

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Fred B. Cushman

vs.

91-04033

Name of Respondents

Barrett Day Securities, Inc.
David Berger
Barry Schwartz
James Weiss
Howard Schwartz

REPRESENTATION

For Claimant: Richard J. Blumberg, Esq. of McLaughlin & Stern, Ballen and Ballen.

For Respondents, Barrett Day Securities, Inc., David Berger and Barry Schwartz: Gerald N. Selvers, Esq. of Sonnenblick, Parker & Selvers, P.C.

For Respondent James Weiss: James Weiss appearing *pro se*.

For Third Party Respondent, Howard Schwartz: David Crystal II, Esq. of Collier, Cohen, Crystal & Bock.

CASE INFORMATION

Statement of Claim filed: December 30, 1991.

Amended Statement of Claim filed on: May 19, 1992.

Claimant's Submission Agreement signed on: December 30, 1991.

Joint Statement of Answer filed by Respondents Barrett Day Securities, Inc., David Berger and Barry Schwartz on: March 3, 1992.

Amended Statement of Answer, Counterclaim, Cross-Claim and Third Party Claim filed by Respondents, Barrett Day Securities, Inc., David Berger and Barry Schwartz on: June 22, 1992.

Respondent, Barrett Day Securities, Inc.'s Submission Agreement signed on: March 2, 1992.
Respondent, David Berger's Submission Agreement signed on: March 2, 1992.
Respondent, Barry Schwartz's Submission Agreement signed on: March 2, 1992.

Statement of Answer and Cross-Claim filed by Respondent James Weiss on: July 16, 1992.
Respondent, James Weiss has not filed a Submission Agreement as required pursuant to Section 25 of the Code of Arbitration Procedure.

Statement of Answer filed by Third Party Respondent, Howard Schwartz on: October 5, 1992.
Third Party Respondent, Howard Schwartz's Submission Agreement signed on: October 29, 1992.

HEARING INFORMATION

Hearing Dates/Sessions: September 17, 1992/Two sessions
 September 18, 1992/Two sessions
 November 30, 1992/One session
 April 19, 1993/Two sessions
 May 24, 1993/Two sessions

Hearing Location: NASD offices located at 260 Franklin Street, Boston, Massachusetts.

CASE SUMMARY

Claimant alleges that Respondent Barrett Day("Barrett"), through Respondents Barry Schwartz("B. Schwartz") and James Weiss("Weiss"), and with the knowledge and approval of Respondent David Berger("Berger"), sold the securities in Claimant's account and purchased highly speculative securities of low grade quality, including shares of Applied Technology Systems, Inc. and common stock and warrants of Vestex, Inc. and Quicksilver Enterprises, Inc. Claimant alleges that these transactions were unauthorized, unsuitable and that Respondents Berger and B. Schwartz intentionally misrepresented the soundness of these investments and omitted to disclose material facts about the companies. Claimant alleges that these actions constitute violations of Rule 10b-5, common law fraud, breach of contract, breach of fiduciary duty and negligence.

Respondents Barrett, Berger and B. Schwartz deny the allegations contained within the Amended Statement of Claim. Respondents Berger and Schwartz also filed a Counter-Claim in which they allege that Claimant knew or should have known that the allegations against them were false, which constitutes an unjustified use of the arbitration procedure.

Respondents Barrett, Berger and B. Schwartz also filed a Cross-Claim against Respondent Weiss in which they contend that, if there is a finding of liability on their part, that it should be only passive and secondary in nature and would be the result of wrongful acts of Respondent Weiss.

Respondents Barrett, Berger and B. Schwartz also filed a Third-Party Claim against Howard Schwartz ("H. Schwartz") in which they allege that H. Schwartz was charged with the duty of supervising Respondent Weiss and that, when Respondent Weiss left the employ of Respondent Barrett, H. Schwartz became the account executive for Claimant's account. Respondents Barrett, Berger and B. Schwartz contend that, if there is a finding of liability on their part, that it should be only passive and secondary in nature and would be the result of the wrongful acts of Respondent H. Schwartz.

In response to the Amended Statement of Claim, Respondent Weiss maintains that none of the transactions which Claimant alleges were recommended by Respondent Weiss were either discussed with or recommended by him and that each transaction actually recommended by him was suitable, duly authorized, and approved and/or ratified by the Claimant.

Respondent Weiss denies the allegations contained within the Cross-Claim. Respondent Weiss also filed a Cross-Claim in which he alleges that Respondents Barrett, Berger and B. Schwartz were responsible for those acts alleged as the basis for Claimant's damages.

In response to the Third-Party Claim, H. Schwartz maintains that he received no direct economic benefit as a result of trades made in Claimant's account and was not in charge of Respondent Weiss. H. Schwartz admits that he signed Claimant's new account form but maintains that he did so at the request of Respondent B. Schwartz and that, upon learning that Claimant's account bore his registered representative number, he requested Respondent B. Schwartz to change it and, although assured it would be done, he has now learned that Respondent B. Schwartz neglected to make the change. H. Schwartz also submitted a Counter-Claim.

