

**N.A.S.D. AWARD**

**NASD Regulation, Inc. Office of Dispute Resolution**

**In the Matter of the Arbitration Between**

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**Name of Claimant**

**Cesar Ernesto Balbin**

**94-00420**

**Names of Respondents**

**Fidelity Brokerage Services, Inc.  
Robert Jenkins**

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**REPRESENTATION**

**For Claimant: Stephen Murphy, Esq. of Pino & Dicks, Longwood, Florida.**

**For Respondents: Keith Olin, Esq. of Morgan, Lewis & Bockius, Miami, Florida.**

**CASE INFORMATION**

**Statement of Claim filed: January 18, 1994.**

**Claimant's Submission Agreement signed on: January 18, 1994.**

**Amended Statement of Claim filed: November 14, 1994.**

**Second Amended Statement of Claim filed: June 12, 1995.**

**Preliminary Statement of Answer filed by Respondent Fidelity Brokerage Services, Inc. ("Fidelity"); May 11, 1994.**

**Response to Amended Statement of Claim filed: December 2, 1994.**

**Response to Second Amended Statement of Claim filed by Respondents Fidelity and Robert Jenkins ("Jenkins"): July 24, 1995.**

**Respondent Fidelity's Submission Agreement/Corporate Acknowledgment signed on: April 2, 1998 by Keith Olin, Esq. on behalf of Fidelity.**

**Respondent Jenkins did not file an executed Submission Agreement.**

### HEARING INFORMATION

On October 1, 1997 the arbitration panel conducted a pre-hearing conference which lasted one (1) session.

On May 13, 1998 the Chairperson conducted a pre-hearing conference which lasted one (1) session.

On April 1, 2, 3, 1998, May 18 and 22, 1998, and, July 6 and 8, 1998, hearings lasting fourteen (14) sessions were conducted in Fort Lauderdale, Florida.

### CASE SUMMARY

Claimant alleged that he had extremely limited prior investment experience when, at the age of 22, he opened accounts with Respondent Fidelity; that the funds Claimant deposited were the assets of a family business which Claimant was holding on behalf of the family; and, that from 1991 through 1992, Fidelity excessively traded Claimant's account. Claimant further alleged that during the summer of 1992, the amount of trading in his account was far beyond any reasonable measure of suitable trading; that, for example, in May of 1992, Claimant's account was turned over 16.55 times on an annual basis; that in June of 1992 the account was turned over 28.32 times and in July of 1992 the account was turned over 31.9 times; and, that Respondents also purchased securities in Claimant's account in violation of Regulation "T" as well as in violation of NYSE minimum maintenance required for margin accounts. Claimant maintained that as a result of the excessive activity and margin violations that occurred in his account during this period, he lost \$250,000.00.

Claimant further alleged that in June of 1992, Respondent Fidelity negligently issued a check in the amount of \$134,994.16 from Claimant's account; that the check request did not come from the Claimant and that Fidelity failed to properly identify the individual who was requesting the funds from Claimant's account; and, that Claimant had put in place a security code or personal identification code on the account but that Fidelity failed to request the security code from the individual who requested the check. Claimant maintained that the check was ultimately stolen and that the funds were never recovered.

Claimant next alleged that in June of 1993, Respondent Fidelity opened a second account for the Claimant; that Claimant told Respondents that the funds he was depositing in the account were the proceeds of an insurance settlement that Claimant received as a result of hurricane damage to his home; and that some of the money he was depositing was money he had borrowed, secured by a mortgage on his home; and, that Respondents were aware at the time that they were opening the new account for Claimant that Claimant had lost approximately \$300,000.00 in a Fidelity account as a result of unsuitable trading and margin violations, just six months prior to that time. Claimant further alleged that the Respondents were aware that Claimant was complaining about the unauthorized withdrawal of the \$134,994.00 from his account; that despite their knowledge of Claimant's clear lack of investment acumen as well as his extremely precarious financial condition, Fidelity loaned Claimant enormous amounts of money for the margin trading of securities in his account. Claimant maintained that Fidelity induced him to trade at unsuitable levels; that Fidelity again violated Regulation "T" and the NYSE minimum maintenance requirements for margin accounts; that during this period, Fidelity loaned Claimant over \$3,000,000.00 to purchase securities although Claimant's capital investment during this period was only \$436,000.00; and, that as a result of the excess trading and margin violations in Claimant's account, Claimant lost over \$300,000.00.

