

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Mark Appel, Alan Appel & Hera Appel

92-01652

Name of Respondent(s)

Stratton Oakmont, Inc.  
Brian Scanlan  
Brian Herman  
Jordan Belfort

REPRESENTATION

For Claimant: Paul E. Schofield, Esq. of Siebel, Whipple and Schofield, Chicago, Illinois. Claimant Mark Appel appeared on behalf of the remaining claimants.

For Respondent Brian Herman: Jerry M. Santangelo, Esq. of Neal, Gerber & Eisenberg, Chicago, Illinois.

For Respondent Brian Scanlan: Scott M. Zucker, Esq. Great Neck, New York.  
Respondent Brian Scanlan appeared telephonically.

For Respondents Jordan Belfort & Stratton Oakmont, Inc.: Frank D. Ornstein, Esq. of Ornstein & Evangelist, Jericho, New York.

CASE INFORMATION

Statement of Claim filed: May 14, 1992.

Claimant's Submission Agreement signed on: May 7, 1992.

Respondent Stratton Oakmont, Inc.'s Submission Agreement signed on: June 1, 1992.

Respondent Brian Herman's Submission Agreement signed on: July 22, 1992.

Respondent Jordan Belfort's Submission Agreement signed on: July 25, 1992.

The NASD does not have a record of Respondent Brian Scanlan's having filed a Submission Agreement in this matter.

Statement of Answer filed by Respondents Stratton Oakmont, Inc., Brian Herman, and Jordan Belfort on: July 31, 1992.

Respondent Jordan Belfort filed a Motion to Dismiss with the Statement of Answer on: July 31, 1992.

Claimant's Response to the Motion to Dismiss filed: August 18, 1992.

### HEARING INFORMATION

Hearing Dates:                      January 19, 1993 for two (2) sessions.  
   February 16, 1993 for two (2) sessions.  
   February 17, 1993 for two (2) sessions.

Hearing Location: Chicago, Illinois.

### CASE SUMMARY

Claimants, Mark Appel, Alan Appel, and Hera Appel, ("Claimants") alleged intentional misrepresentation, omission of material facts, unsuitability and negligence on the part of Respondent Stratton Oakmont, Inc. ("Stratton"), by and through its registered representatives, Respondents Brian Scanlan, ("Scanlan") and Brian Herman, ("Herman") and its chief executive officer, Jordan Belfort, ("Belfort"). These allegations arise out of Claimants' investments in Ventura Entertainment Group, Nova Capital Inc. (a/k/a Visual Equities), Repossession Auction, Inc., Nutrition Management Services Inc., SMT Health Services, Ropak Laboratories, DVI Financial Group, IPS Health Care and Ventura Motion Picture Group.

Claimants alleged that Respondents engaged in a deliberate pattern of solicitation and trading designed to mislead Claimants as to the alleged merits and real dangers involved in trading the securities purchased and sold in their accounts. Claimants further alleged that they relied upon Respondents in all matters concerning their accounts. Claimants stated that Respondents' misrepresentations included: Leading Claimants to believe that they would be investing in high quality stocks by soliciting Eastman Kodak stock as a lure, when Respondents knew that none of their subsequent recommendations would be in that class; concealing the hazards of buying only marginally-traded stock; and concealing the true nature of Respondents' selling policy.

In addition, Claimants asserted that Respondents failed to inform Claimants of the philosophy governing Respondents' business, failed to inform Claimants of the dangers of investing in marginally-traded stocks, failed to warn Claimants of the dangers inherent in failing to diversify their portfolios, and failed to warn Claimants that the conduct of their business was such that it might attract negative attention from regulatory agencies. Also, Claimants maintained that Respondents recommendations were not in keeping with the Claimants' objectives or risk parameters and all of the stocks traded in Claimants' accounts were recommended because Stratton made a market in them and was intentionally working to manipulate the prices of those stocks for its own benefit. Claimants contended that Respondents breached the fiduciary duty they owed Claimants by recommending low-priced, high risk stocks only because Respondents made a market in them, failed to ascertain Claimants' financial and investment profile, operated in such a way to attract negative attention from regulatory agencies, which attention would have an adverse effect on

*Claimants' portfolio, failed to monitor stocks in which they made a market and failed to supervise the conduct of registered representatives handling Claimants' accounts. Lastly, Claimants alleged that Respondent Stratton failed to supervise the conduct of its registered representatives and that Respondents breached the implied covenant of good faith and fair dealing.*

In their Statement of Answer, Respondents Stratton, Herman, and Belfort, alleged that Claimants were aware of and directed each and every trade in their accounts, Claimants fully understood and appreciated the possible rewards and risks of their trading activity, and Claimants confirmed their financial ability to bear the risks of their trading activity by repeatedly depositing substantial funds into their accounts for the express purpose of effectuating additional trades. Respondents alleged that Claimants alone were responsible for their "unrealized loss" on Ventura Entertainment Group. In regard to initial public offerings ("IPO") purchases, Respondents alleged that Claimants knew the market risks and Claimants were responsible for their "unrealized losses" on their IPO purchases of Repossession Auction, SMT Health Services and Nutrition Management Services, Inc. Respondents further stated that Claimants have realized profits and their damage claim for "unrealized losses" is exaggerated and unfounded. Lastly, Respondents alleged that there is no fiduciary relationship between a stockbroker and a customer, with respect to a non-discretionary account, there is no separate claim for breach of an "implied obligation of good faith" and there is no separate claim for "nondisclosure"; it collapses into the insupportable fraud claim.

