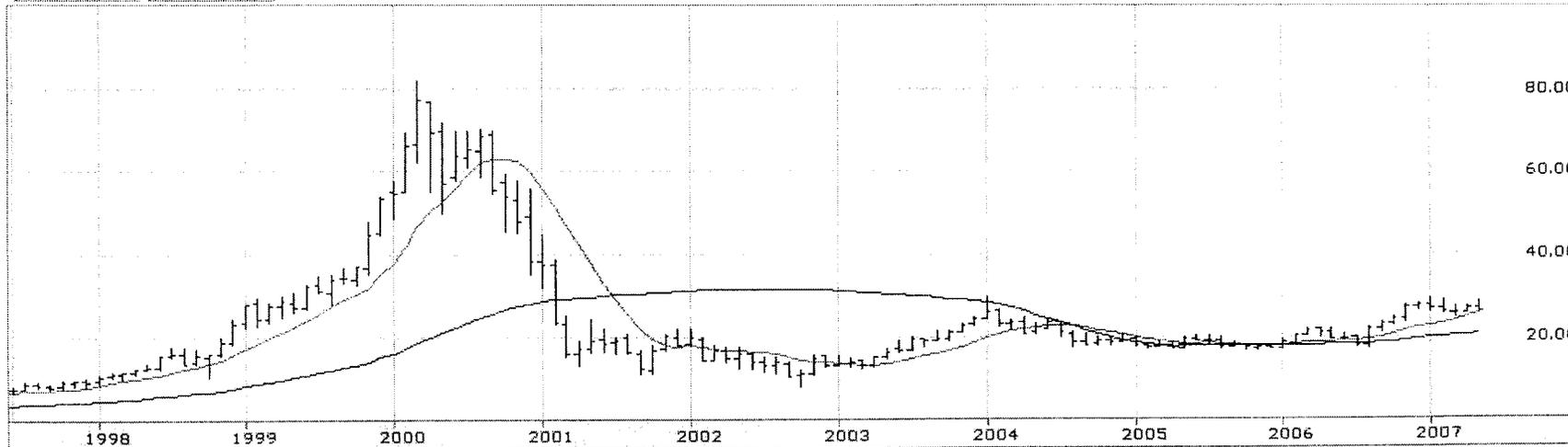
Timeframe

Lower Indicators

Events and Comparisons

Price Performance

Jan 01, 2001 Open \$38.125 High \$44.50 Low \$31.9375 Close \$37.4375



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Oracle Corp NASDAQ:ORCL

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Symbol... **Go**

19.17 \downarrow **0.14 (0.73%)** **Buy** **Sell** **Set Triggers** **View Option Chain** **Set Alert**

Bid **19.16** Ask **19.17** B/A Size **21400 x 20900** High **19.34** Low **19.11** Vol. **17,570,045** (Below Avg)

Chart Style

OHLC

Period

Monthly

Upper Indicators

Add Upper Indicator

Timeframe

1day | 2day | 5day | 10day | 1mo | 3mo | 6mo | YTD | 1yr | 3yr | 5yr | **10yr** | 20yr

Lower Indicators

Add Lower Indicator

Events and Comparisons

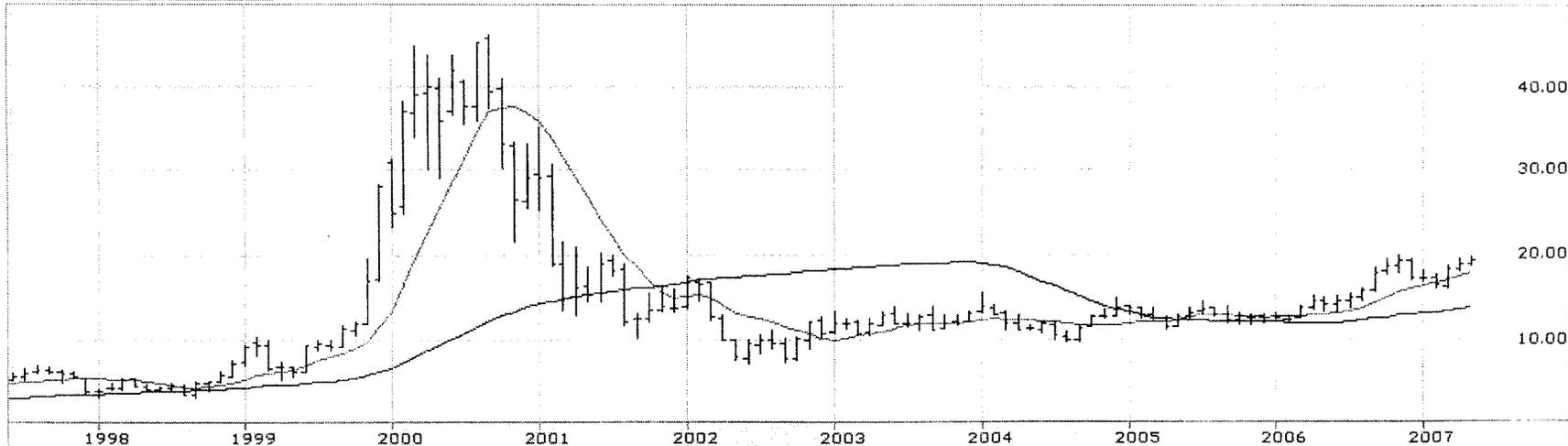
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Price Performance

