

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

James D. Craig

vs.

Case #

93-02032

Name of Respondents

Bailey, Martin & Appel Inc

BMA Advisors, Inc.

Mark Perron

Howard Appel

Stephen Patrick Harrington

Donald Bailey

Frank A. Martin

Financial Equities Resources, Inc.

REPRESENTATION

For Claimant, James D. Craig ("Claimant"), Phillip M. Giordano, Esq. with the law firm of Giordano & Champa, located in Boston, Massachusetts.

For Respondents, Bailey, Martin & Appel, Inc. ("BMA"), Financial Equities Resources, Inc. ("FER"), BMA Advisors, Inc. ("Advisors"), Howard M. Appel ("Appel"), and Steven P. Harrington ("Harrington"), Daniel J. Dugan, Esq. with the law firm of Spector Gadon & Rosen, P.C., located in Philadelphia, Pennsylvania.

For Respondent, Mark Perron ("Perron"), Michael V. Morisi, Esq. with the law firm of Morisi & Associates, located in Braintree, Massachusetts.

Respondent, Donald A. Bailey, ("Bailey") represented himself, pro se.

Respondent, Frank A. Martin, IV ("Martin"), did not appear, nor was he represented at the hearing.

CASE INFORMATION

Statement of Claim was filed on May 20, 1993.
Claimant's Submission Agreement was signed on May 17, 1993.

Joint Statement of Answer was filed by Respondents, BMA, Advisors, Appel, Harrington and FER on August 13, 1993.
Said Respondents' Submission Agreements were signed on August 12, 1993.

Statement of Answer was signed by Respondent Perron on September 22, 1993.
Perron's Submission Agreement was signed on September 22, 1993.
Amended Statement of Answer was filed by Perron on November 29, 1993.

Statement of Answer was filed by Respondent Bailey on November 5, 1993.
Bailey's Submission Agreement was signed on November 4, 1993.

Respondent Martin did not file a Statement of Answer or execute a Submission Agreement.

HEARING INFORMATION

Pre-Hearing Conference: May 5, 1994 - 1 session

Hearing Dates/Sessions:	December 16, 1994	-	2 sessions
	December 19, 1994	-	2 sessions
	March 6, 1995	-	2 sessions
	March 7, 1995	-	2 sessions
	March 8, 1995	-	2 sessions

Hearing Location: NASD offices located in Boston, Massachusetts

CASE SUMMARY

In his Statement of Claim, Claimant makes a claim for losses in excess of \$60,000 due to transactions in four different securities. Claimant alleges that the loss is the result of Respondents' violations of securities laws, Massachusetts laws, Delaware laws, breach of contract, breach of fiduciary duty, fraud and deceit, breach of the duty to supervise, breach of the duty of reasonable care and fair practice and negligent misrepresentation.

Respondent Perron denies the principal allegations of Claimant and asserts that any losses suffered by Claimant were not the fault of Respondent Perron. Respondent Perron also filed an amendment to his answer stating that Claimant's claims are barred by the statute of limitations.

Respondents BMA, Advisors, Harrington and FER also deny the allegations of Claimant and assert that Respondent Perron and his supervisors dealt fairly with Claimant at all times.

Finally, Respondent Bailey also denies the allegations of Claimant and asserts that Claimant fails to state a claim upon which relief can be granted, should be estopped from pursuing any claim and that Claimant's damages were caused by his own actions or by parties for whose conduct Respondent Bailey was not responsible. Respondent Bailey also adopted the responses of other Respondents who filed answers.

Respondent Martin did not file an answer.

RELIEF REQUESTED

Claimant requests that Respondents' liability for damages, losses and costs be determined on a joint and several basis and that Claimant be awarded actual losses, treble damages, costs, reasonable attorneys' fees, amounts of unjust enrichment, losses as a result of loss of economic opportunity, punitive damages and further relief as the arbitration panel deems just and proper.

All Respondents request dismissal of the claims.

