

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimants

John M. Biffle and
Johnny M. Biffle
Jtten

91-01171

Names of Respondent

Alex Brown & Co. Inc.,
National Bank of Commerce,
Commerce Investment Corporation,
Pershing Division of Donaldson, and
Lufkin & Jenrette Securities Corporation

Name of Third-Party Respondent

Ray W. Burney, Jr.

REPRESENTATION

Claimant, John M. Biffle was represented by Robert Fargarson, Esq. of Neely, Green, Fargarson & Brooks, Memphis, Tennessee.

Respondent Alex Brown & Sons Incorporated was represented by Daniel McIntyre, Esq. of Alex Brown & Sons, Inc., Baltimore, Maryland.

Respondents, National Bank of Commerce and Commerce Investment Corporation were represented by Shepherd D. Tate, Esq. of Martin, Tate, Morrow & Marston P.C., Memphis, Tennessee.

Respondent, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation was represented by Thomas A. Franko, Esq. of Pershing Division of Donaldson, Lufkin & Jenrette Securities, Jersey City, New Jersey.

Third-Party Respondent, Ray W. Burney, Jr. was represented by B. R. Hester, Esq. of Hester & McCrary, Bartlett, Tennessee.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on May 10, 1991.

Claimants, John M. Biffle and Johnny M. Biffle's Submission Agreement was signed on May 6, 1991.

Respondent, Commerce Investment Corporation's Submission Agreement was signed on September 4, 1991 by Thomas R. Curry, Compliance Officer.

Respondent, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation's Submission Agreement was signed on September 5, 1991 by Thomas A. Franko.

A Statement of Answer was filed with the NASD by Respondent, Alex Brown & Sons Incorporated on April 23, 1992.

A Statement of Answer was filed with the NASD by Respondent, Commerce Investment Corporation on September 5, 1991.

A Statement of Answer was filed with the NASD by Respondent, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation on September 10, 1991.

An Amended Statement of Claim was filed with the NASD by Claimants, John M. Biffle and Johnny M. Biffle on November 9, 1992.

An Amended Statement of Answer was filed with the NASD by Respondent, Commerce Investment Corporation on December 4, 1992.

An Amended Statement of Answer was filed with the NASD by Respondent, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation on November 23, 1992.

A Motion to Dismiss was filed with the NASD by Respondent, Commerce Investment Corporation on September 24, 1992.

A Response to Respondent, Commerce Investment Corporation's Motion to Dismiss was filed with the NASD by Claimants John M. Biffle and Johnny M. Biffle on October 30, 1992.

A Reply to the Claimants' Response to the Motion to Dismiss was filed with the NASD by Respondent, Commerce Investment Corporation on October 29, 1992.

A Motion to Dismiss was filed with the NASD by Respondent, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation on September 9, 1992.

A Response to Respondent, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation's Motion to Dismiss was filed with the NASD by Claimant John M. Biffle on October 1, 1992.

A Motion to Dismiss was filed with the NASD by Respondent, Alex Brown & Sons Incorporated on April 23, 1992.

A Response to Respondent, Alex Brown & Sons Incorporated's Motion to Dismiss was filed with the NASD by Claimant, John M. Biffle on May 11, 1992.

Third-party Respondent, Ray W. Burney, Jr. did not file either an answer to the third-party claim filed against him by Respondent, Commerce Investment Corporation or an executed Submission Agreement with the NASD.

Respondent, National Bank of Commerce which was served on a voluntary basis by the NASD chose not to submit to the jurisdiction of the forum and was therefore dismissed as a party to this matter by the NASD.

HEARING INFORMATION

A telephonic pre-hearing conference was held before the arbitration panel on December 7, 1992 and lasted for one (1) session.

The hearing date was December 10, 1992 and the hearing lasted for two (2) sessions.

The hearing location was Memphis, Tennessee.

CASE SUMMARY

Claimants, John M. Biffle ("Biffle") and Johnny M. Biffle, alleged wilful and intentional breach of fiduciary duties, breach of contract, and effectuation of a civil conspiracy on the part of Respondent, Commerce Investment Corporation ("CIC"), a subsidiary of Respondent, the National Bank of Commerce, ("NBC"), as the employer of securities agent Ray W. Burney ("Burney"). Biffle stated the original transaction which these allegations arose out of was in the name of Respondent Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation ("Pershing") and then transferred to Respondent Alex Brown & Sons Incorporated ("Alex Brown").

