

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. NOV 10 1992

In the Matter of the Arbitration Between

ARBITRATION CHICAGO

Name of Claimant

BMMG Capital Corporation

and

89-02243

CONSOLIDATED WITH

89-02234

Names of Respondents

Suburban Stock/Option Investment Club; Robert J. Brown; Lester Graves; William E. Harris; Jack Hornbeck; Raymond L. Jenner; David M. Kaufman; J. Keith Kavanaugh; John Moyle; Calvin W. Meyer; Everett S. Nicholas; Glen H. Phillips; Quentin Samuelson; Everett Van Reken; Robert L. Whipple; Jerry L. White; Robert W. Wyatt and Richard G. Tomek

and

Names of Counter-Claimants and  
Third-Party Claimants

Suburban Stock/Option Investment Club; Robert J. Brown; Lester Graves; William E. Harris; Jack Hornbeck; David M. Kaufman; Calvin W. Meyer; Glen H. Phillips; Quentin Samuelson; Robert L. Whipple and Richard G. Tomek

and

Names of Counter-Respondent

BMMG Capital Corporation

and

Names of Third-Party Respondents

Ronald A. Lavery; Gregory E. V. Dodgson;  
Raymond A. Weigel and James Bulliment

**REPRESENTATION OF PARTIES**

Claimant, BMMG Capital Corporation and Third-Party Respondents, Ronald A. Lavery, Gregory E. V. Dodgson and Raymond A. Weigel were represented by Ronald H. Filler, Esq. and Randall M. Lending, Esq. of Vedder, Price, Kaufman & Kammholz, Chicago, Illinois.

Respondents, Suburban Stock/Options Investment Club, a general partnership and certain individual Club members Respondents as named as named in NASD Arbitration No. 89-02243 as follows: Robert J. Brown, Lester Graves, William E. Harris, Jack Hornbeck, David M. Kaufman, Calvin N. Meyer, Glen H. Philips, Quentin Samuelson, Richard G. Tomek, in his individual capacity as a Club member, and Robert L. Whipple were represented by Christopher J. Barber, Esq. and Marsha A. Tolchin, Esq. of Adler, Kaplan & Begy, Chicago, Illinois.

Respondent, Richard G. Tomek as named in NASD Arbitration No. 89-02234 was also represented by J. William Holland, Esq. of Holland and Holland, Chicago, Illinois.

Third-Party Respondent, James Bulliment did not enter an appearance.

**CASE INFORMATION**

The Statement of Claim for NASD Arbitration Case No. 89-02243 was filed with the National Association of Securities Dealers, Inc. ("NASD") by Claimant, BMMG Capital Corporation on August 8, 1989.

Claimant, BMMG Capital Corporation's Submission Agreement was signed in NASD Arbitration Case No. 89-02243 on August 3, 1989 by Gregory E. V. Dodgson, Chairman of the Board of Directors of BMMG Capital Corporation, a Michigan Corporation.

The Statement of Answer, Counter-Claim and Third-Party Claim was filed with the NASD for NASD Arbitration Case No. 89-02243 by Respondent, Suburban Stock Options Investment Club and the Individual Partners of the Club as named above in the style of the case, on December 11, 1989.

Respondent, Suburban Stock Options/Investment Club's did not file a properly executed Submission Agreement with the NASD.

The individual Club member respondents executed Submission Agreements and filed them with the NASD for NASD Arbitration Case No. 89-02243 as follows: Respondent, Robert J. Brown's Submission Agreement was signed on March 20, 1990. Respondent, Calvin N. Myer's Submission Agreement was signed on March 12, 1990. Respondent, Glen H. Phillips' Submission Agreement was signed on March 1, 1990. Respondent, William E. Harris' Submission Agreement was signed on March 1, 1990. Respondent, David M. Kaufman's Submission Agreement was signed on March 1, 1990. Respondent, Richard L. Whipple's Submission Agreement was signed on March 2, 1990. Respondent, Lester Graves' Submission Agreement was signed on March 2, 1990. Respondent, Richard G. Tomek's Submission Agreement was signed on March 8, 1990. Respondent, Jack Hornbeck's Submission Agreement was signed on March 6, 1990. Respondent, Quentin Samuelson's Submission Agreement was signed on March 28, 1990.