RELIEF REQUESTED

Claimant requests an award of compensatory damages in the amount of \$265,090.00 plus interest, punitive damages in the amount of \$1,000,000.00 and costs, including attorneys' fees.

Respondents Barrett, Berger and B. Schwartz request either that the Claim be dismissed in its entirety or an award of contribution and indemnification against Respondents Weiss and H. Schwartz.

Respondents Berger and B. Schwartz request an award against Claimant in the amount of \$50,000.00.

Respondent Weiss requests either that the Claim be dismissed in its entirety or an award against Respondent Barrett, Berger and B. Schwartz plus an assessment of costs against Respondents Barrett, Berger B. Schwartz and Third-Party Respondent H. Schwartz.

Third-Party Respondent H. Schwartz requests that the Third Party Claim be summarily dismissed and that he be awarded approximately \$25,000.00 for costs, including reasonable attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondents Barrett, Berger and B. Schwartz made a Motion to Postpone the hearings scheduled for July 8, 1992. The Motion was granted and a postponement fee in the amount of \$400.00 was assessed against and paid by Respondents Barrett, Berger and B. Schwartz.

Respondents Barrett, Berger and B. Schwartz made a Motion for Change of Venue and a Motion to have the Panel recuse itself, both of which were denied.

The Panel granted a Motion made by Respondents Barrett, Berger and B. Schwartz to include H. Schwartz as respondent.

Third-Party Respondent H. Schwartz's Motion for Summary Dismissal was denied by the Panel.

After two days of hearings, Claimant advised the Arbitrators that he had settled his claim with Respondents Barrett, Berger, B. Schwartz and Weiss. The Arbitrators were also advised that Respondents Barrett, Berger, B. Schwartz and Weiss had subsequently settled their dispute.

Respondents Barrett, Berger and B. Schwartz made a second Motion for Change of Venue, which was denied.

Third-Party Respondent H. Schwartz made a Motion to Dismiss, which was denied by the Panel.

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:

- a) All claims are dismissed in their entirety.
- b) Each party shall bear their respective costs, including attorneys' fees.

Claimant's settlement agreement with Respondents Barrett, Berger and B. Schwartz is incorporated herein by reference. The settlement between Respondent Weiss and Respondents Barrett, Berger and B. Schwartz is also incorporated herein by reference.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

Non-refundable filing fee for Claim:	\$250.00
Non-refundable filing fee for Counter-Claim filed by Respondents Barrett, Berger and B. Schwartz:	\$500.00
Non-refundable filing fee for Cross-Claims filed by Berger and B. Schwartz:	\$500.00
Non-refundable filing fee for Third-Party Claim filed by Barrett, Berger and B. Schwartz:	\$500.00
Non-refundable filing fee for Cross-Claim filed by Weiss:	\$500.00
Non-refundable filing fee for Third-Party Counter-Claim filed by H. Schwartz:	\$500.00
Hearing session fees: \$1,000.00)	\$9,000.00(Nine sessions X
Total paid by Claimant:	\$1,250.00
Net due	\$10,500.00

Claimant is assessed and the NASD shall retain the \$1,250.00 previously deposited by Claimant.

The Respondents Barrett Day Securities, Inc., David Berger and Barry Schwartz are hereby jointly and severally liable and shall pay to the NASD the sum of \$5,250.00.

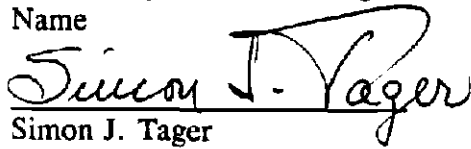
Third-Party Respondent Howard Schwartz is hereby liable and shall pay to the NASD, Inc. the sum of \$5,250.00.

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

ARBITRATION PANEL

Joseph Scardino, Esq.	-	Public Chairperson
Joseph J. Slotnik	-	Industry Panelist
Simon J. Tager	-	Public Panelist

Concurring Arbitrator's Signature
Name


Simon J. Tager

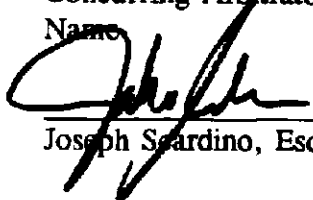
Date of Decision: July 15, 1993

ARBITRATION PANEL

Joseph Scardino, Esq.	-	Public Chairperson
Joseph J. Slotnik	-	Industry Panelist
Simon J. Tager	-	Public Panelist

Concurring Arbitrator's Signature

Name

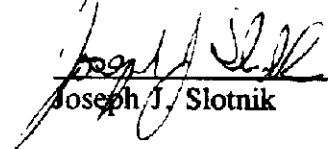

Joseph Scardino, Esq.

Date of Decision: July 15, 1993

ARBITRATION PANEL

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Joseph J. Slotnik	-	Industry Panelist
Simon J. Tager	-	Public Panelist

Concurring Arbitrator's Signature
Name



Joseph J. Slotnik

Date of Decision: July 15, 1993