

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Standard Press, Inc. Profit Sharing Plan

91-02160

Name of Respondents

Norris & Hirshberg, Inc.  
Dan L. Weinberg  
Robert A. Rosenberg  
Newton Osborn

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REPRESENTATION

For Claimant: James Stuart Youngblood, Esq.

For Respondent: Respondents Newton L. Osborn and Robert A. Rosenberg were represented by Richard W. Jones, Esq.

The Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg did not appear.

CASE INFORMATION

Statement of Claim filed: July 15, 1991.

Claimant's Submission Agreement signed on: June 18, 1991.

Respondent Robert A. Rosenberg's Submission Agreement signed on: January 10, 1992.

Joint Statement of Answer filed by Respondents Robert Rosenberg and Newton Osborn on: January 15, 1992.

Respondent Newton Osborn's Submission Agreement signed on: January 10, 1992.

The Respondents Norris & Hirshberg, Inc., and Dan L. Weinberg did not execute submission

agreements or file Answers as required pursuant to Section 25 of the Code of Arbitration Procedure.

### **HEARING INFORMATION**

Hearing Dates/Sessions:                      November 17, 1992, 2 Sessions.  
November 18, 1992, 1 Session.

Hearing Location:                      NASD offices located in Atlanta, Georgia.

### **CASE SUMMARY**

Claimant alleged that Respondents churned its account; violated the NASD Rules of Fair Practice which rules when violated may give rise to causes of action for negligence, breach of fiduciary duty, common law fraud, federal securities fraud and federal RICO; breached the fiduciary duties owed to the Claimant by placing securities in Claimant's account which they knew were both unsuitable which included investments in "penny stocks" and not in keeping with the original written plan they falsely assured Claimant would be adhered to and were negligent in the handling of Claimant's account. Claimant further alleged Respondents' actions entitled it to treble damages under the RICO statute and punitive damages. Claimant further alleged Respondent Dan L. Weinberg was the person that directly participated in the wrongdoing, Respondent Norris & Hirshberg, Inc. is liable under the doctrine of "respondeat superior" and under the RICO statute and Respondents Newton Osborn and Robert Rosenberg were "supervisory" persons and were required to review business engaged in with a view to detecting and preventing violations.

Respondents Robert A. Rosenberg and Newton Osborn maintained the primary transactions that serve as a basis for the Statement of Claim and the initial investment of the Claimant of \$184,373.00 was made in 1984, more than 6 years prior to the filing of the Statement of Claim so pursuant to Section 15 of the Code of Arbitration Procedure those transactions that took place six years or more before the filing of the Statement of Claim are not eligible for arbitration and all claims relating to those transactions should be dismissed. Respondents Robert A. Rosenberg and Newton Osborn further alleged all claims that are based upon alleged violations of the anti-fraud provisions of the federal securities laws are time barred by the statute of limitations if the act which is the basis of the violation is discovered more than one year prior to the time the claim is filed and in any event, all such claims are time-barred if the act on which they were based occurred more than three years prior to the filing of the claim and none of the transactions complained of took place within 3 years of July 15, 1991 the date Claimant filed its Statement of Claim; therefore, all claims based on violations of the federal securities laws should be dismissed. Claimant further alleged the RICO Statute of Limitations is four years and none of the transactions complained of took place within four years of the filing of the Statement of Claim and accordingly, all causes of actions based on the RICO counts are time-barred.

Respondents Robert A. Rosenberg and Newton Osborn further maintained Claimant cannot establish an aiding and abetting theory and they cannot be held responsible for the independent lark of a sales representative which was designed and had the effect of circumventing the supervisory procedures established by Norris & Hirshberg, Inc.; the Respondents Robert A. Rosenberg and Newton Osborn did not violate the NASD Rules of Fair Practice; the Respondents Robert A. Rosenberg and Newton Osborn did not churn Claimant's account as Claimant maintained control over its account and reviewed all trades made in the account; they did not commit common law fraud and/or violate any fiduciary duties as there is no allegation or evidence that would indicate Mr. Rosenberg or Mr. Osborn were aware of the investment plan or any valuation reports received by Claimant; they were not negligent as the evidence indicates that Norris & Hirshberg, Inc. established supervisory procedures and Respondents Robert A. Rosenberg and Newton Osborn attempted to enforce those procedures; thus, they conformed to the standard of reasonable supervisors in a banking firm and there is no causal connection between the loss and the conduct of Respondents Robert A. Rosenberg and Newton L. Osborn. Respondents Robert A. Rosenberg and Newton Osborn further maintained they are not responsible for a violation of the federal RICO statute and the Claimant is not entitled to punitive damages. Respondents Newton Osborn and Robert A. Rosenberg further maintained if the trustee had met his obligations as trustee, he would have been in a position to reduce the damages.