Third-Party Respondents, Ronald A. Lavery's and Raymond A. Weigel's Submission Agreements were signed for NASD Arbitration Case No. 89-02243 on January 10, 1990 and Third-Party Respondent, Gregory E. V. Dodgson's Submission Agreement was signed for NASD Arbitration Case No. 89-02243 on January 24, 1990.

BMMG filed a Motion to Dismiss the Counter-Claim of Suburban Stock Options/Investment Club and the individual Club members in NASD Arbitration Case No. 89-02243 with the NASD on December 29, 1989.

BMMG also filed a Motion to Dismiss the Third-Party Claims of Suburban Stock Options/Investment Club and the individual Club members in NASD Arbitration Case No. 89-02243 with the NASD on January 30, 1990.

No written reply to either of the Motions to Dismiss filed by BMMG in NASD Arbitration Case No. 89-02243 was filed with the NASD by Respondents, Suburban Stock Options/Investment Club or the individual Club members.

The Statement of Claim was filed with the NASD for NASD Arbitration Case No. 89-02234 on August 8, 1989.

Claimant, BMMG Capital Corporation's Submission Agreement was signed in NASD Arbitration Case No. 89-02234 on August 3, 1989 by Gregory E. V. Dodgson, Chairman of the Board.

The Statement of Answer, Counter-Claim and Third-Party Claim was filed with the NASD for NASD Arbitration No. 89-02234 by

Respondent, Richard G. Tomek on November 10, 1989.

Respondent, Richard G. Tomek's Submission Agreement was signed on November 8, 1989 for NASD Arbitration No. 89-02234 by Richard G. Tomek.

BMMG filed a Motion to Dismiss the Counter-Claim of Respondent, Richard G. Tomek asserted in NASD Arbitration Case No. 89-02234 with the NASD on or about November 28, 1989.

BMMG also filed a Motion to Dismiss the Third-Party Claim of Respondent, Richard G. Tomek asserted in NASD Arbitration Case No. 89-02234 with the NASD on January 30, 1990.

No written reply to either of the Motions to Dismiss filed by BMMG in NASD Arbitration Case No. 89-02234 was filed with the NASD by Respondent, Richard G. Tomek.

Third-Party Respondent, James Bulliment did not file an Answer or Submission Agreements with the NASD for either NASD Arbitration Case No. 89-02234 or NASD Arbitration Case No. 89-02243.

BMMG filed a motion to consolidate these arbitration matters with the NASD on January 30, 1990. The NASD determined to consolidate the matters for hearing.

#### HEARING INFORMATION

The hearing was held in the consolidated NASD Arbitration Cases of 89-02234 and 89-02243 on:

June 15, 1992 for two (2) sessions;  
June 16, 1992 for two (2) sessions;  
June 17, 1992 for two (2) sessions;  
June 18, 1992 for two (2) sessions;  
June 19, 1992 for two (2) sessions;  
June 24, 1992 for two (2) sessions; and  
July 15, 1992 for one (1) session.

The hearing location was Chicago, Illinois.

CASE SUMMARY

In the Statement of Claim filed for NASD Arbitration No. 89-02243, Claimant, BMMG Capital Corporation, a Michigan Corporation, ("BMMG") alleged that it was the successor in interest to BUYS, MACGREGOR a registered securities broker-dealer which was a member of the NASD. BMMG alleged that Respondent, Suburban Stock Options/Investment Club, ("SSOIC" or "the Club"), was a general partnership formed on or about January 4, 1983 for the purpose of investing in stocks, options, bonds and securities.

BMMG alleged that on or about November of 1984, BUYS, MACGREGOR, and SSOIC entered into four separate agreements which were as follows: "Customer's Agreement", a "Customer's Loan Consent", a "Joint Account Agreement" and "Option Agreement". BMMG alleged that many of the Club's partners also signed and entered into these agreements for SSOIC and that since SSOIC was a general partnership, the individual partners of the Club were liable for the obligations incurred by SSOIC under the terms of these agreements.

