

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

George Sperlak

90-00709

Name of Respondent(s)

Piper, Jaffray & Hopwood, Inc.
Calvin G. Heisler
Bernard Woody

REPRESENTATION

Claimant George Sperlak was represented by S. Lee Terry, Jr. of Gorsuch, Kirgis, Campbell, Walker and Grover Located in Denver, Colorado. Respondent, Piper, Jaffray & Hopwood, Inc. was represented by John S. Lutz of Kelly, Stansfield & O'Donnell located in Denver, Colorado. Respondents Bernard Woody and Calvin G. Heisler both appeared pro se.

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on March 8, 1990. Claimant George W. Sperlak ("Sperlak") alleged claims against Respondents Piper Jaffrey & Hopwood, Incorporated ("Piper Jaffray"), Calvin G. Heisler ("Heisler") and Bernard Woody ("Woody") as a result of losses he claimed were incurred principally in the securities of CHEMEX corporation which were purchased in a private transaction on or about April 27, 1988 and, in addition, unsuitable trading in his account commencing in December of 1988. Respondents allegedly recommended unsuitable securities and an unsuitable investment strategy in light of Sperlak's financial background, objectives and needs, which were disclosed or otherwise known to Respondents, resulting in Sperlak purchasing common stocks, warrants and opening a margin account in order to trade in stocks and options on margin. It was further alleged that Heisler affirmatively misrepresented the suitability of the securities and investment strategy he recommended by advising Sperlak that they were in fact suitable and that Heisler initiated an inordinate number of purchases and sales of securities in Sperlak's account causing the payment of excessive commissions. In this regard, Sperlak has alleged that Respondents' activities described in the Statement of Claim are part of a recurring practice engaged by Heisler, Piper Jaffray and other Piper Jaffray registered representatives of recommending unsuitable, high volume trading programs on margin for the purpose of increasing brokerage commissions and Piper Jaffray's margin loan income. In addition, it was alleged that the acts and commissions complained of were made possible by Piper Jaffray's

failure to adequately supervise the activities of Heisler and Woody, and to monitor Sperlak's account. Sperlak alleged that Respondents' activities violated the following laws: Section 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j (b) and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5; Section 12 (2) of the Securities Act of 1933; sections of the Colorado Securities Act; Federal Civil RICO (18 U.S.C. Sec. 1962(b) and (c); Colorado Civil RICO (C.R.S. 1973, Sec. 18-17-104(2) and (3)); and, Article III, Section 2 of the NASD Rules of Fair Practice. In addition, Claimants alleged that Respondents committed breach of their fiduciary duties to Claimant, fraud and negligence. The liability of Respondent Piper Jaffray was alleged pursuant to Section 20(a) of the Securities Exchange Act of 1934; Section 15 of the Securities Act of 1933; the Colorado Securities Act (C.R.S. 1973, Sec. 11-15-125(5)(b); Article III, Section 27 of the NASD Rules of Fair Practice; and common law theories of agency, including respondeat superior.

In a Statement of Answer filed with the NASD on May 7, 1990, Respondent Piper Jaffray & Hopwood, Incorporated generally denied the allegations of the Statement of Claim, stating affirmatively that: 1) the offer to sell CHEMEX securities was made by Heisler individually and without the knowledge or consent of Piper Jaffray; 2) Piper Jaffray had no knowledge or participation in the offer or purchase of the CHEMEX securities in April 1988; 3) Piper Jaffray had no account or business relationship with Sperlak until December of 1988 when he opened his account; 4) Sperlak bought the stock directly from CHEMEX; 5) Sperlak could have sold at a profit in Spring of 1989, but failed to do so; and, 6) Sperlak authorized all transactions after opening his account. Respondent further alleged the following affirmative defenses:

