

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Names of Claimants

Michael Perry  
Rachel Perry  
Elizabeth Gustafson

91-04095

Names of Respondents

First American Biltmore Securities, Inc.  
Randall Evans  
Gordon Nevers  
Members Service Corporation

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**REPRESENTATION**

Claimants, Michael Perry, Rachel Perry and Elizabeth Gustafson were represented by Paul J. Roshka, Jr., Esq. of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.A., Phoenix, Arizona.

Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers were represented by Randall D. Wilkins, Esq. of Bonn & Jensen, Chartered, Phoenix, Arizona.

Respondent, Randall Evans appeared pro se.

**CASE INFORMATION**

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on January 23, 1992.

Claimants, Michael and Rachel Perry and Elizabeth A. Gustafson's Uniform Submission Agreement was signed on January 16, 1992.

Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers did not file executed Submission Agreements with the NASD.

Respondent, Randall Evans' Submission Agreement was signed on February 25, 1992.

A Joint Statement of Answer was filed with the NASD by Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers on May 15, 1992.

A Statement of Answer was filed with the NASD by Respondent, Randall Evans on April 2, 1992.

A Motion to Dismiss was filed with the NASD by Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers on December 4, 1992.

A Request to join Respondents, First American Biltmore Securities and J. Gordon Nevers' Motion to Dismiss was filed with the NASD by Respondent, Randall Evans on December 30, 1992.

A Response to Respondents' Motion to Dismiss was filed with the NASD by Claimants on February 16, 1993.

A Reply in Support of Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers' Motion to Dismiss was filed with the NASD by First American Biltmore Securities, Inc. and J. Gordon Nevers on February 18, 1993.

A Hearing Memorandum was filed with the NASD by Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers on December 4, 1992.

A Response to Respondents' Hearing Memorandum was filed with the NASD by Claimants on February 16, 1993.

A Rebuttal Hearing Memorandum was filed with the NASD by Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers on February 23, 1993.

A Pre-Arbitration Memorandum was filed with the NASD by Claimants on December 7, 1992.

A Supplemental Arbitration Memorandum was filed with the NASD by Claimants on March 16, 1993.

A Supplemental Memorandum re: Arbitrability of Azrac Claims and Effect of Gilmer v. Interstate/Johnson Lane on Issue Before the Panel was filed with the NASD by Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers on March 16, 1993.

A Motion in Limine re: Inadmissibility of Evidence of Other Alleged Wrongful Conduct was filed with the NASD by Respondents, First American Biltmore Securities, Inc. and J.

Gordon Nevers on March 16, 1993.

A Hearing Memorandum Regarding Issue of Sale of Unregistered Securities and Respondents' Estoppel Defense was filed with the NASD by Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers on March 17, 1993.

### HEARING INFORMATION

The hearing dates were February 22, 23, 24, 1993 and March 22, 23, 24, 1993 and the hearing lasted for ten (10) sessions.

The hearing location was Scottsdale, Arizona.

### CASE SUMMARY

Claimants, Michael and Rachel Perry ("Perrys") and Elizabeth Gustafson ("Gustafson") alleged intentional and negligent misrepresentations, omissions, racketeering, fraud, breach of fiduciary duty and violations of the NASD's Rules of Fair Practice on the part of Respondent, First American Biltmore Securities, Inc. ("FABS"), through its securities representative, Respondent, Randall Evans ("Evans"), its Branch Manager, J. Gordon Nevers ("Nevers") and Respondent, Members Service Corporation, ("MSC") as 100% owner of FABS.

The Perrys alleged that they informed Evans that they wanted no more than ten to fifteen percent of their assets in high risk investments and the rest in stable investments which provided an income of \$1,000 a month. Gustafson alleged that she directly instructed Evans not to risk any of the funds in her IRA. The Perrys and Gustafson asserted that despite their stated desires for safe investments, Evans recommended Income Development Corporation ("IDC"), Cel-Sci stock, NU Dawn stock and LA Gear stock. The Perrys and Gustafson maintained that Evans had discretionary control over their accounts because they knew so little about the stock market and further alleged that Evans told them they could make more money by buying puts and calls in LA Gear. According to the claim, Evans entered options trades without informing the Perrys or Gustafson what he was doing. The Perrys and Gustafson further alleged that Respondents falsely completed forms, by stating that Mr. Perry had five years of experience in trading options and that Gustafson had ten years of experience in trading options. Gustafson claimed she did not learn she had a margin account until consulting with an ADVEST representative and the Perrys claimed that they did not learn of the existence of their margin account until being told by ADVEST that they needed to sign a margin agreement in order to transfer the account.

The Perrys and Gustafson further alleged that Evans recommended MSC to them as the "absolute safest place" to put their money. Gustafson contended that Respondents never delivered any written disclosure to her. Also, the Perrys maintained that in connection with some of their MSC investments, Evans was listed as the purchaser/representative and with one of the MSC investments, Evans and FABS were listed as the purchaser/representative. The

Perrys and Gustafson asserted that FABS and Evans knew that their account information was insufficient for participation in this highly speculative purported private placement and that Claimants did not meet the suitability standards. The Perrys and Gustafson alleged that when Evans discussed their investments with them, he wrote out an "estimated portfolio value" that greatly misrepresented the value of their holdings. Lastly, Claimants contended that Respondents failed to disclose that these investments were recommended to generate commissions, failed to disclose that margin interest was being charged and misrepresented the profitability of the investments.

FABS and Nevers, in their Joint Statement of Answer, denied that Evans had "discretionary control" over the Perrys' or Gustafson's account. FABS and Evans further alleged that the decision to purchase stocks was made by the Perrys and Gustafson alone. FABS and Nevers did admit that only in connection with the Perrys' investments in MSC was Evans listed as the purchaser/representative and that on one MSC investment, Evans and FABS were listed as the purchaser/representative.

FABS and Nevers set forth the following affirmative defenses:

1. MSC Units sold to the Perrys and Gustafson did not constitute a public offering and the Units were sold pursuant to an exemption from the registration requirements under applicable federal and state securities laws;
2. The Perrys and Gustafson represented that their assets were suitable for the MSC investment;
3. The NASD panel lacks jurisdiction to award treble damages against FABS and Nevers;
4. The Perrys and Gustafson were specifically informed by Evans that the IDC, Cel-Sci, NU Dawn and LA Gear stocks involved risk and the Perrys and Gustafson agreed to purchase these stocks despite Evans' warnings, and therefore, assumed the risk; and
5. The claims are barred by the doctrines of waiver, estoppel, laches, ratification, payment, misrepresentation, negligent misrepresentation, breach of contract, assumption of risk and failure to mitigate damages.

Evans, in his Statement of Answer, alleged that at all times when purchase orders were executed, the Perrys either authorized or requested the purchase. Evans stated that there were occasions when Gustafson was out of town and had previously authorized Evans to use his discretion. Evans alleged that he recommended stable investments with good track records including insurance contracts, all of which were rejected by the Perrys and Gustafson. Evans claimed that on each occasion, the Perrys and Gustafson selected riskier alternatives realizing that the reward would be higher if the risk was higher. Evans denied that he ever guaranteed

immunity from loss.

### **RELIEF REQUESTED**

Claimants, Michael and Rachel Perry requested an award of three-fold the amount of damages they have sustained in the amount of at least \$405,000 plus trebling of the interest thereon at the legal rate of ten percent (10%) per annum. Elizabeth Gustafson requested an award of three-fold the amount of damages she has sustained in the amount of at least \$97,500 plus trebling of the interest thereon at the legal rate of ten percent (10%) per annum.

Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers requested that Claimants take nothing against Respondents by their Statement and that Respondents be granted judgement and be awarded their reasonable attorneys' fees, costs, interest on their fees and costs at the highest rate and from the earliest date permitted by law and such other relief as the panel deems just and proper.

Respondent, Randall Evans requested that the claim be dismissed.

### **OTHER ISSUES CONSIDERED & DECIDED**

Purported Responent, Members Service Corporation, a non-member of the NASD was served on a voluntary submission basis and refused to submit to the jurisdiction of the NASD. Members Service Corporation was therefore, not a party to this action.

In Respondents, First American Biltmore Securities, Inc. and J. Gordon Nevers' Motion to Dismiss, which Respondent Randall Evans requested to join in with Respondents, they alleged that Counts One, Three, Four, Five, Ten and Eleven of Claimants' Statement of Claim should be dismissed for failure to state a claim. FABS and Nevers further alleged that the Perrys and Gustafson rejected numerous "safe" investments that Evans offered for their consideration, and instead, agreed to assume the risk of other securities. FABS and Nevers maintained that Count One was barred by the statute of limitations, that the NASD panel does not have the authority or jurisdiction to award the Perrys' or Gustafson punitive damages or to assess AZRAC damages. FABS and Nevers claimed that no private right of action existed for alleged violations of the NASD's rules of Fair Practice, so Count Ten failed to state a claim upon which relief could be granted.

In their Response to the Motion to Dismiss, the Perrys and Gustafson, stated that their allegation that FABS, Nevers and Evans sold unregistered securities in violation of A.R.S. Section 44-1841 was not barred by the statute of limitations and that the arbitration panel does have authority and jurisdiction to award punitive damages and treble damages under the Arizona Racketeering Statute. The Perrys and Gustafson maintained that they were entitled to bring an action against FABS, Nevers and Evans for their violations of the NASD Rules of Fair Practice.

The Arbitration Panel denied the Motion to Dismiss.

Respondents, FABS and Nevers filed a Motion in Limine to Restrict Testimony which was also denied by the Arbitration Panel.

FABS and Nevers did not file a properly executed submission to arbitration with the NASD but are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure, and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.

Evans appeared at the hearing in person on February 22, 23 and 24, 1993 but did not appear on March 22, 23 and 24, 1993. The panel determined that Evans had notice of the continuation of this hearing pursuant to Section 29 of the NASD Code of Arbitration and went forward in Evans' absence. Evans appeared by telephone to present closing arguments on March 24, 1993.

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.

#### **AWARD**

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

1. The Perrys ("Perrys") are awarded Fifty Thousand Dollars and No Cents (\$50,000.00) for rescission only against "FABS", conditional upon the Perrys transferring to FABS all rights, title and interest to the 5 Units of MSC they hold including any stock in connection therewith, that was purchased by them on or about July 30, 1990. This transfer is conditioned upon and should be made simultaneously with the payment of the \$50,000 by FABS to the Perrys;
2. The Gustafson's Claims asserted against FABS, Nevers and Evans are denied and dismissed in their entirety;
3. Perrys claims asserted against Nevers and Evans are denied and dismissed in their entirety;
4. No interest, punitive damages or attorneys' fees are awarded; and,

5. Other than Forum Fees which are addressed below, each party is to bear its own costs, expenses and attorney's fees.

### FORUM FEES

Pursuant to Section 43c of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the non-refundable claim filing fee of \$250.00 and the \$1,000.00 hearing session deposit previously deposited by Claimants Michael and Rachel Perry and Elizabeth Gustafson. The Perrys' and Gustafson are assessed additional Forum Fees of \$4,000.00 and FABS is assessed additional Forum Fees of \$5,000.00. Forum Fees were calculated on the basis of \$1,000.00 per hearing session for ten (10) hearing sessions.

Additional Forum Fees assessed to the parties are payable to the NASD.

#### Signatures of Concurring Arbitrators:

/S/ William M. Howard

Dated: April 26, 1993

William M. Howard, Esq.  
Chairperson  
Public Arbitrator

/S/ William L. Olson

Dated: April 30, 1993

William L. Olson  
Industry Arbitrator  
Panelist

/S/ Charles E. Dew

Dated: April 29, 1993

Charles E. Dew  
Public Arbitrator  
Panelist

Date award served by the NASD: May 4, 1993