Biffle alleged that Burney persuaded Biffle to invest in securities through CIC. According to Biffle, he relied on Burney's investment advice and had no reason to suspect that Burney was not CIC's employee/agent or a broker dealer agent. Biffle maintained that pursuant to Burney's repeated requests, Biffle agreed to sell 44 shares of his National Municipal Trust stock ("NMT"), worth \$41, 625.60, with the understanding that Burney was

investing the proceeds through CIC in a tax exempt transaction. According to Biffle, subsequent to this sale, he began receiving, via direct deposit, \$420.00 per month in his NBC checking account. Biffle asserted that he was repeatedly told by Burney that his "new investment" was secure and that Biffle was receiving a monthly dividend from the "investment." In addition, Biffle maintained that when he would inquire of Burney as to his account number regarding the "investment", Burney would respond that the appropriate CIC department had not yet issued an account number. Biffle further alleged that even after Burney was terminated from his position as agent at CIC, he continued to assure Biffle that his investment was made through CIC and that he was still working with CIC on obtaining an account number from CIC for the "investment."

Biffle alleged that it was not until he spoke with a representative of People's Bank that he learned that Burney d/b/a Access, Inc. ("Access") had invested Biffle's funds, received from the sale of 44 shares of NMT, in an account at Allierion Bank f/k/a American Bank and Trust, New Orleans, Louisiana. Biffle also asserted that Burney and CIC maintained that Burney held both Series 7 and Series 63 registrations and that Burney was licensed to sell securities in Tennessee, Arkansas and Mississippi. Biffle stated that Burney, while employed as broker-dealer by CIC, was not licensed with either the National Association of Securities Dealers or the State of Tennessee and he was never licensed to act as either a securities salesman or broker-dealer during his employment with CIC. Also, Biffle claimed that CIC acted carelessly and negligently in failing to ascertain whether Burney was a licensed securities broker or a licensed investment advisor, and CIC acted intentionally and recklessly in failing to discover that Burney was misappropriating its customers' investments, specifically Biffle's investment. Biffle alleged that CIC failed to supervise and oversee its employee/agent Burney, in violation of the Tennessee Consumer Protection Act, ch. 18, secs. 101-117, and under the doctrine of respondeat superior, violated Section 20(a) of the Securities and Exchange Act, 15 U.S.C. sec. 78(t). Lastly, Biffle claimed that CIC and Burney violated T.C.A. 48-2-109, 48-2-104, and 48-2-110 and Sections 201(a) (b) of the Uniform Securities Act.

In its Statement of Answer, Pershing stated that Biffle made no allegation regarding any involvement by Pershing in the events upon which the Statement of Claim was based. Additionally, Pershing maintained that it functioned solely as a fully disclosed clearing agent for CIC pursuant to a fully disclosed clearing agreement ("agreement") by which CIC was solely responsible for all matters of client contact. Pershing asserted that pursuant to the agreement with CIC, CIC was solely responsible for the supervision of Burney, while Burney was in the employ of CIC. Pershing additionally stated that by the terms of the agreement, CIC issued a check to Biffle, which Biffle claimed to have not received. Pershing claimed that by the terms of the agreement, it is indemnified by CIC for any matter arising out of its use of the Pershing checkbook. Pershing also alleged that its first and only notice that Biffle had not received the check issued from the

account came with the filing of the instant arbitration. Pershing made the following affirmative defenses:

- 1) Claimants failed to state a claim as against Pershing;
- 2) Any claim is barred by waiver, estoppel and laches and applicable statutes of limitation;
- 3) The periodic statements furnished to Claimant stated, in pertinent part: "This statement will be deemed an account stated unless you advise us in writing of any objection to it within ten days after receipt." This claim is therefore barred.
- 4) Claimant has made a claim on the bank which cashed the check. That claim has obviously been rejected.

Lastly, Pershing alleged that pursuant to the agreement, it has a claim for indemnity as against CIC and it reserved its right to assert such claim.