BMMG alleged that during October of 1987, BUYS, MACGREGOR executed various option trades for SSOIC's accounts and due to the unprecedented market activity of October 1987 and the subsequent liquidation of the positions in SSOIC's account No. 77075323, a large debit balance occurred in the Club's account. BMMG alleged that despite written demand for payment of this debit balance, the amount remains unpaid and outstanding.

SSOIC and the individual general partner Club member respondents denied the allegations of the statement of claim. SSOIC and the Club member partners alleged that BMMG and Third-Party Respondents, Ronald A. Lavery ("Lavery"), James Bulliment ("Bulliment"), Raymond A. Weigel ("Weigel") and Gregory E.V. Dodgson ("Dodgson") violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by reason of fraudulent omissions and misrepresentations of material fact made in connection with the sale of securities and the manner in which SSOIC's account was traded.

SSOIC and the Club member Counter-Claimants also alleged that the foregoing third-party respondents breached their fiduciary duty to SSOIC and its individual general partner Club members as follows:

- (1) by failing to make inquiry with respect to or disregarding the essential facts regarding SSOIC and the individual Club members' financial position;
- (2) sophistication as investors;
- (3) ability and expressed investment objectives, particularly regarding limitation of activity and risk;
- (4) recommending to and/or executing for Third-Party Claimants, securities transactions without having reasonable grounds or disregarding the fact that reasonable grounds did not exist for believing that such transactions had been authorized by SSOIC members, that such transactions were suitable for SSOIC and its Club members, that SSOIC and its members had such knowledge and experience with speculative securities that they could reasonably be expected to or be capable of evaluating the risks of those transactions, and that SSOIC's members were financially able to bear the risks of those transactions;
- (5) failing to execute SSOIC's express orders regarding limitation of activity and risk;
- (6) failing to notify SSOIC of the margin and maintenance calls applicable to the Club's account; and,
- (7) failing to liquidate the Club's account pursuant to the applicable federal laws, self regulatory association rules and BUYS, MACGREGOR rules.

SSOIC and the individual Club members also alleged that the conduct of Counter-Respondent BMMG and Third-Party Respondents, Lavery, Dodgson, Bulliment and Weigel amounted to common law fraud and negligence.

In the Statement of Claim filed in NASD Arbitration No. 89-02234, BMMG alleged that Respondent, Richard G. Tomek ("Tomek") and BUYS, MACGREGOR entered into three agreements in September of 1985. These agreements were a "Customer's Agreement" a "Customer's Loan Consent" and "Option Agreement". Pursuant to these agreements, BMMG alleged that BUYS, MACGREGOR performed various brokerage services for Tomek, including, but not limited to, the placing of numerous transactions involving the purchase and sale of stock options contracts for Tomek's account. BMMG alleged that all trades for Tomek's account were pursuant to the specific request and direction of Tomek. BMMG alleged that during October of 1987, BUYS, MACGREGOR executed various stock

option trades for Tomek and that due to the unprecedented market activity in this month, the liquidation of the option positions in Tomek's account resulted in a debit balance.

BMMG alleged that Paragraph Three of the Customer's Agreement, which Tomek executed, provided that Tomek agreed to pay any debit balance which occurred in his account, plus interest upon demand. BMMG also alleged that Paragraph Nine of the Option Agreement required Tomek to pay losses and expenses incurred by BUYS, MACGREGOR as a result of Tomek's breach of the Option Agreement or Customer Agreement. BMMG alleged that despite written demand to pay the outstanding debit balance in his account, he has refused to do so and is therefore in breach of his contract with BUYS, MACGREGOR.

BMMG also alleged that BUYS, MACGREGOR filed suit against Tomek on March 8, 1988 in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois for the debit balance in his account, interest, costs and attorney's fees. Tomek moved to dismiss the complaint on the grounds that the dispute should be submitted to arbitration before the NASD. The civil lawsuit was stayed on June 6, 1988, pending the outcome of the arbitration matter by court order entered on June 6, 1988.