In his Statement of Answer, Respondent Scanlan denied each and every allegation contained in the Statement of Claim. In particular, Scanlan put forth the following affirmative defenses:

1. The Statement of Claim failed to state the required elements of a legally sufficient cause of action;
2. The Claimants are sophisticated and active traders who were aware not only of the general risks inherent in the securities market, but with specific awareness of the particular issues alleged in the Statement of Claim;
3. The Claimants received confirmations on each and every transaction made for their accounts and received detailed monthly account statements itemizing each trade placed for the account in the amount charged as a result thereof, and never communicated concern to Respondents. Claimants ratified and are estopped from complaining about transactions of which they are fully aware of and of which they never complained;
4. Each trade made for Claimants' account was made with the prior knowledge and consent of the Claimants at their specific instance and request with full knowledge of the risks and potential rewards attendant thereto. Claimants assumed the risks of all of those transactions and are estopped from asserting the instant arbitration;
5. Claimants' alleged losses were caused by their own active, affirmative, negligent and/or culpable conduct;
6. Claimants waived their right to bring such claims by their own actions, including their delay in bringing their purported claims;

7. Claimants' alleged losses were a result of persons, entities or market conditions beyond Scanlan's control;
8. Claimants have failed to mitigate damages;
9. Claimants are active, knowledgeable investors and Scanlan is not a guarantor of profits or losses in this or any account; and
10. Claimants' claim for punitive damages is barred under New York law.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages in the minimum aggregate amount of \$356,410, subject to amendment for damages occurring after the filing of this action, pre-award and post-award interest from the date of the original investment at the maximum rate allowed by law, costs of this action, including filing fees, attorney's fees, expert witness fees, and any other costs deemed fair and reasonable, and punitive damages in an amount to be determined by the arbitrators, sufficient to make an example of Respondents and to punish them for their willful and outrageous conduct and to serve as an example to deter such conduct in the future.

Respondents Stratton Oakmont, Inc., Brian Herman and Jordan Belfort requested that the Statement of Claim be dismissed with prejudice, and award Respondents such further relief as is deemed appropriate under the circumstances.

Respondent Brian Scanlan requested that the Statement of Claim be dismissed as against Brian Scanlan and that the Arbitration Panel grant such other and further relief as the Arbitration Panel may deem just and proper.

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

At the hearing held on January 19, 1993, Claimants filed a letter dismissing Respondent Brian Scanlan from this proceeding. However, Brian Scanlan remained as a witness for the Claimants. Claimants' counsel also sought to amend the pleadings to reflect that Mark Appel was the Claimant on behalf of himself and others for whom he was trading.

On January 19, 1993, counsel for Brian Scanlan, Scott M. Zucker, Esq. filed a Motion to have Stratton Oakmont, Inc.'s attorney, Frank D. Ornstein, Esq. removed as counsel because of occasions where Mr. Ornstein represented Brian Scanlan in securities matters while he was a broker at Respondent Stratton Oakmont, Inc. Mr. Zucker alleged that Mr. Ornstein has privileged attorney-client information about Mr. Scanlan. The Motion related to the representation by Mr. Ornstein in an SEC matter in the Spring of 1991, wherein Claimants' account was reviewed. Claimants supported the Motion. After hearing argument, and deliberation, the panel denied the Motion.

On January 19, 1993, Belfort made an oral Motion to Dismiss. After hearing argument from the parties, and deliberation, the panel took the Motion under advisement.

On January 19, 1993, counsel for Stratton and Belfort, Frank D. Ormsten, Esq., stated that the prejudicial content of the material contained in the complaint (SEC complaint and Forbes article) biased the arbitrators. The Chairman, on behalf of the panel, declined to recuse themselves and stated that the arbitrators had not been biased by any documents or words contained in the Statement of Claim. The Chairman also stated that the panel had not received a copy of the Forbes article that counsel had referred to, and also stated that the NASD file did not contain the article.

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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Stratton Oakmont, Inc. is liable for, and shall pay to Claimant, Alan Appel the sum of \$38,750.00, and shall pay to Claimant, Hera Appel the sum of \$19,375.00 as satisfaction for their claims herein. Interest shall be at the prime rate, and shall begin to accrue on March 17, 1993, until paid.
2. Claimant Mark Appel's claims are hereby denied and dismissed with prejudice.
3. Claimants', Mark Appel, Hera Appel, and Alan Appel, claims against Respondents Brian Scanlan, Brian Herman, and Jordan Belfort are hereby denied and dismissed with prejudice.
4. Claimants', Mark Appel, Hera Appel, and Alan Appel, claims for punitive damages are hereby denied and dismissed with prejudice.

#### OTHER COSTS

5. Each party shall pay its own costs and attorneys' fees incurred in this arbitration, except as set forth more fully below.
6. Respondent Stratton Oakmont, Inc. is liable for, and shall pay to Claimants, Mark Appel, Hera Appel, and Alan Appel, the sum of \$950.00 as reimbursement for their filing costs for this arbitration.

#### FORUM FEES

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

6 sessions X \$750.00 = \$4,500.00 minus hearing session deposit of \$750.00 = net \$3,750 due.

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount:

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to \$200.00, and shall retain the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimants.

Respondent Stratton Oakmont, Inc. is assessed additional forum fees in the amount of \$3,750.00.

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

Concurring Arbitrators' Signatures

Name

Public/Industry



Edwin R. Dunn, Esq.

  
James W. Carney  
Mark Miller, Esq.Date of Decision: February 17, 1993

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Date  
~~Public/Industry~~

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James W. Carney  
Industry

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3/3/93

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Mark Miller, Esq.

Date of Decision: \_\_\_\_\_

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James W. Carney

Mark L. Miller

Mark Miller, Esq.

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Public

Date of Decision: 3/4/93