

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Bruce A. Manchel.  
John F. Steel, IV,  
Philip J. McConkey

NASD AWARD #92-02735 CONSOLIDATED  
#92-02907 CASES  
#92-03459

vs.

Name of Respondents

Dean Witter Reynolds, Inc.,  
Robert W. Inbody  
Worth H. Bagley

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REPRESENTATION

For Claimants: Shirli Fabbri Weiss, Esq., Gray, Cary, Ames & Frye of San Diego, California.

For Respondents: Kevin K. Fitzgerald, Esq., Jones, Bell, Simpson & Abbott of Los Angeles, California.

CASE INFORMATION

Statement of Claim filed:

Bruce Manchel (Manchel):	August 14, 1992
John Steel (Steel):	August 28, 1992
Philip McConkey (McConkey):	October 13, 1992

Claimants' Submission Agreement signed:

Manchel:	August 12, 1992
Steel:	August 25, 1992
McConkey:	October 2, 1992

**Statement of Answer filed by Respondents on:**

Manchel vs. DWR:	October 13, 1992
Steel vs. DWR:	November 13, 1992
McConkey vs. DWR:	November 24, 1992.

**Respondents' Submission Agreements signed on:**

Manchel {DWR	- November 3, 1992
{Bagley	- October 14, 1992
Steel {DWR	- December 2, 1992
{Bagley	- December 10, 1992
McConkey {DWR	- November 25, 1992
{Bagley	- December 23, 1992

Inbody did not file a Submission Agreement, but filed an Answer and appeared at the hearing and is subject to National Association of Securities Dealers, Inc. (NASD) jurisdiction in accordance with Section 12 of the NASD Code of Arbitration Procedure.

**HEARING INFORMATION**

**Prehearing Conference(s) Date(s) Sessions: None**

**Hearing Date/ Sessions:**

June 30, 1993	(two sessions)
July 1, 1993	(two sessions)
July 2, 1993	(two sessions)
July 15, 1993	(two sessions)
July 16, 1993	(two sessions)

**Hearing Location: San Diego, California**

**CASE SUMMARY**

**Manchel vs. DWR, et al.**  
**(92-02735)**

**Claimant Manchel alleged: Breach of Fiduciary Duty, Fraud and Deceit, Negligence and Constructive Fraud/Rescission of "Release" in the purchase of stock in a company called Special Devices, Inc. (SDII). Manchel is a self-employed podiatrist in his mid-30's who was and is inexperienced with respect to securities investments. He first opened an account with Respondent Worth Bagley (Bagley) at Shearson Lehman Brothers (Shearson) and transferred it to DWR when Bagley became employed by DWR in late 1991 or early 1992. He signed a Customer Agreement, a margin account which he did not understand and which was not explained to him.**

In February 1992 Bagley solicited Claimant to purchase stock in SDII and sent him a letter containing material misrepresentations concerning SDII overstating the company's prospects and understating the risks of investing in it. Bagley's statements led Manchel to believe that the company's prospects had been personally verified by an officer of the company. Claimant borrowed money to purchase 2,200 shares at 15 1/2 on March 4, 1992 for an investment of \$34,100. Thereafter, between March 5 and March 17, 1992, without authorization, and using the \$34,100 in Claimant's account as a margin deposit without telling Manchel, Bagley purchased 2,800 more shares of SDII on margin at prices ranging between 14 3/4 and 15 1/4, for a total account position of 5,000 shares.

Bagley spoke glowingly about SDII and stated that the price of the stock did not matter as the stock was going "to the moon." On March 30, 1992 Bagley solicited Claimant for the purchase of an additional 5,000 shares based on other developments at SDII, which Manchel called to decline on March 31. Bagley responded that it was too late because he had already purchased 5,000 more shares at 18, not too worry and deposit \$50,000, which Claimant did by cashing a Certificate Deposit.

On May 11, 1992, Claimant appeared at DWR's offices and met with Respondent Robert Inbody (Inbody) Manager of the La Jolla office. Claimant explained Bagley solicitation, the unauthorized purchases and unauthorized use of margin. The result of the meeting was a letter from Bagley to Claimant addressing margin. Bagley also pressured Manchel to release him from any claims arising from the handling of the account, which he did on May 14.