OTHER ISSUES CONSIDERED & DECIDED

The parties who appeared in this arbitration have agreed that the Award in this matter may be executed in counterpart copies and the parties have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

By letter dated November 15, 1994, Respondents BMA, FER, Advisors, Appel and Harrington moved to consolidated this matter with another arbitration proceeding and Claimant opposed that motion and his arguments are contained in his submission dated November 29, 1994. This panel denied the motion.

After reviewing NASD papers concerning notice to Respondent Martin at the hearing, this Panel determined that he was notified and proceeded with the hearing in his absence pursuant to Sections 25 and 29 of the *Code of Arbitration Procedure* ("Code"). The panel issued an Order of Appearance for Mark Perron to appear on the hearing day of December 16, 1994.

Respondents Perron and Bailey filed written objections to arbitrator David Plimpton. After discussion on the record on the hearing day of December 16, 1994, their objections to David Plimpton were withdrawn on the record. On the hearing day of December 16, 1994, the panel ordered that Donald Craig appear as a witness at the hearings.

On the hearing day of March 6, 1995, Claimant made a motion for summary judgment with respect to certain Respondents, based upon collateral estoppel because of arbitration awards in other arbitration proceedings before NASD. In response, Respondents made a motion in limine requesting that the panel not consider the motion for summary judgment. After oral argument, the panel granted the motion in limine and did not consider Claimant's motion for summary judgment. The panel granted the request of the parties present at the hearings to file post hearing briefs after the last hearing day of March 8, 1995. The date for the completion of filing of all briefs was March 29, 1995, whereupon the record was closed, except for the issuance of this Award.

DISCUSSION AND RATIONALE

The arbitrators reject the claims of Claimant with respect to all securities except OTC Securities Fund I, L.P. ("OTC"). The other disputed securities transactions (Longwood Group, Diversified Human Resources and Naturade), although they were risky and did result in losses for Claimant, were not unsuitable for Claimant nor were there significant misrepresentations by Respondents at the time these investments were made in 1989 and 1990. The panel took into consideration factors such as Claimant's education, business and investing experience, high income, total net worth, liquid net worth, other investments and evolving investment objectives, in rejecting the Longwood, Diversified Human Resources Group and Naturade claims. Although the total Longwood investment of approximately \$45,000 was significant, the Longwood investments were made at five separate times. The Longwood investments were not unreasonable investments given the total circumstances of Claimant. The problems with Longwood surfaced long after the investments were made. The Longwood investment related, in part, to Claimant's desire to be associated with a real estate-related investment which, given claimant's income, asset picture and long-term goals, was not unreasonable. Naturade and Diversified Human Resources Group were, relatively speaking, very small investments and were part of an evolving strategy on the part of Claimant to get involved in the stock market on a limited basis.

The OTC investment in September of 1989 of \$25,000, however, was accompanied by material misrepresentations and omissions as to the status of the investment. There were material misrepresentations and omissions on the part of Respondents Perron, Appel, Harrington, Advisors and BMA with respect to certain factors related to OTC, which these Respondents knew or should have known would be relied upon by Claimant in connection with the purchase of OTC. In addition the circumstances surrounding the sale of OTC to Claimant were inappropriate in a number of respects. Relevant factors taken into account included:

1. Material omissions as to the status of BMA, whose continued activity in the stock market was represented as a major advantage to OTC investors.

2. The closing of the subscription of Claimant after the subscription acceptance deadline in the documents of August 31, 1989.
3. Material misrepresentations as to the investment prospects and the nature of the investments involved in OTC.
4. Significant pressure on the part of Perron, who also acted on behalf of BMA and Advisors, to close immediately without an adequate opportunity on the part of Claimant to review and understand the risks. That pressure was applied at a time when Claimant's investment was needed to complete the minimum offering amount of \$240,000. Advisors was the General Partner of OTC, BMA was Perron's employer, Harrington had supervisory responsibility as to Perron and Perron made the OTC sale to Claimant.

Respondents FER, Martin and Bailey were not shown to be directly involved, or control persons, with respect to OTC. Therefore, no award is made against them.

