

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)

Name of Claimant(s))

Irvin J. & Rita Weiss)

Name of Respondent(s))

Otra Clearing, Inc.)

Profile Investments Corporation)

Robert Schlein)

Carlos Fontecilla)

Alan Stuart Beshary)

Gregory Mandel Marholin)

Case No. 90-00108

Heard before the members of the Arbitration Panel:

Robert Harschmann, Esq.

Harold Alenick

Richard M. Kowalske

Public

Public

Industry

REPRESENTATION

Claimants, Irvin J. and Rita Weiss ("Weiss"), were represented by Robert Wayne Pearce, Esq. of Lerner & Pearce, P.A.

Respondents, Robert Schlein ("Schlein") and Profile Investment Corporation ("Profile") were represented by Schlein; Carlos Fontecilla ("Fontecilla") was represented by Lenard H. Gorman, Esq. of Lenard H. Gorman, P.A.; Gregory M. Marholin ("Marholin") was pro se; Otra Clearing, Inc. ("Otra") was represented by Dennis A. Nowak, Esq. of Kirkpatrick and Lockhart; and, Alan S. Beshary was pro se.

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on January 8, 1990. Claimants alleged that Beshary persuaded them to transfer their accounts to Profile; that Respondents made misrepresentations of and omitted to state material facts; recommended and effected unsuitable transactions including the sale of equity securities from Claimants' portfolio; made unauthorized transactions in Claimants' accounts of equity securities, including penny stocks and warrants; and, that Beshary and Marholin misappropriated \$100,000.00 from Claimants' IRA accounts. Claimants alleged that Respondents' actions constituted breach of fiduciary duty; negligence; breach of contract; and, violation of Sections 517.301, 812.014 and 772.10 (Civil Theft), Florida Statutes.

In a Statement of Answer filed with the NASD on June 18, 1990, Schlein denied all allegations of wrongdoing and alleged the affirmative defenses of no direct contact with Claimants and reliance on Beshary as compliance officer and Richard Nurenberg as BOM; failure to state a claim; waiver; estoppel; and, conduct in accord with all applicable rules and regulations. Profile failed to file an Answer.

In a Statement of Answer filed with the NASD on March 1, 1991, Fontecilla denied all allegations of wrongdoing and alleged the affirmative defenses of lack of knowledge; sole basis of claim is "controlling person"; that on December 13, 1988, he sold his shares and resigned as director of Profile; on March 15, 1989, he resigned as an officer of Profile; that he was responsible only for the daily financial operations of Profile; acted in good faith; and, lacked knowledge of any wrongdoing.

In a Statement of Answer filed with the NASD on June 15, 1990, Marholin denied all allegations of wrongdoing and alleged that he was merely a clerical assistant to Beshary; that he exercised reasonable care in all his duties; acted in good faith; did not induce any wrongful acts; was never Claimants' account executive; and, was fully registered with and abided by all rules and regulations of appropriate governing bodies including the NASD, SEC and FDS.

In a Statement of Answer filed with the NASD on April 8, 1991, Otra denied all allegations of wrongdoing and alleged that it acted solely as clearing broker for Profile on a fully disclosed basis; carried the Claimants' account for and on behalf of Profile; but, had no direct contact with or duties to Claimants. Otra alleged the affirmative defenses of failure to state a claim; compliance with clearing agreement; no breach of duty; no unauthorized trading; Claimants' failure to exercise due diligence; conduct of other persons caused the damage; no duty to Claimants; and, Claimants named Otra in bad faith.

In a Statement of Answer filed with the NASD on May 22, 1990, Beshary alleged that he was not registered with the NASD; there was no jurisdiction over him in this matter; that he was not liable for any claims; and, that his duties were strictly public relations and publicity.

RELIEF REQUESTED

Claimants requested damages in the amount of \$100,010.00, treble damages in the amount of \$300,000.00, punitive damages, attorney's fees, interest and costs.

Respondent, Schlein, requested dismissal, attorney's fees and costs.

Respondent, Otra, requested dismissal, costs, expenses and attorney's fees.

Respondent, Beshary, objected to the hearing and the arbitrators and requested that this illegal harassment be stopped.

Respondents, Profile and Marholin, made no requests.

AWARD

On April 15 and 16 and May 13, 1991, in Fort Lauderdale, Florida, during a hearing lasting seven (7) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimants on November 7, 1989 and by Respondents, Schlein on June 15, 1990; Fontecilla on April 5, 1990; Marholin on June 12, 1990; on April 4, 1991, by Scott G. Monson, on behalf of Otra; and, not signed by Profile or Beshary as required by Sections 12 and 25 of the Code.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Claimants, Schlein, Fontecilla, Marholin and Otra have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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.

2. Respondents, Otra and Fontecilla, are found not liable and, therefore, all claims against them are hereby dismissed.

3. Respondents, Profile, Schlein, Beshary and Marholin, are found liable for violation of Section 517.301, Florida Statutes, and shall pay to the Claimants the amount of \$100,010.00, plus interest at the legal rate of 12% per annum in the amount of \$25,922.59, for a total due to the Claimants of \$125,932.59, to be apportioned as follows:

- a. Profile and Schlein are liable, jointly and severally, for the amount of \$80,008.00 plus interest of \$20,738.07, for a total due to the Claimants of \$100,746.07;
- b. Beshary is liable for the amount of \$15,001.50 plus interest of \$3,888.39, for a total due to the Claimants of \$18,889.89; and,
- c. Marholin is liable for the amount of \$5,000.50 plus interest of \$1,296.13, for a total due to the Claimants of \$6,296.63.

4. Respondents, Profile, Schlein, Beshary and Marholin, are also found liable and shall pay to the Claimants the further amount of \$20,927.55 for attorney's fees pursuant to Section 517.211, Florida Statutes, to be apportioned as follows:

- a. Profile and Schlein are liable, jointly and severally, for the amount of \$16,742.10;
- b. Beshary is liable for the amount of \$3,139.18; and,
- c. Marholin is liable for the amount of \$1,046.38.

5. Respondents, Profile and Schlein, are also found liable, jointly and severally, and shall pay to the Claimants the further amount of \$240,024.00 for treble damages pursuant to Sections 812.014 and 772.10, Florida Statutes (Civil Theft).

6. Respondents, Otra and Schlein's, requests for attorney's fees, costs and expenses are denied.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$5,250.00 (seven sessions x \$750.00). The NASD shall retain \$200.00 of the \$750.00 previously deposited by the Claimants for the non-refundable filing fee. Respondents, Profile and Schlein, are hereby assessed \$4,200.00, jointly and severally, \$550.00 of which shall be paid directly to the Claimants, and \$3,650.00 of which shall be paid to the National Association of Securities Dealers, Inc. Respondent, Beshary, is hereby assessed \$787.50 and Respondent, Marholin is hereby assessed \$262.50.

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

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

OTHER ISSUES

Respondents, Beshary and Marholin, had been removed as parties to this matter as a result of separate petitions for bankruptcy. These parties were reinstated as a result of Motion for Relief of Automatic Stay and Stipulation and Agreed Order (Marholin) as contained in Arbitrator's Exhibit #2; and, Emergency Motion and Stipulation for Relief from Stay and Order Approving Stipulation for Relief from Stay (Beshary) as contained in Arbitrator's Exhibit #3.

Concurring Arbitrators' Signatures

/s/
Robert Herschmann, Esq.

/s/
Harold Alenick

/s/
Richard M. Kowalske

Date of Decision: June 14, 1991