

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between	)	
RONALD MARTINO	)	
Claimant	)	CASE NO. 92-01144
v.	)	
CHARLES MARWELL, III,	)	
Respondent	)	

REPRESENTATION

For Claimant: Philip M. Giordano, Esq. and Linda Trent,  
Esq., Ricklefs & Giordano, P.C., Boston,  
MA

For Respondent: Pro se (February 16, 1993)  
Daniel J. Dugan, Esq., Spector Gadon & Rosen,  
Philadelphia, PA (March 12, 1993)

CASE INFORMATION

Statement of Claim dated: March 26, 1992 (filed June 1, 1992).

Claimant's Submission Agreement signed: March 27, 1992.

Statement of Answer: None filed

Respondent's Submission Agreement: None filed; Respondent appeared  
at all hearings.

HEARING INFORMATION

Hearing Date/Sessions: February 16, 1993 - Two sessions.  
March 12, 1993 - Two sessions  
April 23, 1992 - One session (conference)

Hearing Location: Boston, Massachusetts.

CASE SUMMARY

Claimant Ronald Martino sought damages proceeding against the  
respondent, a registered representative formerly associated with  
the Braintree, Massachusetts firm of Bailey, Martin & Appel, Inc.  
arising out of trading in unlisted securities between April and

December, 1989.<sup>1</sup> Claimant, whose business during the period was the construction of "spec" homes in Cranston, Rhode Island, alleged that the respondent made misrepresentations concerning the investment merits of six securities purchased and sold during that period, and induced him to borrow approximately \$60,000 via home equity loans and credit cards to support his trading in securities. Property subject to the home equity loan was sold at a total loss of claimant's equity in the property. Claimant demanded restitution for his losses, repayment of both interest expenses and the loss of equity in the Cranston, Rhode Island property as "reliance damages", "lost opportunity damages" for loss of a conservative rate of return in invested capital for the period between the transactions in issue and the hearing, punitive damages, costs (including expert fees) and attorney's fees.

Respondent testified at the hearing that he had advised claimant of the risks inherent in the unlisted securities Claimant purchased, fully disclosed all information, including the participation of principals of Bailey, Martin & Appel, Inc. in the management of the corporations and limited partnerships in which claimant invested, never made any representations to him concerning potential rates of return, nor encouraged him to incur indebtedness through credit card or home equity loans for the purpose of purchasing securities.

#### RELIEF REQUESTED

Claimant sought damages in the following amounts:

- a. Aggregate securities losses (without offsetting gains of \$17,956): \$47,096<sup>2</sup>
- b. Interest incurred to support securities transactions: \$36,590.
- c. Lost equity in property in Cranston, Rhode Island sold to liquidate debt incurred to purchase securities: \$25,034.
- d. Lost opportunity damages \$19,616;
- e. Punitive damages \$500,000;
- f. Costs (expert fees) \$3,000; and

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<sup>1</sup>The firm consented to the suspension of its NASD membership and ceased operations in 1990-91, prior to the filing of the Statement of Claim. No claim was asserted against the firm or its former principals.

<sup>2</sup>Net losses were \$29,139.00

g. Attorneys fees \$15,000

#### OTHER ISSUES CONSIDERED AND DECIDED

##### 1. Motion to preclude answer.

In August, 1992, after respondent failed to file an answer within the time required by Section 25 of the Code of Arbitration Procedure, claimant moved to preclude the answer of the respondent. No answer was ever filed. After hearing at the session of February 16, 1992, the motion was granted. The respondent was limited at the hearing to presenting evidence to contradict the testimony presented by the claimant, and was not permitted to present any evidence pertaining to affirmative defenses.

##### 2. Adjournments.

The proceeding was adjourned with what the panel understood to be the consent of all parties from the original hearing date of January 12, 1992 to February 16, 1992 at the claimant's request. Claimant was assessed a \$500 postponement fee pursuant to Section 30(b) of the Code of Arbitration Procedure. The panel had advised the respondent through the NASD that no adjournment beyond February 16, 1992 would be granted absent a show of cause in writing by January 12. No such document was provided to the panel. The respondent was notified in writing on January 18, 1992 that the hearing would take place on February 16, 1992.

