

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Roy Lindgren and
Galen Skramstad, as Trustee of
Lindgren & Enquist, D.D.S.
Profit Sharing Plan

No. 91-03559

Name of Respondents

Summit Investment Corp.
G. James Spinner
Robert Paymar

Name of Third-Party Respondent

Kevin Miller

REPRESENTATION OF PARTIES

For Claimants: James R. Anderson, Esq.

For Respondents: Summit Investment Corp., G. James Spinner, and Robert Paymar: Joe Anthony, Esq. and Vincent Louagie, Esq. of Fruth and Anthony.

For Third-party Respondent Kevin Miller: Greg Stenmold, Esq. of Briggs and Morgan.

CASE INFORMATION

Statement of Claim filed: November 12, 1991.

Claimant's Submission Agreement signed on: December 3, 1991.

Joint Statement of Answer, Motion to Dismiss and Third Party Claim filed on: January 30, 1992.

Respondent Summit Investment Corporation's Submission Agreement signed on: January 9, 1992.

Respondent G. James Spinner's Submission Agreement signed on: January 9, 1992.

Answer to Third-party Claim filed on : February 28, 1992.

Order of District Court compelling arbitration entered October 29, 1991.

Claimant's Package in Reply to Respondents' motions to dismiss filed: February 10, 1992.

HEARING INFORMATION

Hearing dates: March 2, 1992. One Session.
March 3, 1992. Two Sessions.
March 4, 1992. One Session.

Hearing Location: Minneapolis, Minnesota.

CASE SUMMARY

Claimant alleged conspiracy, breach of fiduciary duty, negligence, fraud, and violation of Minnesota Statute Section 325F.68 by Respondents Summit Investment Corporation ("SIC"), G. James Spinner ("Spinner") and Robert Paymar ("Paymar") arising out of a transaction involving Magnetic Technologies ("MT") promissory notes and warrants by Claimant and his pension plan. Claimant alleged that Third-party Respondent Kevin Miller ("Miller") solicited Claimant's investment in MT at the direction of Spinner and Paymar of SIC. Claimant then stated that when SIC received the funds, they were labeled as having a Summit Source and not Miller or MT. Claimant further alleged that MT and Foxmoor were to have merged, and that Spinner had drafted and negotiated the agreement and Summit would have received a \$50,000 fee.

Claimant went on to allege that Spinner had detailed knowledge of the transaction, and that he failed to disclose to Miller or Claimant that: MT had no resources to pay the \$50,000 notes/warrants other than the merge; MT was insolvent by a wide margin; most of the existing MT notes were overdue and in default; there were law suits pending against MT to collect on past due notes; MT had never made any principal or interest payments on any of its promissory notes; any sale of warrants or promissory notes by MT at that time was strictly prohibited by its agreement with Foxmoor; and the offering had not been reviewed by customary safeguard source (Summit Compliance Officer). Claimant then stated that the merger fell through. Moreover, Claimant alleged that he would have never made the investments had the facts been disclosed to him. Lastly,

Claimant alleged that he was not aware of the alleged fraud until 1990.

For their Statement of Answer, motion to Dismiss and Third-party Claim, Respondents SIC, Spinner, and Paymar denied each and every material allegation contained in the Statement of Claim. SIC, Spinner and Paymar denied liability to Claimant, alleging that they were not involved in the MT transaction. Respondents instead asserted that Claimant conducted the MT transaction outside SIC, and that Claimant paid MT the funds directly. Based on these allegations, and the fact that the District Court had refused to allow Claimant to add Spinner and Paymar as Respondents, Spinner and Paymar requested the panel dismiss them from the case because there was no factual connection between them and the Claimant. Spinner and Paymar also requested that Claimant's punitive damages claim be dismissed based on the argument that the District Court had refused Claimant such request. Lastly, SIC, Spinner and Paymar brought a Third-party Claim against Kevin Miller ("Miller") on the grounds that if Summit is liable to Claimant, it is only because of the unauthorized acts of Miller.

In their Answer to the Motions to Dismiss, Claimants asserted that the Court had determined that there was not sufficient evidence to bring Spinner, Paymar, or punitive damages into the Claim, and that the Court had not ordered that Spinner and Paymar were not liable to Claimants and that punitive damages may not be recovered. Claimants reasserted and realleged that Miller had solicited the MT transaction at the direction of Spinner and Paymar, and that Claimants' money had been labeled as having a Summit Source. Claimants also reasserted and realleged that Spinner had full knowledge of the facts surrounding the MT solicitation and the MT/Foxmoor merger and had failed to disclose negative facts which would have kept Claimants from investing. Lastly, Claimants alleged that they were directed to send the money to a certain bank and that Claimants had no idea how the transaction was being handled until Miller contacted Claimants from SIC stating that he was purchasing the MT promissory notes/warrants through SIC.