Respondents denied that they are liable to Claimant under any of the theories or claims alleged and maintained that all of the transactions executed in Claimant's accounts were pursuant to unsolicited orders placed by Claimant; that the ideas for each and every transaction either originated from individuals unaffiliated with Fidelity who were advising Claimant or from Claimant himself; that Respondents did not recommend or solicit any of the trading in Claimant's accounts; and, that at all times Fidelity acted properly with respect to margin balances. Respondents further maintained that at all times supervision was appropriate given the nature and character of Claimant's trading. Respondent Fidelity further denied that it was responsible for a check made payable to Claimant which allegedly was stolen and negotiated over a forged endorsement and asserted that the evidence indicated that Claimant was directly involved in the negotiation of that check and in the subsequent receipt of its proceeds.

#### **RELIEF REQUESTED**

Claimant requested an award of compensatory damages and attorneys fees equal to \$1,300,000.00 plus punitive damages.

Respondents requested that Claimant's claims be dismissed and that the costs of this proceeding be assessed against the 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 NASD Regulation, Inc.

Respondent Jenkins did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed Submission Agreement but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

At the conclusion of Claimant's case, Respondents made a motion for a directed verdict which was denied by the panel.

#### **AWARD**

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

1. Respondent Fidelity is found liable and shall pay to the Claimant the sum of \$134,994.16.
2. Respondent Jenkins is found not liable and, therefore, all claims against him are hereby dismissed.
3. Claimant's requests for attorneys' fees and punitive damages are hereby denied.

**FORUM FEES**

Pursuant to Rule 10332(b) of the Code, a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four hours or less.

Pursuant to Rule 10332(c) of the Code, the arbitration panel has assessed forum fees in the amount of \$15,300.00 (one (1) pre-hearing conference (panel) x \$1,000.00 + one (1) pre-hearing conference (Chairperson only) x \$300.00 + fourteen (14) hearing sessions x \$1,000.00).

1. Respondent Fidelity is assessed forum fees in the amount of \$7,650.00 payable to NASD Regulation, Inc.
2. Claimant is assessed forum fees in the amount of \$7,650.00 payable to NASD Regulation, Inc.

**OTHER FEES**

1. Pursuant to Rule 10332 of the Code, the Claimant has paid to NASD Regulation, Inc. the claim filing fee of \$250.00.
2. Pursuant to Rule 10319(b) of the Code, NASD Regulation, Inc. has applied the hearing session deposit of \$1,000.00, previously deposited by the Claimant, to the postponement fee for the hearing scheduled for February 14, 15 and 16, 1996.
3. Pursuant to Rule 10319(b) of the Code, Claimant shall pay to NASD Regulation, Inc. the sum of \$2,000.00 representing payment for two postponement fees for the hearings scheduled for May 8, 9 and 10, 1996 and June 2, 3 and 4, 1997.
4. Pursuant to Rule 10319(b) of the Code, Respondent Fidelity shall pay to NASD Regulation, Inc. the sum of \$1,000.00 representing payment for the previously invoiced postponement fee for the hearing scheduled for December 8 and 9, 1994.
5. The Claimant has paid an administrative fee of \$53.00 for copies.

Fees are payable to the NASD Regulation, Inc., Office of Dispute Resolution.

**ARBITRATION PANEL**

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s/\_\_\_\_\_  
Meah Dell Rothman-Tell, Esq.

Public/Chairperson

\_\_\_\_\_/s/\_\_\_\_\_  
John J. Hearn, Esq.

Public/Panelist

\_\_\_\_\_/s/\_\_\_\_\_  
David L. Yerkes

Industry/Panelist

Date of Decision: August 24, 1998