

**Final Order**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Cannan Family Partnership, (Claimant) vs. D.E. Frey & Company, Inc. and David Bromberg, (Respondents) vs. George Cannan, Sr. (Third-Party Respondent)

Case Number: 00-04884

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant Canaan Family Partnership, hereinafter referred to as "Claimant": George Cannan, Sr., Partner, Cannan Family Partnership, Lakewood, NJ. Previously represented by: Leonard H. Bloom, Esq., Broad and Cassel, Miami, FL.

Respondent D.E. Frey & Company, Inc. ("Frey"): Thomas P. Swigert, Esq., Dorsey & Whitney LLP, Denver, CO. Previously represented by: Larry D. Hayden, Esq., L.D. Hayden & Associates, Arvada, CO.

Respondent David Bromberg ("Bromberg"): Jack D. Ballard, Esq., The Ballard Law Firm, Houston, TX. Mr. Ballard was with the law firm of Ogden, Gibson, White & Broocks, L.L.P., Houston, TX, when he originally appeared in this matter.

Third-Party Respondent George Cannan, Sr. ("Cannan"), appeared *pro se*. Previously represented by: Leonard H. Bloom, Esq., Broad and Cassel, Miami, FL.

**CASE INFORMATION**

Statement of Claim filed on or about: October 30, 2000.

Reply to Frey's Counterclaim and Motion to Strike filed by Claimant on or about: February 1, 2001.

Reply to Bromberg's Counterclaim filed by Claimant on or about: February 6, 2001.

Claimant signed the Uniform Submission Agreement: April 26, 2000.

Statement of Answer and Counterclaim filed by Frey on or about: January 23, 2000.

Response to Claimant's Motion to Strike filed by Frey on or about: February 16, 2000.

Frey signed the Uniform Submission Agreement: January 22, 2001.

Statement of Answer, Counterclaim, and Third-Party Claim filed by Bromberg on or about: January 22, 2001.

Supplement to Third-Party Claim filed by Bromberg on or about: February 27, 2001.

Bromberg signed the Uniform Submission Agreement: December 29, 2000.

Statement of Answer and Motion to Dismiss filed by Cannan on or about: February 6, 2001.  
Cannan signed the Uniform Submission Agreement: October 27, 2000.

### CASE SUMMARY

Claimant asserted the following causes of action: unauthorized trades; fraud; fraud in the inducement/rescission; conversion; fraudulent misrepresentation and omission of material facts; violation of Sections 10(b) and 20 of the Securities and Exchange Act of 1934 and Rule 10b-5; breach of fiduciary duty; constructive fraud; negligence; negligent misrepresentation; negligent supervision; and violations of Article 23-A and Section 349 of the General Business Law of the State of New York. Claimant's claim involved the stocks of Environmental Technologies Inc. ("EVTC") and EpicEdge Inc. ("EDG").

Unless specifically admitted in its Answer, Frey denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant has failed to state a claim upon which relief may be granted; Claimant knowingly and deliberately opened accounts with Frey and several other brokerage firms across the country for the sole purpose of influencing or affecting the trading activity in EVTC and EDG; Claimant's allegations are legally and factually without merit; Frey did not hold, nor did it have control of, Claimant's EVTC stock certificate; the acts and/or omissions in question were on the part of Cannan and those acting in concert with him; Claimant participated in a device, scheme, and artifice designed to defraud Frey and other broker/dealers; there is no record or document to support Claimant's contention that unauthorized trades were effected by Frey; Frey will prove that its conduct was not negligent, nor was there a breach of any perceived or actual fiduciary duties by Frey; Claimant's assertion that Frey employed deceptive acts and practices in the opening of Claimant's account with Frey are without foundation; Claimant cannot shift responsibility for its investment decisions to Frey; the evidence to be presented at hearing will demonstrate that Frey acted in good faith, and that any fraudulent, deceptive, or negligent activity with the purchase and/or sale of EVTC and EDG was set in motion not by Frey, but rather by Cannan and those acting in concert with him; and Frey's system of supervision of Bromberg's activities was clearly delineated and subject to day to day supervision by the Houston branch manager.