In his Answer to the Statement of Claim filed in NASD Arbitration No. 89-02234, Tomek denied the allegations of the Statement of Claim and asserted a Counterclaim against BMMG and Bulliment, Lavery, Dodgson and Weigel for violations of section 10(b) of The Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, common law fraud, negligence and breach of fiduciary duty.

Tomek alleged that Lavery represented that the risks inherent in options trading were overstated or exaggerated and that he was an expert in trading options. Lavery allegedly touted his strategy of selling out-of-the-money naked options and a strategy known as "selling the wings" or strangles which purportedly offered the opportunity to generate significant rates of return with little or no downside risk. Lavery allegedly represented to Tomek that this option strategy had little risk and that if losses were incurred in one month, they would be "paper losses" which could be eliminated by "rolling out" to another month's contracts as specified by Lavery's strategy.

Tomek alleged that he had little or no experience with options in general and the OEX options market in particular.

Tomek alleged that he relied on Lavery's representations of his option trading program's risk adverse nature and Lavery's representations concerning his expertise with options.

Tomek alleged that BUYS, MACGREGOR, Lavery, Bulliment, Dodgson and Weigel were obligated to use due diligence to learn the essential facts regarding Tomek's financial position and sophistication as an investor and refrain from recommending or effectuating any securities transaction unless there were reasonable grounds for believing the transactions were suitable for Tomek in light of his financial position, sophistication as an investor and expressed investment objectives, particularly those regarding limits on activity and risk. Tomek alleged that the foregoing was not done and this resulted in substantial financial harm to him.

BMMG alleged in Motions to Dismiss the Counterclaims filed in NASD Arbitration Case No. 89-02234 and NASD Arbitration Case No. 89-02243 that SSOIC, the individual general partner Club members and Tomek failed to timely file their answers to the respective Statements of Claim submitted to the NASD.

BMMG, Lavery, Weigel and Dodgson alleged in Motions to Dismiss the Third-Party Claims filed in NASD Arbitration Case No. 89-02234 and NASD Arbitration Case No. 89-02243 that SSOIC, the individual general partner Club members and Tomek failed to timely file their answers to the respective Statements of Claim submitted to the NASD.

SSOIC, the individual Club members and Tomek did not file responses or otherwise plead or answer the Motions to Dismiss the Counterclaims or the Third-Party Claims filed in either NASD Arbitration Case No. 89-02234 or NASD Arbitration Case No. 89-02243.

#### RELIEF REQUESTED

In NASD Arbitration Case No. 89-02243, BMMG requested judgment in the amount of \$137,736.29, plus interest since November 27, 1987, costs and attorney's fees and such other just relief as the panel deemed appropriate.

SSOIC and its individual Club member respondents requested dismissal of the claim filed in NASD Arbitration No. 89-02243 and requested damages on their Counter-Claim and Third-Party Claims in excess of \$170,000.00 and punitive damages in the amount of



\$150,000.00, reasonable attorney's fees and costs of the proceeding.

In NASD Arbitration Case No. 89-02234, BMMG requested judgment in the amount of \$105,517.31 against Tomek, plus interest since November 27, 1987, costs, attorney's fees and any other just relief.

Tomek requested dismissal of the Claim filed in NASD Arbitration No. 89-02234, judgment against Counter-Respondents and Third-Party Respondents in an amount equal to the damages sustained by Tomek, punitive damages in excess of \$150,000.00, reasonable attorney's fees and costs incurred in the proceeding.

BMMG, Lavery, Weigel and Dodgson did not file a written answer to the Counter-Claim or Third-Party Claim filed in either arbitration matter with an affirmative relief request for the panel to consider.

#### OTHER ISSUES CONSIDERED & DECIDED

At the hearing on June 15, 1992 J. William Holland, Esq. withdrew as counsel of record for Respondent, Richard G. Tomek as named in NASD Arbitration No. 89-02234. The panel acknowledged this fact and Respondent, Richard G. Tomek, in his individual capacity as a Club general partner, still had legal representation by Christopher J. Barber, Esq. In regard to the case involving Respondent, Richard G. Tomek's personal account, he became pro se.

