

NASD AWARD
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

David W. Hicks, Sr.

and

NASD Number 93-02384

Gruntal & Company, Inc.

REPRESENTATION OF PARTIES

Claimant David E. Hicks, Sr. was represented by Michael Farrell, Esq. of Wells, Moore, Simmons & Neeld located in Jackson, Mississippi.

Respondent Gruntal & Company, Inc. was represented by Jonathon Taylor, Esq. of Schulte Roth & Zabel located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about June 17, 1993. The Submission Agreement of Claimant David E. Hicks, Sr. was signed on May 10, 1993.

The Statement of Answer and Counterclaim of Respondent Gruntal & Company, Inc. was filed on or about November 3, 1993. The Submission Agreement of Respondent Gruntal & Company, Inc. was signed on November 3, 1993 by Robert Sablowsky, Executive Vice President.

HEARING INFORMATION

A pre-hearing conference was held on November 29, 1994 before one arbitrator for total of one (1) pre-hearing session.

The hearing was held on March 1, 1995, March 2, 1995 and April 10, 1995 in Memphis, Tennessee for a total of eight (8) hearing sessions.

CASE SUMMARY

In the Statement of Claim, David E. Hicks, Sr. ("Hicks") alleged that in January, 1992 Respondent Thomas Brazil ("Brazil"), a registered representative with Gruntal & Company, Inc. ("Gruntal"), called the Claimant urging him to invest in common stock of a Canadian company called Dimples Group, Inc. ("Dimples"). Hicks contended that Brazil failed to disclose material facts such as Dimples was a highly speculative stock and that Brazil made certain false and misleading statements about Dimples including a statement that the \$4.00 stock would increase to \$10.00 within 30 to 60 days. Hicks further contended that the common stock of Dimples was not registered with the

Securities and Exchange Commission pursuant to Section 5 of the 1933 Securities Act. According to the Claimant, Brazil failed to make any inquiry of him as to his investment objectives, his tolerance for risks, his financial ability to withstand a full loss and whether the stock would be suitable. On January 10, 1992, David Hicks opened an account with Gruntal making an initial purchase of 5,000 shares of Dimples stock at \$4.18 per share. As alleged, Brazil made further false and misleading statements about Dimples on January 17, 1992 and on February 14, 1992. Hicks was allegedly induced, as a result of telephone calls, confirmation statements and promotional brochures from the Respondents, to make a second and third purchase of 5,000 shares each for a total investment of \$91,000.00 in Dimples stock. The Claimant made other specific allegations against the Respondents including, but, not limited to, violations of Section 10(b) of the Securities Exchange Act of 1934, violations of SEC Rule 10(b)(5) and violations of the Mississippi Securities Act.

In its Answer, Gruntal & Company, Inc. denied the allegations set forth in the Statement of Claim. The Respondent specifically stated that Brazil properly determined that the purchase of Dimples stock was suitable for Hicks, an experienced and knowledgeable investor who owns his own cotton brokerage business, and that Brazil never made any false or misleading statements to Hicks, who was aware of the speculative nature of his investment and even made an additional unsolicited purchase of Dimples stock after the price of the stock has declined substantially. The Respondent asserted that Dimples Group, Inc. was exempted from the registration requirements under the 1934 Act and the 1933 Act. Gruntal contended that Hicks complained about the commission he was charged for his purchase of 10,000 shares of Dimples in July, 1992; Brazil advised Hicks that he had received a 40% discount on the commission. Gruntal further contended that Hicks failed to pay for the purchase and the 10,000 shares were sold out for a loss resulting in a debit balance in the account. Gruntal asserted the following affirmative defenses:

1. The Statement of Claim failed to state a claim against Gruntal upon which relief may be granted;
2. The claims asserted herein are barred in whole or in part by the applicable statute(s) of limitation and by the doctrine of laches; and
3. Claimant is barred under New York law from recovering punitive damages.

RELIEF REQUESTED

Claimant David E. Hicks, Sr. requested an award in the amount of \$91,000.00 in actual damages plus interest, attorneys' fees and punitive damages.

