

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Ernest P. and Phyllis B. Bilhuber

91-02296

Name of Respondents

R.F. Lafferty & Co., Inc.
Securities Settlement Corporation
Whitehall Securities, Inc.
Ernst & Company
Joshua Fry
Booth duBerrier & Co.
Redstone Securities Inc.
Gorman Commodities and Securities, Inc.
U.S. Clearing Corp.

REPRESENTATION

For Claimants Ernest P. and Phyllis B. Bilhuber ("Claimants"): Patrick G. Finegan, Jr., Attorney at Law.

For Respondent Ernst & Company ("Ernst & Co"): Michael H. Du Boff of the law firm of Salon, Marrow & Dyckman.

For Respondent Whitehall Securities, Inc. ("Whitehall"): Lee Schreiber, Esq. of the law firm of Schreiber & McBride.

For Respondents Redstone Securities, Inc. ("Redstone") and U.S. Clearing Corporation ("US Clearing"): Scott M. Zucker, Esq. Attorney at Law.

Respondent R.F. Lafferty & Co., Inc. ("Lafferty"): Michael R. Fleishman, Esq. of the law firm of Finkelstein Bruckman Wohl Most & Rothman.

Respondent Gorman Commodities and Securities, Inc. ("Gorman") was not represented.

Respondents Joshua Fry ("Fry") and Boothe DuBerrier & Co. ("DuBerrier") were not represented.

Respondent Securities Settlement Corporation ("SSC") was not represented.

CASE INFORMATION

Statement of Claim filed: July 15, 1991

Amended Statement of Claim filed: December 6, 1991

Claimants' Submission Agreements signed on: July 9, 1991, August 23, 1991 and January 8, 1992

Statement of Answer filed by Lafferty on: April 2, 1992

Lafferty's Submission Agreement signed on: March 31, 1992

All disputes between Lafferty and Claimants were settled prior to the hearings conducted in this matter.

Statement of Answer filed by Ernst & Co. on: March 6, 1992

Ernst & Co.'s Submission Agreement executed on: February, 1992 (exact date not provided)

Joint Statement of Answer filed by Redstone and US Clearing on: February 24, 1992

Redstone's Submission Agreement executed on: February 18, 1992

US Clearing's Submission Agreement executed on: February 14, 1992

Statement of Answer filed by Whitehall on: February 20, 1992

Whitehall's Submission Agreement executed on: February 18, 1992

Respondents Fry, DuBerrier and Gorman did not execute submission agreements nor did these Respondents file an answer.

HEARING INFORMATION

Hearing Dates/Sessions: March 3, 1993 - two sessions

March 4, 1993 - two sessions

March 5, 1993 - two sessions

Hearing Location: NASD Office - Washington, D.C.

CASE SUMMARY

Claimants alleged that they were unsophisticated investors who were going to retire in a few years and were seeking investments that were conservative, safe and would protect their retirement income. Claimants alleged that Fry explained that he would employ a complicated trading strategy that was virtually risk free. Claimants alleged that they completely relied on and trusted Fry and therefore opened two accounts with him. Claimants alleged that they placed approximately \$326,000 in these two accounts. Claimant alleged that Fry in association with numerous business entities, who are named as Respondents here, lost almost all of Claimants' money by making speculative and unsuitable investments that did not meet Claimants' investment goals and objectives. Claimants alleged that the investment strategy employed by Fry was for the benefit of Fry and the other Respondents and that the trades generated almost \$40,000 in commissions. Claimants alleged that the Respondent clearing firms are jointly liable for all harms accruing under their watch, along with the individual broker and his respective firms. Claimants alleged, among other things, that the clearing firms and the member firms that Fry was with are liable for his actions under the legal theory of Respondeat Superior. Claimants alleged that Respondents are liable for securities fraud and churning. Claimants alleged that Fry made unsuitable recommendations. Claimants alleged that Fry made unauthorized trades. Claimants alleged that Respondents breached their fiduciary duty that they owed to Claimants.

Claimants alleged that Fry and his firms held themselves out to be trained, competent and professional in offering investment advice. Claimants alleged that special titles were used to induce confidence and reliance. Claimants alleged that suitability concepts were required to review the suitability and concentration of the recommended investments. Claimants alleged that an implied contract of fair dealing and reliable performance was created. Claimants alleged that Respondents did not meet this standard set by the NASD, AMEX NYSE

and SEC and did not act in a professional manner. Claimants alleged that Respondents undertook a solicited fiduciary responsibility to Claimants, which Respondents failed to perform. Claimants alleged, at the very least, this conduct was negligent. Claimants also alleged common law fraud, RICO and wrongful infliction of emotional distress.

Respondents Ernst & Co., Whitehall, US Clearing and Redstone denied each and every allegation of wrongdoing asserted by the Claimants. The clearing firms Respondents Ernst & Co. and US Clearing (Respondent clearing firms) maintained that they properly executed their duties and responsibilities in accordance with their clearing agreements which were in conformity with all rules and regulation concerning clearing agreements. The clearing firms maintained that Claimants filled out all the proper documentations which indicated that the trading in their accounts met their stated investment objectives and that met the suitable requirements. Respondent clearing firms maintained that Claimants never objected to any of the trading in their accounts and maintained that all confirmation statements, monthly account statements and margin calls were sent to Claimants and they never complained. The clearing firms maintained that the documented evidence established that they acted properly and totally in compliance with all regulations and sound brokerage practices with Claimants' accounts. Respondent clearing firms maintained that Claimants never advised them of any improprieties with regard to their account nor that their alleged relationship with Fry was contrary to the information set forth on the signed documents and confirmation slips.