For his Answer in response to the Third-party Claim, Miller alleged that Claimant Roy Lindgren was a sophisticated investor who was very familiar with MT through a previous investment, and Claimant Roy Lindgren was fully aware of what he was investing in and risks associated therewith. Miller alleged he never received any commissions from the transaction in question. Lastly, Miller stated that all actions by Miller which are at issue, were at the direction of, authorized, and/or ratified by Respondents SIC, Spinner, and Paymar.

2. On March 2, 1992, Respondents Spinner and Paymar made a Motion to Dismiss themselves from this arbitration because they had no contact with Claimant nor had they directed anyone to talk to Claimant. Claimant opposed the Motion to Dismiss. After hearing argument from both sides, and deliberation, the panel reserved their ruling until the deliberation of the final award.

3. A third motion was made on March 2, 1992 by Respondents SIC, Spinner and Paymar to deny punitive damages based on the District Court's refusal of Claimant's request for punitive damages pursuant to Minnesota Statute Section 549.20. Claimant opposed this motion. After hearing argument from all parties, and deliberation, the panel denied the Motion to Dismiss punitive damages.

The parties have agreed that the Award in this matter may be executed by a counterpart copy 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 original remains on file with the NASD.

AWARD

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

1. Claimants', Roy Lindgren and Galen Skramstad, as trustee of Lindgren & Elquist, D.D.S. Profit Sharing Plan, claims are hereby denied and dismissed;
2. Each party shall bear their own costs of this arbitration; and
3. Respondents, Summit Investment Corporation, G. James Spinner and Robert Paymar, are liable for all hearing session fees as set forth more fully below.

FORUM FEES

Pursuant to Section 43 (c) of the NASD Code of Arbitration Procedure, the following forum fees are assessed:

4 hearing sessions X \$750.00 = \$3,000.00

Pursuant to Section 43(c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$200.00, and shall retain the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimant.

RELIEF REQUESTED

Claimant requested rescission and restitution (\$50,000) of SIC, Spinner and Paymar, or, in the alternative, damages of \$50,000 plus legal interest from November 18 to December 20, 1985, attorney's fees, and punitive damages in the amount of \$450,000.

Respondents SIC, Spinner and Paymar requested that the claims by the Claimants be dismissed in their entirety. Respondents also requested that they be awarded their costs and attorney's fees incurred in defending against Claimants' claims.

For their Third-party Claim against Miller, Respondents requested that they be awarded contribution and/or indemnity from and against Miller for any and all expenses, including reasonable attorney's fees incurred in defending against Claimants' claims, and for the amount of any award to Claimants.

Claimants requested that the Motions to Dismiss be denied.

Miller denied that he was liable to Claimants or Respondents in any way and asked that the claims be dismissed and that Miller be awarded his attorney's fees incurred in having to continue to defend against this action.

OTHER ISSUES CONSIDERED & DECIDED

1. At the first day of the hearing, March 2, 1992, Third-party Respondent Miller made a Motion to Dismiss himself based on the merits and on procedural grounds. For his procedural argument, Miller alleged that he was never served with a copy of the Statement of Claim, was never asked to submit his Submission Agreement, and was not notified pursuant to Section 21 of the Code of Arbitration Procedure. Miller had previously been released by the Claimant. Further, in his argument on the merits, Miller stated that the claims were more than 6 years old, and, thus, were barred. Miller went on to state that none of the Claims in the Statement of Claim applied to him, and that Respondent SIC is liable for something it did to Claimants through Miller, who was an employee of SIC. Under Minnesota law, Miller stated he was shielded from contribution or indemnity from his employer. Claimants joined Miller in his Motion to Dismiss. Respondents SIC, Paymar and Spinner opposed the Motion to Dismiss. After hearing argument from all parties, and deliberation, the panel granted Miller's Motion to Dismiss the Third-party Claim on the theory that Claimants represented that they had no Claim coming through Miller. If the panel found that any part of the Claim related to Miller, they would rule to deny that portion of the Claim. However, the panel ordered Miller to make himself available as a witness.

Additional hearing session fees in the amount of \$2,250.00 are assessed jointly and severally against Respondents Summit Investment Corp., G..James Spinner and Robert Paymar.

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

Dated:

April 7, 1992

/s/Douglas D. McFarland
Douglas D. McFarland
Presiding Chair
Public Arbitrator

April 8, 1992

/s/James H. Colburn
James H. Colburn
Public Arbitrator

April 7, 1992

/s/Edward J. Hentges
Edward J. Hentges
Industry Arbitrator