

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)

Name of Claimant(s))

Cherie M. Brown TRS Cherie M. Brown Trust)
Terry Edwin & Cherie M. Brown)

) Case No. 91-02022

Name of Respondent(s))

Robert Earl Hillard, Pershing & Co. Inc.,)
Specialty Securities Inc., Mark Brecher,)
American Capital Equities Inc., Stephen)
Kenneth Burch, Harvey H. Feldman, and)
Stephen R. Matthews)

REPRESENTATION

For Claimants, Cherie M. Brown as Trustee of the Cherie M. Brown Trust, dated December 15, 1986; and, Terry Edwin Brown and Cherie M. Brown as Joint Tenants ("Brown"): Robert W. Pearce, Esq. of Lerner and Pearce, P.A.

For Respondents:

Pershing, Division of Donaldson Lufkin & Jenrette Securities Corp. ("Pershing"): Bennett Falk, Esq. of Morgan Lewis & Bockius;

Steven R. Matthews ("Matthews"): pro se;

Specialty Securities, Inc. ("Specialty"): Harold L. Raphael;

Mark Brecher ("Brecher"): pro se;

American Capital Equities, Inc. ("ACE"): Robert E. Hillard;

Robert Earl Hillard ("Hillard"): pro se;

Stephen K. Burch ("Burch"): E. G. Burton, III, Esq.; and,

Harvey H. Feldman ("Feldman"): Lawrence Friedman, Esq. of Thompson & Mitchell and pro se.

CASE INFORMATION

Statement of Claim filed: June 27, 1991, Amended February 3, 1992, and Second Amended July 17, 1992. Claimants' Submission Agreements signed: June 21, 1991 by Cherie Brown and June 20, 1992 by Terry Brown.

Respondents' Statements of Answer filed:

April 21, 1992 by Pershing, Amended August 4, 1992. Pershing's Submission Agreement executed: November 22, 1991;

August 15, 1991 by Hillard, Amended November 27, 1991 to add Third Party Claim and Cross Claim, Supplemented December 23, 1991, Amended March 2, 1992, and Second Amended August 3, 1992. Hillard's Submission Agreement signed: August 12, 1991 and November 27, 1991;

August 15, 1991 by ACE;

March 5, 1992 by Burch. Burch's Submission Agreement executed: March 4, 1992;

January 16, 1992 by Feldman to Hillard's Third Party Claim, March 19, 1992 to Claimants' Amended Claim, August 14, 1992 to Second Amended Claim. Feldman's Submission Agreement executed: August 20, 1992.

Respondents, Brecher, Matthews and Specialty, did not file Statements of Answer or sign Submission Agreements as required by Sections 12 and 25 of the Code. ACE did not execute a Submission Agreement as required by those Sections (see "Other Issues").

HEARING INFORMATION

On June 22, 1992, in Fort Lauderdale, Florida, a prehearing conference lasting one (1) session was conducted via telephone conference call with an arbitrator.

On August 18, 19 and 20, 1992, in Fort Lauderdale, Florida, hearings lasting six (6) sessions were conducted.

CASE SUMMARY

Claimants alleged that Cherie Brown is Trustee of the Cherie M. Brown Trust and that Terry Brown, her son, owned all of the assets in the Cherie M. Brown and Terry Edwin Brown Joint Account; that Claimants are unsophisticated and untrained in securities investments; that Respondents, ACE, Specialty, Hillard, Burch, and Feldman, through Matthews and Brecher, made misrepresentations of and omitted to state material facts; induced and pressured Ms. Brown to make unsuitable transactions in low priced unregistered equity securities in Canadian companies; that Specialty,

Matthews and Brecher manipulated the market by effecting trades in the stocks to create an appearance of activity and to affect the price; and, that ACE, Hillard, Burch and Feldman failed to supervise to prevent the sale and manipulation of unregistered securities. Claimants further alleged that the actions of all Respondents, excepting Pershing, constituted breach of fiduciary duty (withdrawn at the hearing against Burch), breach of contract and violation of Sections 517.07 and 517.301, Florida Statutes; that the actions of ACE, Specialty, Brecher and Matthews constituted a violation of Sections 812.014 and 772.10, Florida Statutes (Civil Theft); that ACE, Specialty, Hillard, Brecher, Burch and Feldman's actions constituted negligent supervision; that Pershing's actions constituted breach of contract, violation of Sections 517.07, 517.301 and 517.211, Florida Statutes; and, with ACE, violation of Sections 678.306(2) and (10), Florida Statutes.

Respondents, excepting Brecher, Matthews, ACE and Specialty, denied all allegations of wrongdoing. Respondent, Pershing, alleged that Claimants failed to allege any facts relating to Pershing's role in the alleged wrongs; that Claimants' reliance on vicarious agency liability contradicted Claimants' prior arguments and was unsupported in law; and, that Claimants' theories of liability against Pershing lacked any factual predicate.

