

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

MacBryant, Inc.

90-01475

Name of Respondent(s)

The Stuart-James Company Incorporated
C. James Padgett
Marc M. Geman
Stuart Graff
Ellen Sakamoto

REPRESENTATION

For Claimant: MacBryant, Inc. was represented by J. Jerome Stanley, Esq., Baton Rouge, Louisiana.

For Respondents: The Stuart-James Company Incorporated, C. James Padgett and Marc M. Geman were represented by Donald T. Trinen, Esq. of Hart & Trinen, Denver, Colorado.

CASE INFORMATION

Statement of Claim filed: May 23, 1990

Claimant's Submission Agreement signed on: April 27, 1990 by Bryant J. Bergeron, President, MacBryant, Inc.

Amendment to Statement of Claim filed: February 15, 1991

Statement of Answer filed by Respondent Stuart James Company Incorporated on: July 13, 1990

Respondent Stuart James Company Incorporated's Submission Agreement signed on: July 12, 1990 by Marc N. Geman, The Stuart James Company Incorporated.

Statement of Answer filed by Respondent C. James Padgett on: April 6, 1991

Respondent C. James Padgett's Submission Agreement signed on: April 5, 1991

Amendment to Statement of Answer filed by Respondent C. James Padgett on: September 17, 1991

Statement of Answer filed by Respondent Marc N. Geman on: September 20, 1991
Respondent Marc N. Geman's Submission Agreement signed on: September 16, 1991

HEARING INFORMATION

Pre-Hearing Conference: None Held
Hearing Dates/Sessions: November 11, 1991 for two (2) sessions
November 12, 1991 for two (2) sessions
November 13, 1991 for two (2) sessions

Hearing Location: New Orleans, Louisiana

CASE SUMMARY

Claimant MacBryant, Inc. ("MacBryant") alleged that sometime prior to March 1987, Respondent The Stuart James Company Incorporated ("Stuart James") and a registered representative devised a scheme and artifice to deprive MacBryant of its property by convincing the sole shareholder of MacBryant to establish a securities brokerage account and to buy common stock and warrants based on the fraudulent misrepresentations and omissions of facts which were made by the registered representative. MacBryant alleged that the purpose of these representations was to defraud it of property by inducing the purchase of stock based on misinformation, misstatements of facts and omissions of fact, for the purpose of deriving commissions, fees and other charges. MacBryant further alleged that these commissions, fees and other charges were then invested by Stuart James for the purpose of continuing its operations, and that the above actions constitutes a pattern of racketeering activity in violation of 18 U.S.C. 1962. MacBryant amended the Claim to include Respondents C. James Padgett ("Padgett"), Marc M. Geman ("Geman"), Stuart Graff ("Graff") and Ellen Sakamoto and alleged that the individual Respondents were liable jointly and severally to the same extent as Stuart James under Louisiana Securities Law, Section 714(B) and under 18 U.S.C. 1962(a).

Respondent Stuart James denied the material allegations of the Statement of Claim, alleging that:

1. MacBryant neglected to complain about the matters set forth in the Statement of Claim for and unexplained, unreasonable and inexcusable length of time and the claims should be denied;
2. Any potential claims under Sec. 10(b) of the Securities and Exchange Act of 1934, SEC Rule 10b-5 and Louisiana Blue Sky law are time-barred pursuant to Sec. 51:714 of the Louisiana Code;
3. The RICO claim asserted does not meet any of the required rules of pleading a RICO claim and since the federal securities fraud claims are time-barred, MacBryant cannot rely on such as a predicate act to support the RICO claim;
4. The misrepresentations allegedly made more closely resemble "fairy tales" than fraud and MacBryant's reliance on these tales was not reasonable;
5. Every alleged misrepresentation made was nothing more than opinions or puffing, or was a representation about a future event and cannot constitute fraud;

6. MacBryant received a prospectus prior to or shortly after authorizing the purchase of several securities;

7. The doctrines of unclean hands and in pari delicto prohibit MacBryant from recovering losses since the alleged representations infer that inside information was unlawfully behind the recommendation; and

8. MacBryant has failed to provide a factual and legal basis for recovery of a portion of its damages and has failed to mitigate its damages.