Various motions were filed with the panel of arbitrators at the hearing on June 15, 1992.

BMMG, Lavery, Dodgson, and Weigel asserted a motion to bar the expert witness testimony of SSOIC or in the alternative a motion to compel the production of certain documents related to any prior expert testimony by Respondents' expert witness. The panel heard oral argument on this motion and after executive session ruled to deny the motion. Respondents' expert witness was allowed to testify and the panel refused to order the production of any transcripts or names of matters wherein Respondents' expert witness had previously testified.

BMMG, Lavery, Dodgson and Weigel also asserted a Motion to Strike the answers of SSOIC, the individual general partner Club members and Tomek on the basis that the answers to the Statements

of Claim were not timely filed with the NASD. The panel also considered this motion in executive session after extensive oral argument and denied this motion.

SSOIC and the individual Club member respondents also filed two motions at the hearing on June 15, 1992. The first motion was a Motion for Default Judgment or in the alternative that BMMG, Lavery, Dodgson, and Weigel be barred from presenting evidence in defense of the Counterclaims or Third-Party Claims asserted against BMMG and these Third-Party Respondents. The basis for this motion was that the Counterclaims and Third-Party Claims were not answered by SSOIC and the Third-Party Respondents. The second motion asserted by Respondents was a Motion to Dismiss the Statements of Claim for Lack of Subject Matter Jurisdiction.

The panel heard oral argument on the Motions for Default and following executive session ruled to deny the motions. The panel took the Motion to Dismiss for Lack of Subject Matter Jurisdiction under advisement and determined to proceed with the arbitration of the case. The panel requested that the parties file briefs with the NASD addressing certain issues relevant to the panel's decision on this jurisdictional motion. The parties submitted briefs and the NASD forwarded the briefs to the arbitration panel. The panel and the parties convened on July 15, 1992 in Chicago, Illinois at 7:15 P.M. for further argument on the Motion to Dismiss for Lack of Subject Matter Jurisdiction.

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. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with the NASD.

#### JURISDICTIONAL ISSUES

The panel has considered the parties' positions on the jurisdictional motion and considered the absence of certain properly executed Uniform Submission Agreements as they relate to personal jurisdiction over these parties. The panel determined that the NASD had personal jurisdiction over SSOIC and the individual Club member general partners who did not enter an appearance. The basis for this finding was that this matter was referred to arbitration by court order dated June 6, 1988. In addition, the panel holds that the contractual agreements which were signed on behalf of SSOIC bind the entire membership of the Club such that this award also binds Raymond Jenner, John Moyle, David Kaufman, Everett Nicholas, Everett Van Reken, Robert

Wyatt and Jerry White to the determination of the panel on all issues submitted.

As to Bulliment, the arbitration panel holds that he is bound by the panel's determination on all issues submitted due to the fact that he was required to arbitrate this matter pursuant to Section 12 of the NASD Code of Arbitration Procedure.

On the issue of subject matter jurisdiction, the arbitration panel hereby rules that there is proper subject matter jurisdiction of this tribunal over the dispute between the parties and that the panel had the authority to consider all issues submitted to it for determination.

**AWARD**

After considering the pleadings, the testimony, the evidence presented at the hearing and the briefs and oral argument on the issue of jurisdiction, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

**DISPOSITION OF MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION**

1. SSOIC's Motion to Dismiss the Statements of Claim for Lack of Subject Matter Jurisdiction is hereby denied and the panel of arbitrators holds that it had subject matter and personal jurisdiction over SSOIC and the individual general partners Club members of SSOIC;

**BMMG'S CLAIM-NASD ARBITRATION NO. 89-02243**

2. SSOIC and its individual general partner Club members are jointly and severally liable for and shall pay to BMMG, the sum of One Hundred Thirty Seven Thousand Seven Hundred Thirty Six Dollars and Twenty Nine Cents (\$137,736.29);

