

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Raymond James & Associates, Inc.

92-02917

Name of Respondents

Ross Freitas
Carolyn Safer Kenner
George J. O'Leary
F/S Investment Partnership

Name of Third Party Respondent

David Pracker

REPRESENTATION

For Claimant, Raymond James & Associates, Inc. ("Raymond James") and Third Party Respondent, David Pracker ("Pracker"): Lonnie Browne Zangrillo, Esq. and Richard L. Martens, Esq. of Boose Casey Ciklin Lubitz Martens McBane & O'Connell, West Palm Beach, Florida.

Respondents, Ross Freitas ("Freitas"), Carolyn Safer Kenner ("Kenner") and F/S Investment Partnership ("F/S") were Pro se.

Respondent, George J. O'Leary ("O'Leary") was Pro se.

CASE INFORMATION

Statement of Claim filed: August 25, 1992. Claimant's Submission Agreement signed by Dennis W. Zank, Vice President of Operations and Administration of Raymond James on August 4, 1992 on behalf of Raymond James.

Joint Statement of Answer filed by Respondents on: December 17, 1992. Respondent, Freitas' Submission Agreement signed on: December 16, 1992. Respondent, F/S' Submission

Agreement signed by Ross A. Freitas, partner of F/S Investment Partnership on December 16, 1992 on behalf of F/S. Respondent, O'Leary's Submission Agreement signed on: December 16, 1992. Respondent, Kenner's Submission Agreement signed on December 16, 1992.

HEARING INFORMATION

On December 13, 1993, in Fort Lauderdale, Florida, a pre-hearing conference lasting 1 session was conducted via telephone conference call with an arbitrator.

On December 5 and 6, 1994, and January 30, 31, and February 1, 1995, in Fort Lauderdale, Florida, hearings lasting 8 sessions were conducted.

CASE SUMMARY

Claimant, alleged that: Respondents Freitas and Kenner transferred their margin accounts from Bear, Stearns Securities, Inc. ("Bear") to Raymond James; O'Leary transferred his margin account from Donaldson, Lufkin, Jenrette Securities Corporation ("Donaldson") to Raymond James; the principal stock in all four accounts was the common stock of Ross Cosmetics Distributions Centers, Inc. ("Ross"), an over-the-counter security; Ross had a market value of \$20.00 per share in May 1992, the date of transfer; in opening their margin accounts at Raymond James, Respondents' substituted Raymond James for Bear and Donaldson as their margin leaders; by June 12, 1992, the market price of Ross declined to \$5.00 per share; the decline in market price of Ross prompted margin calls by Raymond James; none of the margin calls have been met and checks tendered by Respondents' have been refused payment or returned unpaid by the payor bank for lack of sufficient funds; and, that Claimant has sustained unrecovered losses as a result of the returned checks and the outstanding margin debit balance. Claimant alleged specifically that Respondent: breached its customer agreement; was unjustly enriched; perpetrated common law fraud; violated Florida Statute Section 772.11; Negligently misrepresented its assets; and, violated Florida Statute Section 517.301.

Respondents denied all allegations of wrongdoing and alleged that: Raymond James breached its agreement with Respondents' to maintain the house maintenance margin requirements with Respondent at 30% or to receive into Respondents' accounts at Raymond James a maximum of 20% of outstanding shares of Ross; Raymond James directly caused the decline of Ross share value by participating in bear raids; Raymond James is barred to bring a cause of action because of the doctrine of in pari delicto and its own unclean hands; Respondents' are entitled to an offset of any amount award by reason of their Counter-Claims; Raymond James failed to mitigate its damages; Raymond James is estopped from bringing a cause of action; Respondents' did not rely on any statements made by Raymond James; Respondents' acts were not the proximate cause of Raymond James' losses; Respondents' alleged future promises, which are not actionable as fraud; the Economic Loss Rule bars any tort claims; Raymond James failed to make a demand upon Respondents and is thus barred to assert a Florida Statute Section

772.11 cause of action; civil theft is unactionable to Raymond James; Raymond James is comparatively negligent in the handling of Respondents accounts; and, that Respondents are not "purchasers" of securities as defined by Florida Statute Section 517.01 and thus Raymond James has no claim under Florida Statute Section 517.301.

Respondents filed a Third Party Claim against Pracker and Raymond James and alleged that: Pracker and Raymond James violated Florida Statute Section 517.301; Pracker and Raymond James perpetrated common law fraud; Pracker and Raymond James breached their fiduciary duty; Pracker and Raymond James violated Section 10(b) of the Securities Exchange Act of 1934 ("SEA of 1934") and Rule 10(b)-5 thereunder; and, Pracker and Raymond James breached their contract with Respondents.

