

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

James E. Ciccolilli

94-00582

Name of Respondents

Michael McDyer  
Hibbard Brown & Co., Inc.

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**REPRESENTATION**

For Claimant: Claimant appeared pro se.

For Respondent: Steven B. Caruso, Esq. of Hibbard Brown & Co., Inc. located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed: February 15, 1994.

Claimant's Submission Agreement signed on: February 9, 1994.

Claimant's clarification of Claimant's Statement of Claim and Response to Respondents Statement of Answer filed: May 9, 1994.

Statement of Answer filed by Respondents Hibbard Brown & Co., Inc. ("Hibbard Brown") and Michael McDyer ("McDyer") on: April 26, 1994.

Respondent Hibbard Brown's Submission Agreement signed on: April 22, 1994.

Respondent McDyer's Submission Agreement signed on: March 14, 1994.

**HEARING INFORMATION**

Hearing Date / Sessions: September 15, 1994 / Two Sessions.

Hearing Location: National Association of Securities Dealers offices located at 33 Whitehall Street, New York, New York.

**CASE SUMMARY**

Claimant alleged that Respondents made misrepresentations to Claimant with respect to securities Claimant purchased through Hibbard Brown and McDyer from April 23, 1991 to October 13, 1992. Claimant further alleged that McDyer never disclosed to Claimant the risks involved with the securities Claimant purchased, and that had Claimant been made aware of the risks, he would not have purchased said securities. Claimant also alleged that McDyer used high pressure sales tactics to induce Claimant into buying risky securities and that Claimant relied upon McDyer's recommendations when purchasing securities from Respondents. Claimant next alleged that monthly statements sent to Claimant by Hibbard Brown did not contain the asset values of Claimant's portfolio and, had Claimant been aware of the asset values, he would not have continued to purchase the securities McDyer was recommending. Claimant alleged that Respondent Hibbard Brown refused to provide Claimant with a letter stating that one security, American Video Imaging, had become worthless.

Claimant also alleged that the investments recommended by Respondent McDyer were wholly inconsistent with all other investments that Claimant had made, and therefore, unsuitable for Claimant. Claimant alleged that he informed McDyer that he wanted to limit his risk and that, as an investor, Claimant had never been one to take on a great deal of risk. Claimant also alleged that he was not provided with any prospectus prior to purchasing securities from Respondents and that in some instances, he was not provided with a prospectus at all.

Respondents Hibbard Brown and McDyer maintained that at no time during the course of the 52 month period when Claimant maintained an account with Respondent Hibbard Brown did McDyer use any high pressure sales tactics on Claimant. Respondents further maintained that Claimant was at all times fully aware, through both written and oral disclosures, of the nature of the investments that Claimant had chosen and the price movements of those investments. Respondents also maintained that there was no misconduct or impropriety with respect to Claimant's account.

Respondents maintained as an affirmative defense that Claimant's statement of claim did not state a cause of action against Respondents upon which relief could

be granted. Respondents further maintained as affirmative defenses that Claimant's claim was barred by the doctrines of estoppel, waiver, laches and ratification. In addition, Respondents maintained as an affirmative defense that Claimant's claim was barred by Claimant's failure to mitigate damages. Respondents maintained as an affirmative defense that Claimant's claim was barred by Claimants assumption of the risks inherent in all securities transactions, that any damages allegedly sustained by Claimant were caused, in whole or in part by the culpable conduct or negligent acts of commission and/or omission of Claimant. Respondents also maintained as an affirmative defense that Claimants claims were barred by Article III, Section 27 of the NASD Rules of Fair Practice in that a system was established and maintained to supervise the activities of registered representatives which was reasonably designed to achieve compliance with applicable securities laws and regulations and with the rules of the NASD. Respondents further asserted as affirmative defenses that Claimant's claims were barred by the applicable statutes of limitation and/or limitations period, by statute and judicial opinion, and by Claimant's unclean hands.

### **RELIEF REQUESTED**

**Claimant requested:**

1. Award against respondents for \$19,081.75 in compensatory damages.

**Respondents requested:**

1. That Claimant's Statement of Claim be dismissed in its entirety.
2. Respondents be awarded such other and further relief as may be deemed just, proper and equitable under the circumstances involved herein.

### **AWARD**

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

1. All of Claimants claims against Respondents are dismissed.
2. Respondents are liable, jointly and severally, and shall pay to Claimant the sum of \$520 to reimburse Claimant for Claimant's filing fee and hearing session deposit paid to the NASD.

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**FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

1 session X \$400 = \$400 minus hearing session deposit of \$400 = net \$0 due.

Forum fees Assessed Against:

1. Respondents are assessed \$520 which represents the total forum fees and filing fee paid by Claimant and shall reimburse Claimant as set out above.


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

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Arbitrator's Signature

Name

  
Richard W. Baldwin, Esq.

Public Chairman

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Date of Decision: October 17, 1994

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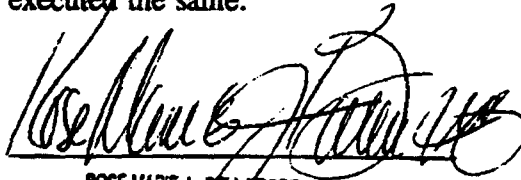
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STATE OF: NEW YORK

SS:

COUNTY OF: NEW YORK

On this 14<sup>th</sup> day of October, 1994, before me personally appeared **Richard W. Baldwin, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



ROSE MARIE J. BELLAFIORE  
Notary Public, State of New York  
No. 41-623199  
Qualified in Queens County  
Certificate Filed in New York County  
Westchester County, Kings County  
Nassau County & Suffolk County  
Commission Expires Jan. 31, 1995