On the morning of the hearing, the panel received a telephone call from Howard Appel, a former principal of Bailey, Martin & Appel, requesting an adjournment on behalf of Mr. Marwell. Mr. Appel was advised that no such adjournment would be allowed. The hearing commenced approximately 10:30 a.m. Mr. Marwell appeared at the hearing at approximately 11:30 a.m., and requested a further adjournment for the purpose of obtaining counsel and the assistance of former principals of Bailey, Martin & Appel. Mr. Marwell asserted that he had requested adjournments by telephone and in fact had transmitted a written request for an adjournment to James Wild of the NASD office in New York. It is unclear when the document arrived. It was never forwarded to the arbitrators. Mr. Marwell made no further communication to the NASD until phone calls on or about February 13, 1992, the last business day prior to hearing. The panel was not advised of these telephone calls prior to the day of the hearing.

Claimant asserted through counsel at the February 16 hearing he was prepared to go forward against the respondent on that date without seeking any relief against Bailey, Martin & Appel and its principals. The panel determined that in view of the respondent's consistent failure to communicate with the NASD between January 18

and the eve of hearing, no further postponement of the hearing would be allowed.

### 3. Exclusion of Testimony.

Claimant submitted with his claim a copy of the statement of claim submitted by a group of investors, including Daniel Zincone, with respect to the conduct of Mr. Marwell and Bailey, Martin & Appel in other transactions. The claimant was not a party to that proceeding. Mr. Zincone was presented as a witness to testify with respect to Mr. Marwell's conduct. The panel determined that Mr. Zincone's testimony should be limited to his participation in transactions involving Mr. Martino.

The respondent presented as a witness at the March 16 hearing a former employee of Bailey, Martin & Appel to testify as to Mr. Marwell's business practices. When it was determined that she had no personal knowledge of transactions involving Mr. Martino, her testimony was excluded.

### THE MERITS

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions filed on or about March 25, 1993 by both parties, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

The evidence presented showed that the claimant commenced to do business with the respondent and his firm to invest in speculative securities with a significant degree of risk. However, the evidence also permits the conclusion that respondent did not fully disclose to claimant that officers and principals of Bailey, Martin & Appel were active in the management and were market makers in a number of the companies which respondent recommended to claimant, including Springton Capital Corp., Lifeline Healthcare Group, Ltd., and Naturade Inc. Further, the evidence permits the conclusion that there was no full disclosure of both the relationship of Bailey, Martin & Appel's officers to Longwood Group, Inc., or that the purchase price of Longwood securities respondent sold claimant reflected a mark-up of approximately 18%.

In sum, we conclude that claimant knowingly accepted a substantial degree of risk in adopting the investment program suggested by respondent, but respondent failed to disclose all material risk factors, including the relationship between Bailey, Martin & Appel and its principals and the issuers of the securities sold to claimant. On this basis, an award of \$11,500 in actual damages with interest is justified. The claim for punitive damages is denied.

Claimant also seeks consequential damages for interest paid on credit card and home equity loans which allegedly supported his securities purchases, loss of equity in a property sold to repay home equity borrowing, and lost income from the mismanagement of his portfolio. Even were we to find that respondent induced claimant to engage in credit card and home equity borrowing to support purchases of non-marginable securities, the evidence claimant presented was insufficient to tie any borrowing or interest expenses to specific investments. Accordingly, the claim for consequential damages and lost opportunity damages is denied.

Claimant is awarded \$500.00 in costs for the services of James D. Kaufman as expert witness. The demand for attorney's fees is denied.

As no party asserted claims against Bailey, Martin & Appel, Inc. or any of its former principals, this decision and the award are entered without prejudice to any claims which any party may assess against the firm or its principals in the future.

#### AWARD

WHEREFORE, damages are awarded for the Ronald Martino and against Charles Marwell, III in the amount of \$11,500 with interest at 12% per annum pursuant to Massachusetts law from June 1, 1992, the date upon which the Statement of Claim was filed. Costs are awarded to claimant in the amount of \$500.00.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed and any deposits previously paid shall be applied to the fees assessed.

1. The NASD has received and shall retain \$150.00 non-refundable filing fees paid by the Claimant;
2. The NASD has received and shall retain all hearing session deposits paid by the Claimant;
3. Claimant is assessed a \$150 non-refundable filing fee;
4. Forum fees in the amount of \$1250 (50% of the cost of five hearing sessions at \$500 per session) are assessed against Charles Marwell, III.

5. Forum fees in the amount of \$1250 (50% of the cost of five hearing sessions at \$500 per session) are assessed against Ronald Martino, who is to tender the balance of \$ 250 due the NASD within 30 days.

Arbitrators' Signatures

Edward R. Wiest

Arbitrator and  
Chairman

James E. Fox

Arbitrator

Colette Manoil

Arbitrator

Date of Decision: