

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

George A. Finn

vs.

Award  
#93-03032

Name of the Respondents

First Albany Corporation  
and Patrick J. Lane

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REPRESENTATION

For the Claimant, George A. Finn: Edward R. Wiest, Esq. of Tarlow, Breed, Hart, Murphy & Rodgers, located in Boston, Massachusetts.

For the Respondents, First Albany Corporation and Patrick J. Lane ("Respondents"): Rhonda B. Parker, Esq. of Sherin and Lodgen, located in Boston, Massachusetts.

CASE INFORMATION

Statement of Claim filed: August 3, 1993.  
Claimant Submission Agreement signed on: July 26, 1993.

Statement of Answer filed by Respondent on: October 8, 1993  
Respondent's Submission Agreement signed on: September 7, 13 1993.

HEARING INFORMATION

Hearing Date/Sessions: June 1, 1994 - Two sessions  
July 11, 1994 - Two sessions  
July 12, 1994 - One sessions

The hearing was conducted at the National Association of Securities Dealers, Inc. office located in Boston, MA.

CASE SUMMARY

Claimant, George Finn, alleges that Respondent, Patrick J. Lane, a registered representative who was associated with First Albany, induced Mr. Finn to increase his use of a margin account in the purchase of Medarex, Inc. stock rather than liquidate his position in biotechnology stocks, thus causing Mr. Finn a substantial financial loss. Mr. Finn alleges the following six counts: 1)breach of contract, 2)negligence, 3)fraud, 4)violation of the Massachusetts Securities Act, 5)violation of Section 10(b) and 10(b)(5) of the 34' Act and 6)unfair and deceptive acts.

Claimant alleges that he is a professional engineer and a self-employed home building inspector who has no knowledge of the management or trading of investments. Claimant alleged that on or about 1989 Mr. Finn informed Mr. Lane and First Albany he was prepared to engage in speculative activities with a medium level of risk. Claimant contends that the account equity was no more than \$50,000 with a margin borrowing of no more than \$20,000.

In or about 1991, Claimant alleges that he invested \$54,000 in cash in Clinical Technology warrants ("Warrants") which had a market value of approximately \$187,000 as of January 1, 1992. Mr. Finn sold the warrants between January 3-6 1992. Claimant further alleges that the recommendation of Mr. Lane, he invested some of the proceeds from the warrants and margin borrowing in Emisphere Technologies, Inc. and Medarex, Inc. Claimant contends that Mr. Lane recommended these transactions even though Claimant had expressed a desire to retain a substantial portion of the cash generated through his sale of the warrants. Claimant further alleges that in January and February 1992, he urged Mr. Lane to reduce the portfolio in biotechnology securities and Mr. Lane encouraged him to hold his position and to purchase additional warrants of Medarex. During this period, the value of both Emisphere and Medarex warrants dropped while the margin account increased to an amount in excess of \$150,000 as of February 28, 1992.

Claimant states that he was not informed of the extend of risk associated with margin trading and that Respondents failed to disclose that they held a substantial position in Medarex warrants.

Respondents deny all allegations of wrongdoing. Respondents assert that Claimant was not an inexperienced investor. They allege that he had been investing for five years before starting an account with First Albany, that he used his margin account for as much as 30 to 50% of his equity holdings and was experienced with the risk factors associated with margin. They contend that

Claimant could have kept his proceeds from the sale of the warrants but chose to invest them in other biotechnology securities, and thus, subjected himself to unforeseen market drops. Based on these factors, respondents assert the following sixteen affirmative defenses: 1) failure to state a claim; 2) compliance with industry, legal and regulatory requirements; 3) Mr. Finn's ratification of transactions after full disclosure of risks 4) failure to timely complain; 5) doctrine of laches, waiver and estoppel; 6) statute of limitations; 7) losses were due to claimants desire to buy, hold or sell securities; 8) claimants failure to mitigate losses; 9) Claimants own negligence; 10) no private cause of action for violation of NYSE or NASD rules; 11) lack of misrepresentation or disclosure to Mr. Finn; 12) good faith representation to Mr. Finn; 13) Claimants assumption of risk; 14) superseding or intervening causes beyond the control of the respondent; 15) prejudgment interest or attorney's fees or costs are not allowed under the law or facts of this case and; 16) punitive damages not allowed under applicable state law or facts of this case.

#### **RELIEF REQUESTED**

Claimant requests awards against the Respondents as follows:

1. Jointly and severally for such amounts as may be due on the claims set forth in counts 1 to 5, including punitive damages as allowed by governing law;

2. Jointly and severally for such amounts as may be due on the claims for unfair and deceptive acts set forth in Count 6, including double or treble damages and attorneys fees as permitted by Chapter 93A, Section 9 of the General Laws of the Commonwealth of Massachusetts; and

3. For such other and further relief as the panel may deem just and proper under governing law and the *Uniform Code of Arbitration and Code of Arbitration Procedure*, including the costs and disbursements of this proceeding and interest as provided for by law.

Respondents request that the arbitration panel dismiss all claims and that costs be assessed against Claimant.

#### **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.

#### 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 are denied.
2. All forum fees are to be split equally between the parties.
3. Each party shall bear its respective costs including attorney fees.

#### FORUM FEES

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the panel has determined that the NASD shall retain the \$200.00 non-refundable filing fee paid by the Claimant. The following Forum Fees are assessed.

5 sessions X \$750.00 = \$3,750.

1. Claimant George A. Finn has deposited \$750 leaving a balance of \$1,125.
2. Respondents are hereby jointly and severally liable for the sum of \$1,875.


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

#### ARBITRATION PANEL

Robert Volk, Esq.	-	Public Chairperson
George D. Campbell,	-	Public Panelist
Julian Daly, Esq.	-	Industry Panelist

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Concurring Arbitrator's Signature

  
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Robert Volk, Esq.

Date of Decision: August 18, 1994

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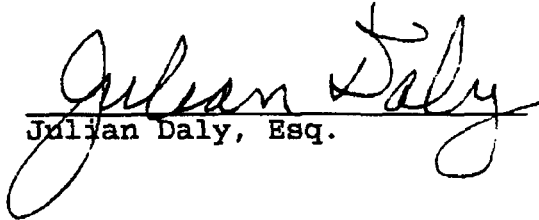
Concurring Arbitrator's Signature

  
George D. Campbell,

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Concurring Arbitrator's Signature

  
Julian Daly, Esq.

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