Jan 01, 2001 Open \$29.5625 High \$35.00 Low \$25.25 Close \$29.125

SMA (10)

SMA (50)



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NASDAQ NMS COMPOSITE INDEX \$COMPX

\$2,614.55 ▲ 10.03 (0.39%) [Set Triggers](#) [View Option Chain](#)

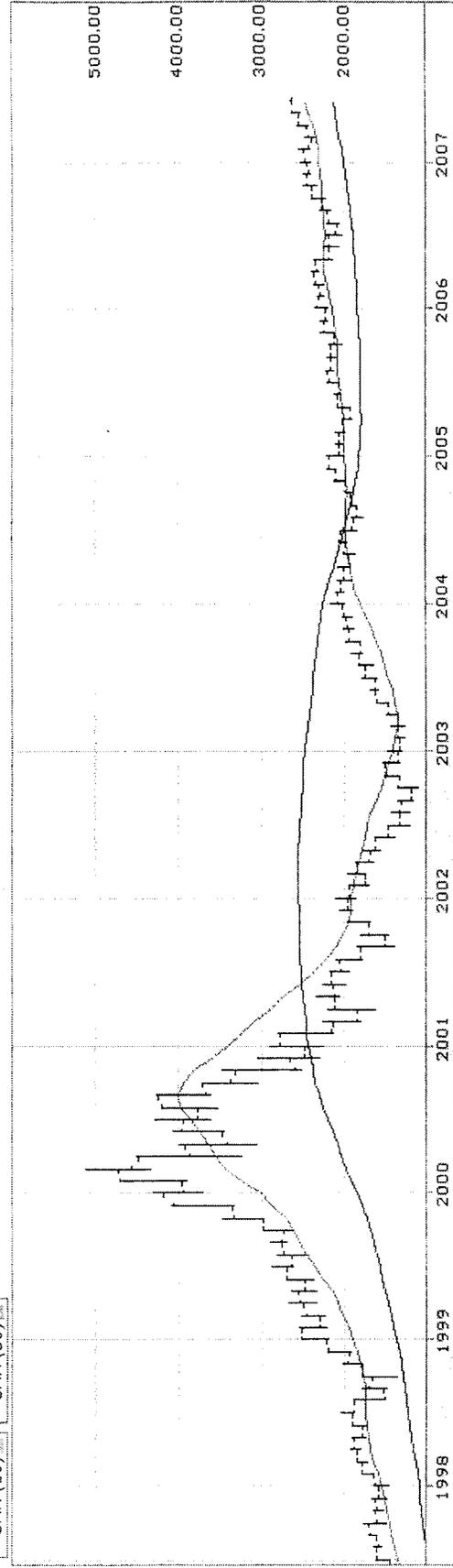
High 2,626.40 Low 2,608.69 Vol. 651,036,400 (Below Avg)

Change company [Symbol lookup](#)
\$compX

Chart Style: OHLC | Add Upper Indicator | Add Lower Indicator | Add Event or Comparison

Period: Monthly | 1day | 2day | 5day | 10day | 1mo | 3mo | 6mo | YTD | 1yr | 3yr | 5yr | 10yr | 20yr

Price Performance: SMA (10) SMA (50) Jan 01, 2001 Open \$2474.16 High \$2892.36 Low \$2251.71 Close \$2772.73



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