Unless specifically admitted in his Answer, Bromberg denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim is barred due to Claimant's unclean hands; Claimant ratified the transactions at Frey or is estopped, by its conduct, from disputing the transactions in the account; and the orders placed in Claimant's account were made by Hector Garcia, who had actual and/or apparent authority to place orders in Claimant's account.

In its Counterclaim, Frey asserted the following causes of action: failure to make timely payments; failure to satisfy margin calls; and failure to pay outstanding debit balance in account.

Unless specifically admitted in its Reply, Claimant denied the allegations made in Frey's Counterclaim and asserted the following defenses: Frey has failed to state any claim upon which relief can be granted; Frey's Counterclaim is barred because Claimant did not authorize, direct, or request the stock transactions in issue in the Counterclaim, which indeed were unauthorized; Frey's Counterclaim is barred because Frey's losses, if any, were caused by Frey's own negligence and/or misconduct and/or that of its agents; Cannan did not give anyone actual or apparent authority to make any of the trades alleged in the Counterclaim; Frey's Counterclaim is barred because Frey never received proper documentation regarding opening an account on behalf of Claimant; any liability to Frey, if any, would be borne by Respondent Bromberg, and not Claimant; Claimant is entitled to a set-off; Frey's Counterclaim is barred by the fact that, at the times the trades alleged therein were made, Frey did not have any client documentation whatsoever on Claimant's supposed account; Frey's Counterclaim is barred because there exists no written documentation authorizing the trades alleged; Frey's Counterclaim is barred due to Frey's unclean hands, caused by Frey's fraudulent activity as alleged with specificity in Claimant's Statement of Claim; Frey's Counterclaim is barred based on the doctrines of waiver and estoppel, due to Frey's wrongful conduct as alleged with specificity in Claimant's Statement of Claim; Frey's Counterclaim is barred based on the doctrine of respondeat superior; Frey's Counterclaim is barred based on Frey's failure to meet a condition precedent thereto, namely the existence of proper account documentation in connection with Claimant's supposed account; and Frey's Counterclaim is barred due to Frey's negligent supervision of Respondent Bromberg.

In his Counterclaim, Bromberg asserted the following causes of action: fraud; defamation; civil conspiracy; and frivolous prosecution.

Unless specifically admitted in its Reply, Claimant denied the allegations made in Bromberg's Counterclaim and asserted the following defenses: Bromberg has failed to state any claim upon which relief can be granted; Bromberg's Counterclaim is barred because Claimant did not authorize, direct, or request the stock transactions in issue in the Counterclaim, which indeed were unauthorized; Bromberg's Counterclaim is barred because Bromberg's losses, if any, were caused by Bromberg's own negligence and/or misconduct, as detailed in Claimant's Statement of Claim; Cannan did not give anyone actual or apparent authority to make any of the trades alleged in the Counterclaim; Bromberg's Counterclaim is barred because Bromberg never received proper documentation regarding opening an account on behalf of Claimant; any liability to Bromberg, if any, would be borne by Respondent Frey, and not Claimant; Claimant is entitled to a set-off; Bromberg's Counterclaim is barred by the fact that, at the

times the trades alleged therein were made, neither Bromberg nor Frey had any client documentation whatsoever on Claimant's supposed account; Bromberg's Counterclaim is barred because there exists no written documentation authorizing the trades alleged; Bromberg's Counterclaim is barred based on the doctrines of waiver and estoppel, due to Bromberg's wrongful conduct as alleged with specificity in Claimant's Statement of Claim; and the statements Bromberg complains are "defamatory" are either true or are non-actionable pure opinion, and/or are privileged.

In his Third-Party Claim, Bromberg asserted the following causes of action: fraud; defamation; civil conspiracy; and frivolous prosecution.

