

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Thomas and Dorothy Hudak

93-02660

Name of Respondents

D.H. Blair & Company
Terry Johnson
Anthony Cincotta

REPRESENTATION

For Claimants Thomas and Dorothy Hudak ("claimants") appeared Kevin C. Harkins, Esq. of Cohen & Grigsby, Pittsburgh, Pennsylvania.

For respondent D.H. Blair & Company ("D.H. Blair") appeared Todd C. Steckler, Esq. of Bachner, Tally, Polevoy & Misher, New York, New York.

Respondents Terry Johnson ("Johnson") appeared pro se.

Respondent Anthony Cincotta ("Cincotta") did not appear at the hearing in this matter.

CASE INFORMATION

Statement of Claim filed: July 1, 1993.

Claimants' Submission Agreement signed on: July 30, 1993.

Statement of Answer, Crossclaim and Counterclaim filed by respondent D.H. Blair on: October 29, 1993.

Respondent D.H. Blair's Submission Agreement signed on: October 28, 1993.

Statement of Answer filed by respondent Johnson on: October 20, 1993.

Respondent Johnson did not file a properly executed Submission Agreement.

Statement of Answer filed by respondent Cincotta on: August 16, 1994.

Respondent Cincotta did not file a Submission Agreement.

Claimants' Reply to Counterclaim filed: December 17, 1993.

HEARING INFORMATION

| | | | |
|-------------------------|-------------------|---|--------------|
| Hearing Dates/Sessions: | February 29, 1996 | - | Two Sessions |
| | March 12, 1996 | - | Two Sessions |

The hearings were held at the William Penn Hotel located in Pittsburgh, Pennsylvania.

CASE SUMMARY

Claimants alleged that their account executives Johnson and Cincotta made recommendations which were tainted with fraudulent misrepresentations and omissions, were unsuitable and resulted in substantial losses. Claimants further alleged that, based upon false representations made by Johnson, they purchased 20,000 shares of TSI Corporation ("TSI") during the period of December 1991 to March 1992. Claimants maintained that Johnson made the false representations in order to generate excessive commissions and to protect D.H. Blair as a market maker. Claimants also maintained that the price of TSI fell and that Johnson continually advised them not to sell the stock. Claimants alleged that the stock was sold for a net loss of \$135,964.00.

Claimants alleged that, in October 1992, Johnson left D.H. Blair and asked claimants to transfer their account to his new firm. Claimants further alleged that they decided to keep their account at D.H. Blair and that Cincotta was assigned as their account representative. Claimants asserted that, based upon various false representations made by Cincotta, they purchased 85,000 shares of Vital Heart and that these shares were sold for a loss of \$59,757.48.

Claimants alleged that Cincotta also represented that he would arrange for claimants to purchase 3,000 shares of Microcarb's initial public offering. Claimants further alleged that, shortly after they received the confirmation for the transaction, Cincotta advised them that he had to cancel the transaction in claimants' Pennsylvania account and that he had to make the purchase through a Virginia account for Blue Sky purposes. Claimants maintained that Cincotta told them to wire funds to a West Virginia account. Claimants further maintained that the funds were wired on January 7, 1993, but that the next confirmation they received showed that the transaction was canceled because funds were not received. Claimants asserted that they were advised that Cincotta failed to properly complete the paper work.

Claimants alleged that they were shunted from broker to broker and were repeatedly misled and misinformed. Claimants further alleged that D.H. Blair violated the federal securities laws and the NASD and stock exchange rules, that it breached its fiduciary duties to train and supervise

its account executives. Claimants also alleged that Johnson and Cincotta violated the federal securities law, the NASD and stock exchange rules and their fiduciary duties.

D.H. Blair maintained that the securities purchased for claimants' account were suitable based upon claimants' investment history, investment objectives and financial history. D.H. Blair further maintained that the representations allegedly made by Johnson to claimants were all contained in a report on TSI issued by Cowen & Co. in December of 1991. D.H. Blair also maintained that claimants made their own investment decisions and the resulting loss in TSI was solely the result of any unforeseen overall downturn in the biotechnology sector.

D.H. Blair maintained that, with respect to claimants' losses on the shares of Vital Heart, in February 1993, Vital Heart revised its earnings from \$280,098.00 as previously reported down to \$24,098.00 and that this caused a precipitous decline in the price of the shares. D.H. Blair further maintained that Cincotta arranged for a sale of Microcarb, but that it had to cancel the sale because the units were not for sale in the claimants' state of residence. In addition, D.H. Blair maintained that the subsequent attempt by claimants to purchase shares of Microcarb was canceled because payment was never received.