However, Claimant is partially responsible for the losses he suffered with respect to OTC. It was Claimant's obligation to have some familiarity with the documents he signed, including the subscription agreement and private placement memoranda. Although the total loss, according to the evidence introduced, with respect to OTC amounted to \$22,272.73, the panel has taken into consideration the above factors in determining the Award in this matter.

The arbitrators commend the parties and their respective counsel for their very thorough and excellent presentations in a complex and difficult case.

AWARD

After considering the pleading, the testimony and the evidence presented at the hearing and post-hearing submissions, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents BMA, Advisors, Appel and Harrington are hereby jointly and severally liable to Claimant in the amount of **TWENTY THOUSAND DOLLARS AND ZERO CENTS (\$20,000.00)**. Of the foregoing amount of \$20,000.00, Respondent Perron is hereby separately liable to Claimant in the amount of Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00). The total award to Claimant, however, is \$20,000.00.
2. Respondents BMA, Advisors, Appel and Harrington are jointly and servally liable to Claimant for interest at the rate of twelve per cent (12 %) per annum on the total award from the date of this award to the date of payment of this award.

3. Respondent Perron is separately liable for interest at the rate of twelve per cent (12%) per annum on **SEVEN THOUSAND FIVE HUNDRED DOLLARS AND ZERO CENTS** (\$7,500.00) of the total award from the date of this award to the date of payment. The total interest due Claimant, however, is 12% on the total award from the date of this award to the date of payment of this award.
4. Respondents FER, Martin and Bailey are found not to be liable to Claimant for any award.
5. All other claims and counter claims, including claims for treble damages, costs, attorneys fees and punitive damages are denied.

FORUM FEES

Pursuant to Section 43(c) of the *Code*, the following Forum Fee(s) are assessed.

Non-refundable Filing Fee: \$200.00

Hearing Session Deposit: \$7,500.00 (10 sessions @ \$750.00 per session)

Pre-Hearing Conference Fee: \$300.00

Total Fees: \$8,000.00

Under all the circumstances of this case, the panel has decided to allocate forum fees follows:

1. Claimant is not assessed any forum fees. Claimant is, however, assessed \$375.00 for postponement of the May 9, 1994 hearing. Claimant previously paid \$950.00 and is entitled to a refund in the amount of \$575.00.
2. Respondents BMA, Advisors, Appel, Harrington and FER, are assessed jointly and severally twenty-five percent of the fees, \$2,000.00.
3. Respondents Perron is assessed twenty-five percent of the fees, \$2,000.00.
4. Respondent Martin is assessed twenty-five percent of the fees, \$2,000.00.
5. Respondent Bailey is assessed twenty-five percent of the fees, \$2,000.00.
6. Respondent Perron is also assessed a \$750.00 fee for the postponement of the October 17, 1994 hearing.
7. Respondents BMA, Advisors, Appel, Harrington and FER are also assessed one-half the

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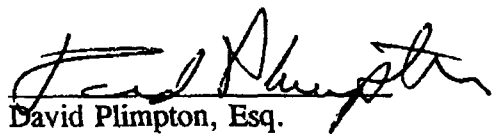
fee for postponement of the May 9, 1994 hearing. The total fees owed by these Respondents is \$2,375.00, which shall be satisfied by reimbursing Claimant \$575.00 and by remitting the balance \$1,800.00 to the NASD.

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

ARBITRATION PANEL

David Plimpton, Esq.	-	Public Chairperson
Simon J. Tager	-	Public Panelist
Stephen J. Sussman, CPA	-	Industry Panelist

Concurring Arbitrator's Signature


David Plimpton, Esq.

Date of Decision: May 10, 1995

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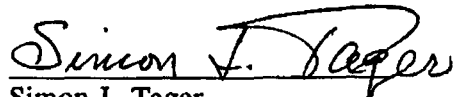
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Simon J. Tager

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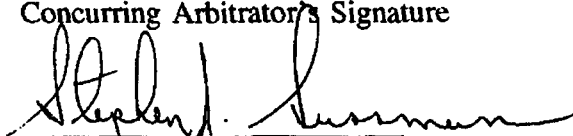
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