The stock declined in value and on June 3 Manchel contacted Bagley because he knew that the stock had fallen below the price which he had told him to liquidate the margin portion of his stock. Bagley stated Claimant should not take a loss and he simply would not sell the stock. Claimant realized Bagley had not and would not follow his instructions. Claimant contacted Inbody to advise him of the problem and that he was not releasing DWR from any claims. Inbody responded that he would take over Manchel's account.

On June 8, Claimant tried to contact Inbody because he was alarmed that Bagley had not liquidated his margin position and the stock was at 14 or lower. Inbody was out of town and failed to return his call. On June 15 the stock declined to 11 and the next day Claimant again called Inbody and told him he had a margin call. Inbody said he knew and that the matter was out of his hands and had been referred by DWR's Legal Department. Manchel contacted DWR's counsel, David Studley who told him he was not a broker but thought Manchel should sell the stock.

Claimant received margin calls on June 18, 19, 22 and 30. Bagley contacted him and insisted he deposit \$30,000 to cover the margin calls and recommended not to liquidate the stock. Bagley said he was receiving good news from the company. On July 2, 6, 7 and 8, 1992 DWR liquidated Manchel's position on SDII causing an out-of-pocket loss in excess of \$85,000 and generating a debit balance in excess of \$5,000.

Respondents denied the material allegations of wrongdoing set forth in the Statement of Claim and alleged: Manchel is a single 37-year-old medical doctor specializing in pediatric medicine. According to the information he gave Bagley, his practice generates between \$300,000 and \$400,000 annually and he pays himself a salary of about \$150,000 per year. Claimant also has \$250,000 invested in annuities, and told Bagley he keeps \$50,000 in cash to meet day-to-day business needs and \$60,000 invested in a Certificate of Deposit.

Claimant spoke to Bagley about diversifying his portfolio into growth companies. Bagley told Manchel about SDII, sent a prospectus and considered the company's attributes at length before deciding to purchase. He received confirmations for each purchase. The final 5000 share purchase was made only after several telephone calls between Manchel and Bagley.

Inbody and Bagley worked with Manchel to resolve complaints and DWR settled with him for \$2,100 on May 14 at which time he signed a release. After accepting the settlement Manchel continued to watch the price of SDII closely. Bagley talked to Claimant about selling enough shares of SDII (because of Manchel's complaint about his failure to understand margin) but Manchel decided against this strategy.

By June 5 the SDII price had declined to about \$14/share and Manchel called Inbody to complain again, stating he now thought the \$2,100 payment was too little. He called again on June 16 when the stock was at \$11/share, stating he wanted out of the position and all his money returned. Inbody explained that the matter had been settled, the responsibility to mitigate damages if he was still unhappy and advised of a \$7,600 margin call. Manchel deposited a check for \$30,000 to meet an additional margin call but it was returned to DWR marked "NSF." In early July, the balance of Manchel's shares were sold to meet the margin call.

Respondent also alleged various affirmative defenses.

Respondent DWR filed a counterclaim against Manchel alleging breach of contract for the debit balance in his account. Claimant denied any liability with respect to the Counterclaim.

**Steel vs. DWR et al.**  
**(92-02907)**

Claimant John Steel (Steel) alleged: Breach of Fiduciary Duty, Fraud and Deceit, Negligence/Negligent Misrepresentation and Constructive Fraud/Rescission of Release in the purchase of Special Devices, Inc. (SDII). Claimant is a self-employed insurance advisor to health care professionals who first met Bagley in 1976, opened an account with him at Shearson in 1991 and transferred it to DWR when Bagley became employed there in 1992.

In February 1992, Bagley solicited Steel to purchase SDII, materially overstating the company's prospects and understating the risks. Bagley's statements led, Steel to believe that the company's prospects had been personally verified by an officer of the company. Relying

on Bagley's information and recommendations. Claimant purchase 20,000 shares on margin. Steel was also concerned about solicitation and purchases of SDII for other clients and friends he had referred to Bagley. In early May 1992 Steel met with Inbody, Manchel and Philip McConkey (McConkey) regarding Bagley's handling of their accounts. Thereafter, Bagley pressured Steel to execute a release of any claims for \$500 (or Bagley would lose his job because \$7,000 had already been committed by Respondents for unauthorized trades) which Steel did.