Respondent, Hillard, alleged the affirmative defenses of fulfillment of all compliance and supervisory duties and responsibilities and compliance with all rules and regulations of the NASD, SEC and State of Florida; that Ms. Brown breached her fiduciary duties and caused any losses; that Matthews may be liable; that Brecher was responsible for Matthews' actions; that Feldman was responsible for any failure to supervise; that Burch was a controlling person and responsible for the salesman and Feldman; that Brown was the sole customer, out of hundreds, to claim for purchases of two of the stocks; and, that Hillard used due care.

Hillard filed a Third Party Claim and alleged that Burch and Feldman were 100% responsible for the clearing division; were the control persons of the clearing division; violated Article III, Sections 1 and 27 of the NASD Rules of Fair Practice; and, that their actions constituted breach of fiduciary duty, negligence, and breach of contract.

Hillard also filed a Cross Claim and alleged that Brecher and Matthews violated Article III, Sections 1, 3 and 18 of the NASD Rules of Fair Practice; breached their agreement with ACE; and, that Brown breached his duties as a branch manager.

Respondent, ACE, stated that it ceased operations December 31, 1990, was expelled from the NASD May 30, 1991, had used its remaining assets to settle its final expenses, and would not be represented in this arbitration.

Respondent, Burch, denied all allegations of wrongdoing and liability in both the Claim and the Cross Claim (Third Party Claim) of Hillard.

Respondent, Feldman, alleged the affirmative defenses of failure to state a claim; bar by statute of limitations; lack of supervisory control and not a controlling person; bar by res judicata, collateral estoppel and equitable estoppel due to Florida Division of securities ("FDS") finding that Feldman was not responsible for or involved in the activities of the Maitland office of ACE, including the sale of securities at issue; intervening superceding causes; punitive damages barred by the United States and Florida Constitutions; and, failure to join indispensable parties.

Third Party Respondent, Feldman, denied all allegations of wrongdoing and alleged the affirmative defenses of failure to state a claim; damages caused by original Respondents; statute of limitations; intervening superceding causes; estoppel; ratification; punitive damages barred by the United States and Florida Constitutions; and, bar by res judicata, collateral estoppel and equitable estoppel due to the FDS finding that Feldman was not responsible for or involved in the activities of the Maitland office of ACE, including the sales of the unregistered securities at issue.

RELIEF REQUESTED

Claimants requested damages in the amounts of \$307,000.00 and \$31,000.00, respectively, punitives of \$927,000.00 and \$93,000.00, respectively, interest, attorney's fees, costs, treble damages, lost profits, rescission and other relief.

Respondents requested dismissal. Feldman requested attorney's fees, expenses and other relief.

OTHER ISSUES CONSIDERED & DECIDED

1. Respondents, Brecher, Matthews and Specialty, failed to file Answers or execute Submission Agreements and ACE failed to execute a Submission Agreement as required by Sections 12 and 25 of the Code. Further, none of the foregoing parties appeared at the hearing of this matter. Although Hillard appeared on his own behalf, he declined to appear on behalf of ACE. This Panel finds adequate service upon and notice to these parties based upon the record evidence contained in the NASD files. Pursuant to Section 29 of the Code, this panel proceeded with the hearing as if each party had entered an appearance.

2. Prior to the hearing, the Panel dismissed the Third Party Claim of Hillard against Feldman. That claim was not amended by Hillard and was not considered in these proceedings.

3. At the close of Claimants' case, Pershing renewed its prior Motion to Dismiss. After careful consideration, Pershing's Motion to Dismiss was granted.

4. The parties who appeared at the hearing have agreed that the heard in this matter may be executed in counterpart copies or that a handwritten,

OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$6,300.00 (one (1) prehearing conference x \$300.00 plus six (6) sessions x \$1,000.00).

2. Respondents are hereby assessed \$6,300.00, jointly and severally, less credit for the \$250.00 previously deposited by Hillard in partial satisfaction thereof, leaving a balance due of \$6,050.00. Of that amount, Respondents shall pay \$1,000.00 directly to the Claimants, and \$5,050.00 to the National Association of Securities Dealers, Inc.

3. The NASD shall retain the \$250.00 non-refundable filing fee previously paid by Claimants and the two (2) \$500.00 non-refundable filing fees previously paid by Respondent Hillard.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

/s/

Myron Dunsy, Esq.
Public Arbitrator

/s/

Jimmie R. Gregory, Esq.
Public Arbitrator

/s/

Anthony S. Pastro, Esq.
Industry Arbitrator

Date of Decision: September 28, 1992