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AUCTION RATE SECURITIES - PENNSYLVANIA

Fulton Financial Advisors, Nat. Ass'n v. NatCity Investments, Inc.

United States District Court, E.D. Pennsylvania - October 15, 2013 - Slip Copy - 2013 WL 5635977

For a number of years prior to 2006, Fulton maintained an institutional investment account with NatCity, for which NatCity acted as Fulton's securities broker. Around 2005, NatCity allegedly recommended to Fulton that it invest in ARS, "in keeping with Fulton's desire to invest in only the highest quality and safest debt investments." An unspecified portion of these ARS were from NatCity's own inventory. Fulton currently holds \$175 million in ARS. NatCity also allegedly acted as a CBD for a number of the ARS issues it recommended to Fulton, for which NatCity typically earned a yearly fee of 0.25 percent of the value of the transaction. For transactions where NatCity was not the CBD, it received a portion of the CBD's fee, a fact not disclosed to Fulton, for directing the Fulton trade to the CBD.

After the collapse of the ARS market, Fulton had been required to write down the value of its ARS by an amount in excess of \$10 million. Fulton then brought the standard-issue ARS action against NatCity, making numerous allegations that state and federal regulators have determined that NatCity and the other major underwriters of ARS manipulated the ARS markets and deceived ARS investors. It also alleges that NatCity had special knowledge and expertise in the ARS auction markets that it did not possess. Because of its superior knowledge and role in the auction markets as Fulton's BD, Fulton alleges that NatCity owed it fiduciary duties, as well as duties of fairness, honesty, disclosure of material information, and undivided loyalty.

NatCity contended that Fulton had failed to plead its fraud-based claims with sufficient particularity, and that Fulton could not have reasonably relied upon NatCity's alleged misrepresentations.

The court found that Fulton had failed to allege specific facts to support the misrepresentation, scienter, and reliance elements of its fraud-based claims, and had also failed to plausibly allege the misrepresentation element of its negligent misrepresentation claim. Consequently, it granted NatCity's Motion to Dismiss the three Pennsylvania Securities Act claims, the negligent misrepresentation claim, the claim for common law fraud, and the claim for aiding and abetting fraud.

The court denied the Motion to Dismiss as to the negligence claim and the breach of fiduciary duty claim.