On May 20, 1992, Steel instructed Bagley to liquidate enough of his position to eliminate the debit balance which amounted to \$160,000. Bagley assured Steel he would do so. In late May Steel questioned Bagley about the liquidation and learned it had not been executed. He instructed Bagley again to liquidate the necessary shares and on June 11 found out the instructions still had not been followed. On June 11 Steel placed another order, this time to sell 5,000 shares, but only 2,000 were sold. On July 6, Respondents sent Steel a letter advising him that if the price dropped to \$14/share, he would have to maintain 100% of the value of the stock in his account. Steel had never been advised of his requirement. On July 24, Respondents sold 1,135 shares of Steel's SDII stock to meet another margin maintenance call.

Respondents denied all material allegations of wrong doing contained in Claimant's Statement of Claim and alleged: Steel is a sophisticated investor with a strong business background, annual income of \$150,000 and a net worth of more than \$2,500,000. He has known Bagley for many years and has come to know and evaluate Bagley's business judgment, personality and credibility. Steel's primary objective was capital appreciation with a secondary objective of speculation.

On May 11, 1992 Steel met Inbody at DWR's offices to complain mostly about the manner SDII was sold to Manchel, McConkey and himself. Inbody offered to settle all of Steel's complaints for \$500, which Steel agreed to and signed a release.

Steel received a prospectus which he could compare against the optimistic information provided by Bagley. Claimant continued to purchase SDII over a 19 day period in March, during which time he saw the price performance of the stock rise to \$15 1/2 by March 4. If the prospects of SDII were misstated by Bagley, Steel then waited three weeks to make his first purchase, purchased more shares over the next three weeks and then waited almost seven weeks before complaining, all the time watching the stock trade at or about the average cost paid for the securities. It is the decline in the closing price of SDII from \$18.25 on March 27 to \$14.50 on May 8 which motivated Steel to question Bagley about the company's performance.

Steel did not give the order to liquidate 20,000 shares at \$14 1/2. He did request that Respondents sell 5,000 shares at a limit of \$11.25. Only 2,000 shares were executed at his price. There was no failure to supervise because no wrongful act occurred and Steel did not complain to DWR after signing his release and cashing his check. Lastly, when a customer opens a margin account, he is provided a Statement of Margin Interest Charges. It explains that

for securities selling below \$4.00 the requirement is 100% of the market value.

Respondents also alleged various affirmative defenses.

**McConkey v. DWR et al.**  
**(92-03459)**

Claimant Philip McConkey (McConkey) alleged: Breach of Fiduciary Duty, Negligence and Breach of Contract in the purchase of Special Devices, Inc. (SDII). Claimant is a retired professional athlete presently working as an insurance broker in New Jersey. He met Bagley through a mutual friend, Mr. Steel. In or about February 1992 Bagley solicited McConkey to purchase SDII shares, recommending the investments with glowing statements which led Claimant to believe that the company's prospects has been personally verified by an officer of the company. Relying on the recommendations and statements, Claimant purchased 2,000 shares on March 10, 1992 and 3,000 shares on March 18, 1992.

On March 30 Bagley contacted McConkey and informed him there was new, favorable information on SDII, soliciting a purchase of an additional 5,000 shares. Claimant authorized the purchase of 2,000 shares based on the new information but when he found it was not new he tried to cancel the order. Bagley told Claimant it was too late to cancel because the order had been executed. In fact, the order had not been placed when Claimant called and canceled the order.

Between March 30 and May 1992, McConkey repeatedly complained to Bagley about the purchase of the additional 2,000 shares. He met with Inbody on May 11 to resolve the problem and settled the dispute. On May 12 Claimant placed a stop loss order to sell his entire position of 7,000 shares if the price went below \$14/share. On June 4 Claimant discovered that the stock closed below \$14/share but that Bagley had failed to liquidate his position. He contacted Bagley that day and placed a market order to sell all of his stock.

On June 11, Bagley contacted Claimant and told him he was required to meet a margin call. Claimant was shocked to find his sell order had not been executed on June 4 and Bagley said he had not sold because he thought it was a bad idea and encouraged him to hold the stock, which McConkey did.

Respondents denied all material allegations of wrongdoing alleged in the Statement of Claims and alleged: McConkey is a sophisticated businessman who was introduced to Bagley by their mutual friend, Mr. Steel. Claimant is a former star athlete for the New York Giants football team, is single, 35 years old and has no dependents. He told Bagley when he opened his account that he had an annual income of \$150,000, net worth of \$1,000,000 and liquid net worth of \$100,000. He had previous stock market experience at Merrill Lynch since the early 1980s.