In its Statement of Answer, CIC denied the allegations against CIC. Specifically, CIC alleged that NBC was mistakenly named in the Statement of Claim but is neither a member of the NASD nor is the bank a party to any agreement which makes it subject to this arbitration proceeding. Additionally, CIC denied that Biffle stated no claim against CIC. CIC asserted that the funds Biffle claimed to have lost were invested through Burney in his individual capacity or d/b/a Access, not through CIC. CIC maintained that whether the investment was originally authorized or not, Biffle retained the investment, had regular discussions with Burney, about the investment and not CIC, Biffle received and deposited regular interest/dividends from Burney without Burney's company, Access, for approximately eighteen months without complaint. CIC further stated that Biffle's investment at issue had no connection with CIC and the dividend/interest payments made monthly by Burney and/or Access had no connection with CIC and Biffle knew that his investment had no connection with CIC.

CIC asserted the following affirmative defenses:

- 1) The action is barred by the applicable statutes of limitation;
- 2) The Statement of Claim fails to state a viable claim as against CIC;
- 3) The claim is barred by the doctrines of waiver, estoppel, laches, ratification, unclean hands, in pari delicto, assumption of risk and comparative negligence; and
- 4) Biffle's losses, if any, occurred as a result of his dealings with Burney in his individual capacity, and/or as a representative of Access, and not as a result of any connection with CIC.

In its Counter Claim against Biffle, CIC alleged that the Statement of Claim asserted against CIC was made in bad faith, that Biffle admitted that Burney's actions were done "on his own" and "away from" CIC and Burney has confirmed this fact. Additionally, CIC alleged that Biffle ratified the investment at issue.

In its Third Party Claim against Burney, CIC alleged that in the event that any of the allegations of the Statement of Claim are true and expose CIC to any liability to Biffle or any other party, CIC is entitled to a recovery against Burney for contribution and indemnification for all such liability.

In its Statement of Answer and Motion to Dismiss, Alex Brown responded that the facts not in dispute demonstrate that there can be no claim against Alex Brown. Alex Brown maintained that during the time of the alleged unauthorized transaction involving Biffle's funds, Alex Brown had no connection or contact with Biffle. Alex Brown asserted that it did not commence acting as clearing broker for CIC until October, 1989, after the transfer complained of by Biffle and thus, Alex Brown should be dismissed from this arbitration.

In Biffle's Response to Alex Brown's Motion to Dismiss, Biffle asserted that the acts of Burney, the agent of CIC, in a scheme to defraud, mislead and misrepresent to Biffle the status of his account, were ongoing from September 1989 up to June 1990.

In its Motion to Dismiss, Pershing asserted that Biffle made no allegation of any involvement by Pershing in the allegedly wrongful activities of Burney and pursuant to the agreement with CIC, Pershing, as the clearing agent for CIC, is not liable for the acts of the introducing broker.

In Biffle's Response to Pershing's Motion to Dismiss, Biffle stated that Pershing's relationship to Biffle was that of a clearing agent and those acts which were the proximate cause of Biffle's injuries and which gave rise to the arbitration proceeding are not imputable to the clearing agent, Pershing.

In its Motion to Dismiss, CIC maintained that because all the facts document that the transaction at issue was not an authorized CIC transaction, the action should be dismissed as against CIC.

In Biffle's Response to CIC's Motion to Dismiss, Biffle asserted that during the time in question, Burney initiated contact with Biffle while employed by CIC and CIC is liable to Biffle for Burney's conduct under the doctrine of respondent superior, as a control person and for its wilful and intentional breach of fiduciary duties, breach of contract and for effectuating a civil fraud.

RELIEF REQUESTED

Claimants, John and Johnny Biffle requested an award of the value of the security at the time of its sale, together with interest at the legal rate from the date of payment, punitive damages in an amount to be determined at trial and reasonable attorney's fees in an amount to be determined at trial.

Respondent, Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation requested that the Statement of Claim be dismissed in its entirety and that the costs, including filing fees and forum costs, be assessed against the Claimants.