Respondent Gruntal & Company, Inc. requested that the claims asserted against it be denied in their entirety and that they be awarded \$3,187.65 in actual damages for the debit balance in the account.

OTHER ISSUES CONSIDERED & DECIDED

Claimant David E. Hicks, Sr. and Respondent Thomas Brazil entered into a settlement agreement prior to the start of the hearing on March 1, 1995.

Claimant David E. Hicks, Sr. submitted a Motion to Compel and a Motion to Bar the Presentation of Evidence. After considering the arguments made by the parties, the panel decided to deny both Motions. Claimant also submitted a Motion to Amend the Statement of Claim to add allegations relating to Brazil's lack of registration in Mississippi. Subsequent to reviewing the written arguments of the parties, the arbitrators decided that the Motion to Amend was granted subject to Gruntal's claim of a statute of limitation defense. Respondent Gruntal & Company, Inc. submitted a Motion to Dismiss which was denied by the panel subject to being taken under advisement for final ruling based on all proof. Finally, Respondent Gruntal & Company, Inc. made a Motion for Summary Judgement at the hearing which, after listening to the arguments of counsel, was denied.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD.

AWARD

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

1. Respondent Gruntal & Company, Inc. is hereby liable for and shall pay to Claimant David E. Hicks, Sr. the sum of \$21,382.15 in compensatory damages plus simple interest at a rate of 8% from January 17, 1992 until paid;
2. Respondent Gruntal & Company, Inc. is hereby liable for and shall pay to Claimant David E. Hicks, Sr. the sum of \$34,152.50 in additional compensatory damages plus simple interest at a rate of 8% from January 27, 1992 until paid;
3. Claimant David E. Hicks, Sr. is hereby liable for and shall pay to Respondent Gruntal & Company, Inc. the amount of \$3,187.65 plus simple interest at a rate of 8% from August 25, 1992 until paid;
4. Respondent Gruntal & Company, Inc. is liable for and shall pay to Claimant David E. Hicks, Sr. the amount of \$46,944.57 in attorneys fees. In determining the Claimant's request for attorneys' fees, the arbitrators considered the authority, MS Code Section 75-71-717, cited by the Claimant as well as the arguments and the pleadings of the parties and determined that authority existed for an award of attorneys' fees to the Claimant;

5. Respondent Gruntal & Company, Inc. is liable for and shall pay to Claimant David E. Hicks, Sr. the sum of \$9,535.21 for expert witness fees;
6. All other requests for damages, including punitive damages, not specifically granted herein are hereby denied in their entirety; and
7. Any and all costs or fees not specifically enumerated herein shall be borne by the party incurring the cost.

FORUM FEES

Forum fees are calculated at the rate of \$500.00 per hearing session and \$300.00 for each pre-hearing conference. There were eight (8) hearing sessions x \$500.00 + one (1) pre-hearing session x \$300.00 = \$4,300.00 in forum fees. Pursuant to Section 43(b) of the NASD Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall **retain** the non-refundable filing fee in the amount of \$150.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$500.00 previously deposited with the NASD by the Claimant. Respondent, Gruntal & Company, Inc. is hereby liable for and shall pay to the NASD the sum of \$3,800.00 for the balance of forum fees. In addition, Respondent Gruntal & Company, Inc. is liable for and shall pay to the NASD the amount of \$500.00 for the non-refundable claim filing fee for the Counterclaim.

The NASD shall retain postponement fees previously deposited with the NASD by Claimant David E. Hicks, Sr. in the amount of \$500.00 and by Respondent Gruntal & Company, Inc. in the sum of \$500.00. **Fees are payable to the National Association of Securities Dealers, Inc.**

John J. Heflin, III, Esq.
John J. Heflin, III, Esq.
Public Arbitrator, Presiding Chair

August 29, 1995
Dated

James C. Branum, Jr., Esq.
James C. Branum, Jr., Esq.
Public Arbitrator

August 29, 1995
Dated

John J. Colcolough, III
John J. Colcolough, III
Industry Arbitrator

August 25, 1995
Dated

Date served by the NASD: August 30, 1995