Unless specifically admitted in his Answer, Cannan denied the allegations made in the Third-Party Claim and asserted the following defenses: Bromberg has failed to state any claim upon which relief can be granted; the Third-Party Claim is barred because Claimant did not authorize, direct, or request the stock transactions in issue in the Third-Party Claim, which indeed were unauthorized; the Third-Party Claim is barred because Bromberg's damages, if any, were caused by Bromberg's and/or Frey's own negligence and/or misconduct, as detailed in the Statement of Claim; Cannan did not give anyone actual or apparent authority to make any of the trades alleged in Claimant's Statement of Claim or Bromberg's Third-Party Claim; the Third-Party Claim is barred because neither Bromberg nor Frey ever received proper documentation regarding opening an account on behalf of Claimant; any liability to Bromberg, if any, would be borne by Frey, and not Cannan; Cannan is entitled to a set-off; the Third-Party Claim is barred by the fact that, at the times the trades alleged therein were made, neither Bromberg nor Frey had any client documentation whatsoever on Claimant's supposed account; the Third-Party Claim is barred because there exists no written documentation authorizing the trades alleged; the Third-Party Claim is barred due to Bromberg's unclean hands, caused by Bromberg's fraudulent activity as alleged with specificity in Claimant's Statement of Claim; the Third-Party Claim is barred based on the doctrines of waiver and estoppel, due to Bromberg's wrongful conduct as alleged with specificity in Claimant's Statement of Claim; the statements which Bromberg complains were "defamatory" are either true, or are non-actionable pure opinion, and/or are privileged; all actions taken by Cannan in connection with this matter were taken as an agent of Claimant, and not on behalf of Cannan, individually, and were taken by Cannan in good faith within the course and scope of his capacity as an agent of Claimant; and NASD Dispute Resolution lacks jurisdiction over this matter.

#### **RELIEF REQUESTED**

Claimant requested:

- a. Compensatory damages in a sum to be determined at hearing;
- b. Punitive damages;
- c. Pre- and post-award interest;
- d. A declaration that the purchases of EDG stock were unauthorized and that Claimant has no liability whatsoever therewith;
- e. Rescission of the client agreement between Frey and Claimant;

- f. Costs of arbitration and reasonable attorneys' fees; and
- g. Such other and further relief as is deemed appropriate and just.

In its Answer and Counterclaim, Frey requested that Claimant's Statement of Claim be dismissed in its entirety and that Frey be awarded damages as follows:

- a. An Award of damages in the amount of \$1,055,349.98 to reimburse Frey for actual losses incurred;
- b. An Award of Frey's fees and costs incurred in pursuing this claim, in an amount to be determined at or following the hearing; and
- c. Such other and further relief, including pre- and post-judgment interest on any damages awarded, as the Panel may deem appropriate.

In its Reply, Claimant requested that the Panel summarily dismiss Frey's Counterclaim, in its entirety and with prejudice, award Claimant all the relief requested in the Statement of Claim, including attorneys' fees, costs, and punitive damages, and grant Claimant such other and further relief as the Panel deems appropriate and just.

In his Answer, Counterclaim, and Third-Party Claim, Bromberg requested that the relief sought by Claimant in this proceeding be denied in all respects, and that the Panel grant him the following relief:

- a. An Award against Claimant for fraud, defamation, and/or civil conspiracy in the amount of at least \$5,000,000.00, pre-judgment and post-judgment interest on that amount at the maximum legal rate, attorneys' fees, costs of arbitration, and punitive damages in the amount of \$15,000,000.00;
- b. An Award against Cannan for fraud, defamation, and/or civil conspiracy in the amount of at least \$5,000,000.00, pre-judgment and post-judgment interest on that amount at the maximum lawful rate, attorneys' fees, costs of arbitration, and punitive damages in the amount of \$15,000,000.00;
- c. An Award against Claimant for all of the attorneys' fees and costs incurred by Bromberg in connection with this arbitration proceeding, and
- d. Such further relief which the Panel deems just.

In its Reply, Claimant requested that the Panel summarily dismiss Bromberg's Counterclaim, in its entirety and with prejudice, award Claimant all the relief requested in the Statement of Claim, including attorneys' fees, costs, and punitive damages, and grant Claimant such other and further relief as the Panel deems appropriate and just.

In his Reply, Cannan requested that the Panel summarily dismiss the Third-Party Claim, in its entirety and with prejudice, and award Cannan his attorneys' fees and costs incurred in responding thereto.