Respondent, Commerce Investment Corporation requested that the Statement of Claim be dismissed in its entirety and that Commerce Investment Corporation be awarded its costs and attorney's fees against the Biffles for asserting such a groundless and bad faith claim and for improperly maintaining this claim against Commerce Investment Corporation and others. In the alternative, Commerce Investment Corporation requested that the panel grant it a judgement against Ray W. Burney for contribution and indemnifying Commerce Investment Corporation against any liability to the Biffles or any other party and to award it its costs and expenses against Ray W. Burney.

Respondent, Alex Brown & Sons Incorporation requested that it be dismissed from this proceeding.

Third-party Respondent, Ray W. Burney did not file an answer with a request for affirmative relief.

OTHER ISSUES CONSIDERED & DECIDED

Respondent, Alex Brown & Sons Incorporated did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure, and having answered the claim, appeared through counsel and argued at the pre-hearing conference is bound by the determination of the arbitration panel on all issues submitted. Likewise, Third-Party Respondent, Ray W. Burney, Jr. did not file a Submission to Arbitration but is required to submit the jurisdiction of the arbitration forum pursuant to Section 8 of the NASD Code of Arbitration Procedure. In addition, Burney appeared at the hearing with counsel and accordingly he is bound by the panel's determination on all issues submitted.

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.

The arbitration panel determined that John M. Biffle was the main Claimant in this action, even though the account at issue was held in joint tenancy between John M. Biffle and his son, Johnny M. Biffle.

During the pre-hearing conference held by telephone before the arbitration panel on December 7, 1992 and pursuant to the Motions to Dismiss submitted by Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation and Alex Brown & Sons Incorporated, and by agreement of Claimants John M. Biffle and Johnny M. Biffle's counsel, the arbitration panel dismissed Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation and Alex Brown & Sons Incorporated. Commerce Investment Corporation's Motion to Dismiss was deferred until the hearing.

Commerce Investment Corporation argued a Motion for Summary Judgment at the hearing. The panel denied the motion. Following the Claimant's case in chief, Commerce Investment Corporation moved for a directed verdict. This motion was denied.

AWARD

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

- 1) Respondent, Commerce Investment Corporation's Motion to Dismiss is denied;
- 2) Respondent, Commerce Investment Corporation is liable for and shall pay to Claimants, John M. and Johnny Biffle, the sum of Twenty Seven thousand Nine Hundred Twenty Five Dollars and Sixty Cents (\$27,925.60);
- 2) All claims asserted against Commerce Investment Corporation by Claimants, John M. and Johnny Biffle for attorney's fees, interest and punitive damages are denied;
- 3) Third-party Respondent, Ray W. Burney, Jr. is liable for and shall pay to Respondent and Third-party Claimant, Commerce Investment Corporation on its Third-party Claim against Burney the sum of Twenty Seven Thousand Nine Hundred Dollars and Sixty Cents (\$27,925.60); and
- 4) Commerce Investment Corporation's CounterClaim for attorney's fees from the Claimants is denied and dismissed in its entirety.

FORUM FEES

Pursuant to Section 43c of the NASD Code of Arbitration Procedure the NASD shall retain the \$120.00 non-refundable claim filing fee and the \$400.00

hearing session deposit previously deposited with the NASD by John M. and Johnny M. Biffle and the \$500.00 non-refundable claim filing fee and the \$600.00 hearing session deposit previously deposited with the NASD by Respondent Commerce Investment Corporation.

Third-Party Respondent, Ray M. Bunney, Jr. is assessed additional Forum Fees payable to the NASD in the amount of \$200.00 and shall reimburse Commerce Investment Corporation for a portion of its assessed Forum Fees in the amount of \$200.00.

Additional Forum Fees assessed to the parties are payable to the NASD and were assessed on the basis of \$400.00 per hearing session for two hearing sessions and \$400.00 for the pre-hearing conference.

Concurring Members of the Arbitration Panel:

/s/ Irving Strauch
Irving Strauch
Public Arbitrator
Chairperson

January 8, 1993
Dated

/s/ David Scott
David Scott
Public Arbitrator
Panelist

January 8, 1993
Dated

Dissenting Member of the Arbitration Panel:

/s/ David Baker
David Baker
Industry Arbitrator
Panelist

January 8, 1993
Dated

Date Award Served by the NASD: January 11, 1993