In its counterclaim, D.H. Blair contended that the Statement of Claim contained defamatory statements about it that had no basis in fact and could have only been included to damage its reputation. D.H. Blair further maintained that claimants made substantial profits on many of their investments and that claimants had no valid claim. In its crossclaim, D.H. Blair maintained that, if it was found liable in this matter, it was entitled to contribution and indemnification from Johnson and Cincotta.

Johnson maintained that he provided claimants with material information to make their decision and that no misrepresentations nor omissions were made. Johnson also maintained that TSI was suitable for the claimants and that it was in accord with claimants' overall securities trading strategy. Johnson further maintained that claimants did not suffer any losses due any negligence on his part and that claimants were not entitled to any recovery.

In his Statement of Answer, Cincotta maintained that he recommended Vital Heart to claimants based on the company's release of their increased revenues for the third consecutive quarter. Cincotta also maintained that on February 12, 1993, Vital Heart issued a press release announcing that they were correcting a \$256,000.00 overstatement of revenues and that within two weeks of the press release, the stock declined over fifty percent.

In response to the counterclaim, the claimants denied that they had a substantial profit on many of their investments. Claimants further maintained that the counterclaim was frivolous and not supported by law or fact.

RELIEF REQUESTED

Claimants requested an award of \$202,471.00 plus interest, punitive damages, attorneys fees and

costs. At the hearing, claimants amended their request for damages to \$154,206.82 plus interest in the amount of \$28,825.40. Claimants further requested a dismissal of the counterclaim.

D.H. Blair requested a sum of no less than \$10,000.00 in damages to be determined and attorneys' fees.

Johnson requested that the Statement of Claim be dismissed.

Cincotta did not specifically request relief.

OTHER ISSUES CONSIDERED & DECIDED

The arbitrators made the following rulings concerning respondent Johnson, who failed to file properly executed Submission Agreement and respondent Cincotta, who failed to file a Submission Agreement and failed to appear at the evidentiary hearing conducted in this matter without obtaining any adjournment/postponement thereof:

1. Pursuant to Section 1 of the Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that Johnson and Cincotta were associated persons of a member of the NASD at the time this controversy arose and, therefore, the panel found personal jurisdiction over Johnson and Cincotta pursuant to Section 12 of the Code.
3. In view of (2) above, the panel found that Johnson and Cincotta were required to file with the NASD a properly executed Submission Agreement pursuant to Section 25(b) of the Code.
4. In addition, in accordance with Sections 21, 26 and 29 of the Code, the panel found that the NASD provided Cincotta with due notice of the hearing conducted in this matter by regular and certified mail. The panel determined to proceed with the hearing without Cincotta, whose absence was unexcused.

At the hearing, claimants withdrew all claims based upon unsuitability and amended their request for damages to \$154,206.82 plus interest in the sum of \$28,825.40.

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. All claims against respondents D.H. Blair, Johnson and Cincotta be and hereby are dismissed in their entirety.
2. Claimants' request for punitive damages be and hereby is denied.
3. The counterclaim and crossclaim of respondent D.H. Blair are dismissed in their entirety.
4. Each party shall bear their respective costs, including attorneys' fees.
5. All other claims are hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$200.00 non-refundable filing fee submitted by claimants and have assessed the following forum fees:


4 hearing sessions x \$750.00 = \$3,000.00

1. Claimants be and hereby are jointly and severally liable for the sum of \$3,000.00 representing the total amount of forum fees. Claimants previously deposited \$750.00 with the NASD and, therefore, claimants are liable and shall pay to the NASD the sum of \$2,250.00, representing the amount of forum fees outstanding.
2. D.H. Blair be and hereby is liable and shall pay to the NASD the sum of \$500.00, representing the non-refundable filing fee for the counterclaim.

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

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ARBITRATORS' SIGNATURES

A handwritten signature in black ink, appearing to read 'Guillermo Bosch', written over a horizontal line.

Guillermo L. Bosch, Esq.
Public Arbitrator

Harry E. Gerhard, Jr.
Public Arbitrator

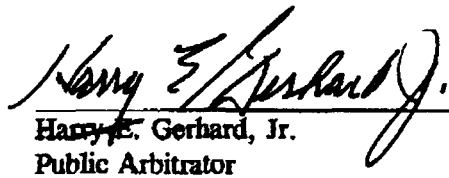
Paul H. McKenna
Industry Arbitrator

Date of decision: April 30, 1996

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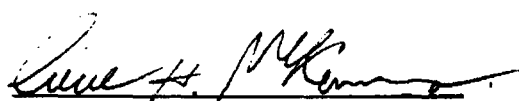
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