McConkey purchase SDII on three occasions at DWR. On the day (May 11) that SDII hit a low of \$14/share during the previous month, Claimant Steel and Machel met with Inbody to discuss their accounts. They complained about alleged misstatements, margin disputes and various other misconduct. DWR agreed to settle with Claimant for \$4,900 which he accepted May 14 and signed a release. He continued to watch the performance of SDII carefully and to continued to hold the stock even after learning that his orders to sell had twice not been executed. McConkey never brought this matter to the attention of the Branch Manager until he filed his complaint.

### **RELIEF REQUESTED**

- A. Claimant Machel requested:
  - 1. Rescission and voiding of the purported release;
  - 2. Compensatory damages in an amount in excess of \$85,000;
  - 3. Declaration that the purported debit balance in Machel's DWR account is void;
  - 4. Prejudgment interest;
  - 5. Special damages for emotional distress;
  - 6. Costs;
  - 7. Attorney's fees; and
  - 8. Punitive damages of \$500,000 against DWR, \$100,000 against Bagley, and \$50,000 against Inbody.
- B. Respondent DWR requested compensatory damages of \$5,190 on its Counterclaim.
- C. Claimant Steel requested:
  - 1. Rescission and voiding of the purported release;
  - 2. Compensatory damages in an amount equivalent to Steel's out-of-pocket loss;
  - 3. Prejudgment interest;
  - 4. Costs;
  - 5. Attorney's fees; and
  - 6. Punitive damages against DWR and Bagley.
- D. Claimant McConkey requested:
  - 1. Compensatory damages in an amount equivalent to McConkey's out-of-pocket loss;
  - 2. Prejudgment interest;
  - 3. Costs; and
  - 4. Attorney's fees.

### OTHER ISSUES CONSIDERED & DECIDED

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.

Respondents at the start of the hearing, made a Motion In Lemine to Exclude Claims and Evidence of Claims Covered by Releases Executed by Claimants in May, 1992, opposed by Claimants. The panel took the motion under advisement pending to taking of evidence and subsequently denied the motion.

### 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:

A. Manchel vs. DWR et al.

1. The release of May 1992 is rescinded;
2. Respondents are jointly and severally liable for and shall pay claimant Manchel the sum of \$83,000 which includes all interest;
3. The counterclaim of \$5,119 is dismissed; and
4. All other claims, including those for punitive damages, are dismissed.

B. Steel vs. DWR et al.

1. The release of May 1992 is rescinded;
2. The sale of 15,000 shares of SDII stock by DWR to Steel is rescinded and those shares will be returned to DWR;
3. Respondents are jointly and severally liable and shall pay claimant Steel the sum of \$218,000, which includes interest and the deduction of \$500 paid at time of release; and
4. All other claims, including those for punitive damages, are dismissed.

C. McConkey vs. DWR et al.

1. The release of May 1992 is rescinded;
2. The sale of 7,000 shares of SDII stock by DWR to McConkey is rescinded and those shares shall be returned to DWR; and
3. Respondents are jointly and severally liable for and shall pay claimant McConkey the sum of \$113,000, which includes interest and deduction of \$4,900 received regarding the release.
4. All other claims, including those for punitive damages, are dismissed.



D. The parties shall each bear their respective attorney's fees.

E. The parties shall each bear their respective costs.

**OTHER COSTS**

None.

**FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the following forum fees are assessed: The National Association of Securities Dealers, Inc. shall refund the \$1000 hearing session deposit previously deposited by the claimant. Forum fees assessed against:

Respondent, jointly and severally, for \$10,000

calculated as follows: 10 hearing sessions at \$1,000/hearing session, equals \$10,000.

Fees are payable to the National Association of Securities Dealers,

**ARBITRATION PANEL**

**Name**

**Public/Industry**

William R. Newsome

Public Arbitrator

Kenneth J. Gross

Public Arbitrator

James O. Johnson

Industry Arbitrator

Concurring Arbitrators' Signature

  
William R. Newsome

DATE SERVED: 08/18/93

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Kenneth J. Gross

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James O. Johnson

Date of Decision: July 16, 1993