**OTHER ISSUES CONSIDERED AND DECIDED**

Third-Party Respondent Cannan filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code on or about September 26, 2001. During pre-hearing conferences that took place on November 1, 2001 and December 18, 2001, the parties were directed by the Panel to submit briefs on the question of the impact of the bankruptcy filing by Cannan on this arbitration. More specifically, Claimant was directed to advise the Panel whether the claims brought by Claimant could be pursued following the bankruptcy filing. Additionally, if the answer to the previous question was "yes", the parties, specifically Claimant and Respondent Bromberg, were to determine if the Bankruptcy Court would permit the claims brought in this arbitration against Cannan to be pursued.

On July 15, 2002, when briefs had not been received by the Panel, the parties were directed to submit the requested briefs by August 15, 2002. Again, no briefs were submitted by the parties.

The Panel then ordered that this arbitration would be dismissed, without prejudice, unless the parties submitted the requested briefs by November 4, 2002. The parties again failed to provide the requested briefs by the deadline set by the Panel. Therefore, the Panel has dismissed this arbitration in its entirety, without prejudice, for failure to prosecute and failure to submit the briefs ordered by the Panel.

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.

### **DECISION**

After considering the parties' failure to prosecute and failure to submit the briefs as ordered, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are hereby dismissed in their entirety, without prejudice.
2. Frey's Counterclaim is hereby dismissed in its entirety, without prejudice.
3. Bromberg's Counterclaim is hereby dismissed in its entirety, without prejudice.
4. Bromberg's Third-Party Claim is hereby dismissed in its entirety, without prejudice.
5. All other requests for relief are hereby denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

### **Filing Fees**

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

Initial claim filing fee	= \$ 250.00
Counterclaim filing fee (Frey)	= \$2,000.00
Counterclaim filing fee (Bromberg)	= \$ 600.00

### **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 person at the time of the events giving rise to the dispute. In this matter, D.E. Frey & Company, Inc. is a party.

Member Surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

Jan. 14, 15, 16, 17 & 18, 2002, adjournment by all parties = WAIVED

### **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:

Three (3) Pre-hearing sessions with Panel x \$1,000.00	= \$3,000.00
Pre-hearing conferences:	
July 11, 2001	1 session
November 1, 2001	1 session
December 18, 2001	1 session
Total Forum Fees	= \$3,000.00

The Panel has assessed all of the forum fees against Claimant.

### **Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 250.00
<u>Forum Fees</u>	= \$3,000.00
Total Fees	= \$3,250.00
<u>Less payments</u>	= \$1,700.00
Balance Due NASD Dispute Resolution	= \$1,550.00

2. Frey is solely liable for:

Counterclaim Filing Fee	= \$2,000.00
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<u>Member Fees</u>	= \$6,300.00
<u>Total Fees</u>	= \$8,300.00
<u>Less payments</u>	= \$1,200.00
Balance Due NASD Dispute Resolution	= \$6,100.00

3. Bromberg is solely liable for:

<u>Counterclaim Filing Fee</u>	= \$ 600.00
<u>Total Fees</u>	= \$ 600.00
<u>Less payments</u>	= \$3,600.00
Refund Due Bromberg	= \$3,000.00

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




**ARBITRATION PANEL**

David L. Becker, Esq.	-	Non-Public Arbitrator, Presiding Chair
Michael E. Silverman, Esq.	-	Public Arbitrator
Laurence V. Senn	-	Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
David L. Becker, Esq.  
Non-Public Arbitrator, Presiding Chair

1/6/2003  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Michael E. Silverman, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Laurence V. Senn  
Public Arbitrator

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

January 6, 2003  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

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Public Arbitrator

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



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

\_\_\_\_\_  
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Public Arbitrator

\_\_\_\_\_  
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Non-Public Arbitrator, Presiding Chair

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Signature Date

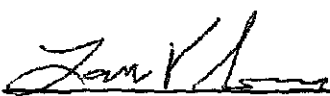
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Michael E. Silverman, Esq.  
Public Arbitrator

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Signature Date

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Laurence V. Senn  
Public Arbitrator

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Signature Date

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