Respondents Whitehall, Ernst & Co., US Clearing and Redstone maintained that Claimants were sophisticated investors and active traders and were aware of the risks attendant to the trading strategy employed in their accounts. Redstone maintained that it properly supervised Fry and had a supervisory system in place to detect and prevent violations of applicable rules. Respondents Whitehall, Redstone, US Clearing and Ernst & Co. maintained that Claimants received all the necessary agreements to trade on options and on margin; moreover, the information completed on these forms indicated that their investment objectives were speculation and growth. Respondents Redstone, Whitehall, US Clearing and Ernst & Co. maintained that the investments by the Claimants were suitable. The above mentioned Respondents maintained that all agreements were signed and agreed to by the Claimants and that Claimants are seeking to make the respondents the guarantors for their losses. Respondents Whitehall, Redstone, US Clearing and Ernst & Co. maintained that Claimants received confirmations on each and every transaction and received detailed monthly statements itemizing each trade placed in their accounts and that Claimants never complained. These Respondents maintained that Claimants should now be estopped from complaining about transactions which they were fully aware of and which they never complained. Respondents maintained that all trades made by Fry were authorized by the Claimants.

RELIEF REQUESTED

Claimant requested that the following damages be awarded:

1. Securities Fraud and churning - \$339,790
2. Unsuitable Recommendations - \$299,790
3. Breach of Fiduciary Duty - \$299,790
4. Negligence - \$333,790
5. Common Law Fraud - \$299,790
6. RICO - \$899,370, plus fees
7. Wrongful Infliction of Emotional Distress - \$1,000,000
8. Punitive Damages - \$1,500,000
9. Loss of Opportunity - \$100,000

Respondents Whitehall, Redstone, US Clearing and Ernst & Co. requested that Claimants' claim be dismissed in its entirety and that Claimants bear all costs and that Respondents be awarded attorneys' fees.

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.

The claim against Lafferty was dismissed pursuant to a stipulation and settlement agreement entered into between Lafferty and Claimants.

During the course of the arbitration, a number of motions were raised and denied by the Panel. These motions included a motion by all Respondents present to sever the case and change venue of the severed cases to New York City; a motion to dismiss by all Respondents present for failure of Claimants to produce Fry, one of the witnesses on Claimant's witness list; a motion by Ernst & Co. joined by Respondent US Clearing, to dismiss the case against Ernst & Co. for failure to state a claim upon which relief could be granted; a motion by Redstone and US Clearing to postpone the hearing due to their counsel unavailability for a hearing on March 5, 1993; a motion made by all Respondents present for attorneys' fees; and motions to dismiss, joined by all Respondents present, the emotional harm, breach of fiduciary duty, securities fraud, negligence and punitive damage claims.

The following Respondents failed to appear at the hearing: Josh Fry, Booth Du Berrier & Co., Gorman Commodities, Inc. and Securities Settlement Corporation. At the joint request of the Respondents that were present, the Panel issued an order to Fry to appear at the hearing on March 3, 1993. Counsel for Respondent Ernst & Co. conveyed this order to Fry by telephone on March 3, 1993, and Fry declined to appear on advice of counsel. On March 4, 1993, the Panel issued a subpoena duces tecum ordering Fry to appear at the hearing on March 5, 1993. The subpoena was served on Fry during the afternoon of March 4, and Fry contacted the NASD office in New York advising of his intention not to appear.

Pursuant to the bylaws of the NASD, the Panel determined that Fry, DuBerrier, Gorman and SSC were required to submit to this arbitration, notwithstanding their failure to appear, file answers or submit submission agreements. Therefore, Respondents Fry, DuBerrier, Gorman and SSC are bound by this Panel's rulings and determinations.

After the hearing sessions had been completed but prior to the record being formally closed, Respondent Ernst & Co. filed a post hearing submission on March 26, 1993 requesting that newly discovered evidence be considered by the Panel. The parties were given an opportunity to respond to the post hearing submission and all post hearing submissions filed on or before April 15, 1993 were considered by the Panel as part of the record in this case.

AWARD

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

1. Whitehall is liable to the Claimants and shall pay to the Claimants the sum of TWELVE THOUSAND AND 00/100 DOLLARS (\$12,000).
2. Redstone is liable to the Claimants and shall pay to the Claimants the sum of EIGHT THOUSAND AND 00/100 DOLLARS (\$8,000).
3. Gorman is liable to the Claimants and shall pay to the Claimants the sum of ONE HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (\$150,000).
4. Respondents Fry and DuBerrier (as a separate corporate entity), to the extent legally permissible as claims based in fraud, are jointly and severally liable to the Claimants and shall pay to the Claimants the sum of TWO

HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (\$250,000).

5. All claims against Ernst & Co., US Clearing and SSC are denied in their entirety.
 6. All claims against Boothe DuBerner & Co. as a division of Whitehall, Redstone, Gorman and Lafferty are denied in their entirety.
 7. Each party shall bear their own costs including attorneys' fees, except as specified herein.
 8. Claimants' relief requests not specifically delineated above are denied in their entirety.
- All amounts awarded above are inclusive of interest.

FORUM FEES

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

6 sessions X \$1000 = \$6,000

Pursuant to Section 43(c) of the Code, the NASD shall retain Claimants' hearing session deposit of \$1,000.

The remaining fees for the additional 5 hearing sessions shall be borne by Respondents Whitehall, Redstone, US Clearing and Ernst & Co., jointly and severally, in the amount of \$5,000.

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

Concurring Arbitrator's Signature
Name

Public/Industry

/s/
Alexander I. Heckman, Esq.

P. Klee

Date of Decision: May 17, 1993