In response, Claimant maintained all claims are within the various applicable statutes of limitations as state law claims of common law fraud, breach of fiduciary duty and negligence are governed by Georgia law which provides for a four year period commencing at the date of accrual which, in the presence of fraudulent concealment, begins on the date of actual discovery. Claimant further alleged its RICO claims are not time barred as that statute of limitations is governed by federal law which is four years after the date of the last predicate act or upon the discovery of the scheme to defraud if fraudulently concealed.

#### **RELIEF REQUESTED**

Claimant requested damages of approximately \$128,000.00 including pre and post-judgment interest, plus costs, attorneys' fees, punitive damages, treble damages under the RICO statute; plus the amount of illicit commissions/profits obtained by Respondents of approximately \$10,000.00.

Respondents Robert A. Rosenberg and Newton Osborn requested a dismissal of all claims against them.

**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. In accordance with Section 1 of the Code of Arbitration Procedure, the panel ruled that it had jurisdiction over the Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg;
2. In accordance with Section 25 of the Code of Arbitration Procedure, the Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg were served with the Statement of Claim and given an opportunity to respond which they failed to do;
3. In accordance with Section 21 and Section 26 of the Code of Arbitration Procedure, the Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg were given due notice of the hearing procedure by regular and certified mail and failed to appear at the hearing.
4. In accordance with Section 29 of the Code of Arbitration, the panel ruled that the Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg had adequate notice of this hearing and determined to proceed with those Respondents as parties in their absence.
5. All claims against Respondents Newton L. Osborn and Robert A. Rosenberg be and hereby are dismissed in all respects;
6. The Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg be and hereby are liable jointly and severally and shall pay to the Claimant the sum of \$65,294.35 interest specifically excluded.
7. The Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg be and hereby are liable jointly and severally and shall pay to the Claimant the sum of \$32,647.18 representing punitive damages awarded under state law claims for common law fraud.
8. The Claimant's claim for treble damages under the Rico statute is denied.
9. The Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg be and hereby are liable jointly and severally and shall pay to the Claimant the sum of \$950.00 to reimburse the Claimant for the fees paid.
10. Each party shall bear their respective costs including attorneys' fees.

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**FORUM FEES**


Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

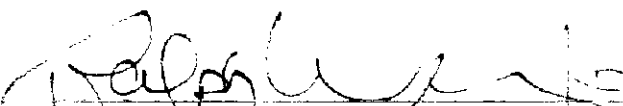
3 Sessions X \$750.00 = \$2,250.00 minus hearing session deposit of \$750.00 =  
net \$1,500.00 due.

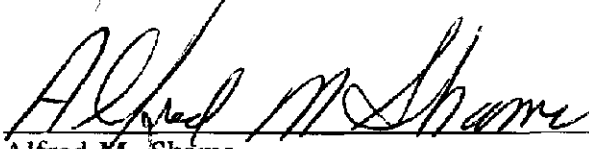
The Respondents Norris & Hirshberg, Inc. and Dan L. Weinberg be and hereby are liable jointly and severally and shall pay to the NASD the sum of \$1,500.00 to represent forum fees.

The NASD shall retain the \$200.00 claim filing fee previously deposited by the Claimant.

**ARBITRATOR SIGNATURES**

  
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Judy C. Cohn, Esq.  
Public Arbitrator

  
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Ralph Williams, Jr.  
Public Arbitrator

  
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Alfred M. Shams  
Industry Arbitrator

Date of Decision: January 7, 1993