3. SSOIC and the individual general partner Club members of SSOIC are jointly and severally liable for and shall pay to BMMG interest in the sum of Thirty Seven Thousand One Hundred Eighty Eight Dollars and No Cents (\$37,188.00) on the amount stated above in paragraph number 2;

SSOIC'S AND THE CLUB MEMBER'S COUNTER-CLAIMS  
AND THIRD-PARTY CLAIMS-NASD ARBITRATION NO. 89-02243

4. BMMG, Lavery, Weigel and Dodgson are jointly and severally liable for and shall pay without interest, to SSOIC and the individual Club members, in satisfaction of their Counter-Claim and Third-Party Claims asserted in NASD Arbitration No. 89-02243, the sum of Fifty Thousand Nine Hundred Twenty Four Dollars and No Cents (\$50,924.00);

5. The Third-Party Claim asserted against Bulliment by SSOIC and the individual Club members is dismissed in its entirety;

BMMG'S CLAIM-NASD ARBITRATION NO. 89-02234

6. Tomek is liable for and shall pay to BMMG, the sum of One Hundred Five Thousand Five Hundred Seventeen Dollars and Thirty One Cents (\$105,517.31);

7. Tomek shall pay to BMMG, interest in the sum of Twenty Eight Thousand Four Hundred Ninety Dollars and No Cents (\$28,490.00) on the amount stated above in paragraph number 6;

TOMEK'S COUNTERCLAIM AND THIRD-PARTY CLAIMS  
NASD ARBITRATION NO. 89-02234

8. Tomek's Counter-Claim asserted against BMMG and Third-Party Claims asserted against Lavery, Dodgson and Weigel in NASD Arbitration No. 89-02234 are denied and dismissed in their entirety;

9. Tomek's Third-Party Claim asserted against Bulliment is denied and dismissed in its entirety; and,

10. The parties shall each bear their own costs, expenses and attorneys fees incurred in the proceeding.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the NASD shall retain the non-refundable filing fee in the amount of \$500.00 and shall retain the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant, BMMG for NASD Arbitration No. 89-02234 and shall retain the non-refundable claim filing fee in the amount of \$500.00 and shall retain the hearing session deposit of \$750.00 previously deposited with the NASD by the Claimant, BMMG for NASD Arbitration No. 89-02243.

BMMG is assessed additional Forum Fees in the amount of \$1750.00. Tomek is assessed additional Forum Fees in the amount of \$3250.00. SSOIC is assessed additional Forum Fees in the amount of \$3250.00. Forum fees were calculated at the rate of \$750.00 per hearing session for Thirteen (13) hearing sessions.

The NASD shall also retain all postponement fees in the amount of previously deposited with the NASD by any parties.

Additional Forum Fees assessed to the parties are payable to the NASD.

Panel Members Concurring:

Dated:

\_\_\_\_\_

Warren P. Landsman, Esq.  
Presiding Chair  
Public Arbitrator

11/3/92

Harryalyn H. Issac  
Harryalyn Issac, Esq.  
P a n e l i s t  
Public Arbitrator

\_\_\_\_\_

Marc Horin  
P a n e l i s t  
Industry Arbitrator

Date Award Served by the NASD: \_\_\_\_\_

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Panel Members Concurring:

Dated: \_\_\_\_\_

  
Warren P. Landsman, Esq.  
Presiding Chair  
Public Arbitrator

\_\_\_\_\_

Harralyn Issac, Esq.  
P a n e l i s t  
Public Arbitrator

\_\_\_\_\_

Marc Horin  
P a n e l i s t  
Industry Arbitrator

Date Award Served by the NASD: \_\_\_\_\_

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Panel Members Concurring:

Dated:

\_\_\_\_\_  
Warren P. Landsman, Esq.  
Presiding Chair  
Public Arbitrator

\_\_\_\_\_  
Harralyn Issac, Esq.  
P a n e l i s t  
Public Arbitrator

*October 13, 1992*

*Marc Horin*  
Marc Horin  
P a n e l i s t  
Industry Arbitrator

Date Award Served by the NASD: \_\_\_\_\_