Respondent Padgett adopted the Statement of Answer filed by Stuart-James as his own. In addition, Padgett alleged that MacBryant cannot assert control person liability against individuals when there is no claim under the Louisiana Securities Act against Stuart-James, the "controlled person", in the first place and the Statement of Claim contains no such action. In addition, Padgett asserted the following Affirmative Defenses:

1. The Claimant fails to state a claim against Padgett upon which relief can be granted;

2. The claim is barred by one or more statutes of limitations and by the doctrines of estoppel, waiver, ratification and laches;

3. The Claimant failed to mitigate its damages;

4. The claim is barred by the failure to object to trades within 10 days of receipt of confirmations;

5. Claimants damages, if any, were caused by unforeseeable market conditions;

6. Claimant was contributorily negligent and assumed the risks inherent in investing;

7. Padgett is not liable because he did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which liability is alleged to exist.

Padgett thereafter amended his Statement of Answer to adopt the Statement of Answer of Respondent Geman as his own.

Respondent Geman adopted the Statement of Answer filed by Stuart-James as his own and further alleged that the NASD Arbitration Department has no jurisdiction to adjudicate MacBryant's claim against Geman because Geman, a resident of Colorado, never dealt with MacBryant and never transacted any business in the State of Louisiana. In addition, Geman alleged that because the Statement of Claim did not apprise him of any alleged wrongdoing on his part, the consideration of such claims would violate Geman's right to procedural due process. Geman further alleged that MacBryant cannot assert control person liability against individuals when there is no claim for primary liability under the Louisiana Securities Act against Stuart-James,

the "controlled person" and the Statement of Claim asserts no such cause of action and that MacBryant has failed to state any predicate acts or cognizable claims against Geman for a violation of 18 U.S.C. 1964. Geman further asserted the affirmative defenses asserted by Respondent Padgett in the preceding paragraph.

RELIEF REQUESTED

Claimant MacBryant, Inc. requested entry of an award against Respondents in the sum of \$169,654.46 plus interest from the date of the purchase until the date of repayment, the cost of the proceeding, and reasonable attorneys' fees in accordance with the laws of the State of Louisiana; punitive damages in the amount of \$250,000.00; and treble damages, the cost of suit and attorneys' fees under 18 U.S.C. 1964(c).

Respondents Stuart-James, Padgett and Geman requested that the Statement of Claim be dismissed and denied in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

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.

On October 18, 1991, an Involuntary Petition under Title 11 of the United States Code was filed against The Stuart-James Company Incorporated in the United States Bankruptcy Court for the District of Colorado (Bankruptcy Case No. 91-23914-RJB). Pursuant to the provisions of 11 U.S.C. 362, the arbitration proceedings against The Stuart-James Company Incorporated were stayed.

Respondent Stuart Graff did not file a Statement of Answer or a Submission Agreement. In addition, Graff did not appear at the hearing. Upon review of documents and after hearing arguments of the parties, the panel determined that Graff had been properly served with the Statement of Claim and Amended Statement of Claim pursuant to Section 25 of the Code of Arbitration Procedure. Furthermore, the panel determined that Graff had received due notice of the hearing as required in Section 26 of the Code and that arbitration of the controversy would proceed and the award entered pursuant to Section 29 of the Code of Arbitration Procedure.

Upon review, the panel determined that Respondent Sakamoto had not been served with the Statement of Claim as required under Section 25 of the Code of Arbitration Procedure. The claim against Respondent Sakamoto was dismissed without prejudice.

On January 6, 1992, Claimant MacBryant, Inc. filed a Motion to Strike the post-hearing briefs of Respondents Padgett and Geman as having been filed untimely. The panel reviewed the Motion and determined that the Motion would be denied.

AWARD

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

1. The Statement of Claim and Amended Statement of Claim are hereby dismissed and denied in their entirety, the panel determining that the claims are barred by the Statute of Limitations;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: Six (6) sessions x \$1,000.00 = \$6,000.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$250.00 and the hearing session deposit of \$750.00 previously deposited by the Claimant MacBryant, Inc. Claimant MacBryant, Inc. is liable for and shall pay to the NASD additional forum fees in the sum of \$2,250.00. In addition, Respondents C. James Padgett, Marc M. Gemen and Stuart Graff are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$3,000.00.

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

CONCURRING ARBITRATORS' SIGNATURES

Dated:

John F. Galvin
John F. Galvin, Esq.
Public Arbitrator
Chairperson

April 3, 1992

Herman Brasseur
Herman Brasseur
Public Arbitrator

April 3, 1992

Robert R. Wolf
Robert R. Wolf
Industry Arbitrator

April 3, 1992

Date of Service: 4/16/92