Pracker and Raymond James denied all allegations of wrongdoing and alleged affirmative defenses of: failure to state a claim upon relief could be granted; Respondents' voluntarily assumed the risk associated with the investment in stock; ratification, account stated, estoppel, waiver, and laches; unclean hands and in pari delicto; failure to mitigate damages; Respondents' are barred by comparative negligence to recover from Third Party Claimants; Respondents failed to timely notify Claimants of any wrongdoing; Raymond James and Pracker did not act with scienter and thus Respondents' fraud claims are barred; Raymond James and Pracker did not cause Respondents damages; statutes of limitation; Respondents 10(b) claims are not timely; punitive damages are unavailable; Raymond James and Pracker did not breach any fiduciary duty because it had no duty toward Respondents; and, the Panel does not have jurisdiction to award attorneys' fees.

RELIEF REQUESTED

Claimant requested the following compensatory damages: \$150,729.04 from Freitas; \$220,401.20 from O'Leary; \$259,633.12 from Kenner; \$ 37,902.35 from F/S; plus interest, attorney's fees and costs pursuant to Section 517.211 of the Florida Statute.

Respondent requested dismissal of the claim. Respondent also requested from Raymond James and Pracker an undisclosed amount of compensatory damages, punitive damages, interest, attorney's fees, the cost of this proceeding, and such other relief that the Panel deems just and appropriate in accordance with Florida Statutes Section 517.211 and Section 517.241.

Raymond James and Pracker request dismissal of the Counterclaim/ Third-Party Claim.

OTHER ISSUES CONSIDERED & DECIDED

1. Respondent, O'Leary did not appear at the hearing. Based upon the evidence contained

in Arbitrator's Exhibit number 2 regarding hearing notices to the parties, this arbitration panel found that proper notice existed as well as jurisdiction pursuant to Section 12 of the Code of Arbitration Procedure over Respondent, O'Leary. Pursuant to Section 29 of the Code of Arbitration Procedure and based upon evidence in Arbitrator's Exhibit number 2, this Panel proceeded with the hearing in O'Leary's absence.

2. Arbitrator James R. South could not appear to serve on the Panel. The Parties that were present indicated no objection to proceeding with the remaining two arbitrators.

3. The parties which were present 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, Freitas, is found liable, and shall pay the Claimant the amount of \$153,210.02 plus interest at the rate of 12 % per annum in the amount of \$47,240.46 for a total due to Claimant of \$200,450.48.

2. Respondent, O'leary, is found liable, and shall pay the Claimant the amount of \$88,743.29 plus interest at the rate of 12 % per annum in the amount of \$27,363.62 for a total due to Claimant of \$116,106.91.

3. Respondent, Kenner, is found liable, and shall pay the Claimant the amount of \$263,906.76 plus interest at the rate of 12 % per annum in the amount of \$81,372.47 for a total due to Claimant of \$345,279.23.

4. Respondent, F/S Investments, is found liable, and shall pay the Claimant the amount of \$37,902.35 plus interest at the rate of 12 % per annum in the amount of \$11,686.73 for a total due to Claimant of \$49,589.08.

5. Respondents are found, jointly and severally, liable for costs of Raymond James from June 1992 to the date of hearing in the amount of \$10,607.75.

6. Respondents are found not liable for Claimant's expert witness fees.

7. Respondents are found, jointly and severally, liable for the attorney's fees of Raymond James in an amount to be determined by a court of competent jurisdiction.
8. Claimant and Third Party Respondent, Pracker are found not liable to Respondents and, therefore, Respondents' Third Party Claim and Counterclaim are hereby dismissed.

OTHER COSTS

None.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed fees in the amount of \$8,300 (1 pre-hearing session x \$300.00 plus 8 sessions x \$1000.00 per session).
2. Respondents are hereby assessed, jointly and severally, forum fees in the amount of \$8,300.00 for which the NASD shall retain the \$1,000.00 previously paid by Claimant and the \$1,000.00 previously paid by Respondents in partial satisfaction thereof, leaving a balance due the NASD of \$6,300.00.
3. Respondents, jointly and severally, are hereby ordered to reimburse Claimant for the \$1,000.00 hearing session deposit previously paid by Claimant.
4. The NASD shall retain the non-refundable filing fee of \$500.00 previously paid by the Claimant.
5. The NASD shall retain the non-refundable filing fee of \$250 paid by the Respondents.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

15/
Nancy J. Cliff, Esq.

Public

15/
Stuart I. Stern

Public

Date of Decision:

3/20/95