1. The Statement of Claim fails to state a cause of action upon which relief can be granted;
2. Piper Jaffray acted in compliance with all applicable rules and regulations, acted in good faith, and did not directly induce the alleged act or acts, if any, constituting the alleged violations of law;
3. The damages alleged have no material relationship with any act committed by or allegedly attributed to Piper Jaffray;
4. The injuries, if any, alleged were caused, in whole or in part, by the culpable conduct of the Sperlak;
5. Sperlak is barred, in whole or in part, by his assumption and acceptance of risk of loss in the market place;
6. Sperlak knew and understood the risks associated with his investments and represented himself as willing and able to assume those risks;
7. Sperlak is barred from recovery by the defenses of assumption of risk, estoppel, waivers, ratification, laches, statute of limitations, accord and satisfaction;
8. Sperlak is time barred by Section 13 of the Securities Act of 1933 from bringing any claim under Section 12(2);

9. Respondents never assumed the role of a fiduciary with respect to Sperlak, his investments or his account;

10. Sperlak fails to state a claim upon which relief can be granted in that the Federal Courts have held generally that Section 17(a) of the Securities Act of 1933 does not provide a private right of action, nor does the recommending of unsuitable securities, standing alone, constitute a basis for a private right of action;

11. Both the Federal and Colorado RICO Acts are unconstitutionally vague and any damages awarded thereunder would be unconstitutional;

12. Sperlak's request for exemplary damages is in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and should be denied.

In a Statement of Answer filed with the NASD on February 7, 1991, Respondent Calvin G. Heisler denied the material allegations of the Statement of Claim, stating affirmatively that: 1) Sperlak never fully disclosed his financial status; 2) Sperlak made the private placement in CHEMEX at his own initiative and directly with the Company; 3) Sperlak authorized all transactions; 4) the commission charges were fair and competitive considering the degree of service provided Sperlak and were not "excessive"; and 5) the activities complained of were not a recurring practice at Piper Jaffray and the supervision of activities by Piper Jaffray was thorough.

In a Statement of Answer received by the NASD on or about February 7, 1991, Respondent Bernard Woody denied the material allegations of the Statement of Claim, stating that Sperlak was not his customer; he was not involved or aware of the Sperlak's investment activities or financial status; and, his only involvement with Sperlak was to accept the purchase order of an additional 15,000 shares of CHEMEX on margin in late December of 1988.

RELIEF REQUESTED

Claimant George W. Sperlak requested entry of an award against the Respondents, jointly and severally, in the amount of \$50,553.00; treble damages in the amount of \$101,106.00 under the Federal or Colorado RICO claims; exemplary damages in an amount of not less than \$50,000.00; interest at the statutory rate; and, reasonable attorneys' fees and costs.

Respondents Piper Jaffray & Hopwood, Inc., Calvin G. Heisler and Bernard Woody each requested that the Statement of Claim be dismissed and denied in its entirety.

AWARD

On February 12, 1991 and April 3, 1991, in Denver, Colorado during a hearing lasting Four (4) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant George W. Sperlak on February 28, 1990; signed by AnnDrea M. Benson on behalf of Respondent Piper, Jaffray & Hopwood Incorporated on May 3, 1990; on February 12, 1991 by Respondent Bernard Woody; and, on February 6, 1991 by

Respondent Calvin G. Heisler.

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.

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

1. Respondent Calvin G. Heisler is liable for and shall pay to Claimant George W. Sperlak the sum of \$21,733.28;
2. The claims against Respondents Piper, Jaffray & Hopwood Incorporated and Bernard Woody are hereby dismissed and denied in their entirety;
3. The parties shall each bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$200.00 Claim Filing Fee and refund the \$550.00 Hearing Session Deposit previously deposited with the NASD by the Claimant George W. Sperlak. Respondent Calvin G. Heisler is liable for and shall pay to the NASD forum fees in the amount of \$3,000.00.

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

Concurring Arbitrator(s) Signature

Conciling Arbitrator

Date: June 12, 1991

Date: June 12, 1991

Albert T. T. Cook, Jr.
Albert T. T. Cook, Jr.
Industry Arbitrator

Date: June 13, 1991