

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

James F. Miglian

94-01632

Name of Respondents

Biltmore Securities Inc.
Philippe Steinitz

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on May 2, 1994, Claimant, James F. Miglian ("Claimant"), who appeared Pro Se, alleged that on or about October 15, 1992, he placed an order with Respondent Philippe D. Steinitz ("Steinitz"), a broker employed by Respondent Biltmore Securities, Inc. ("Biltmore"), to purchase 1,000 shares of Guinness PLC ("Guinness"). Claimant alleged that Steinitz made misrepresentations to induce Claimant to purchase Guinness. Claimant alleged that after he purchased Guinness it began to decline in value. Claimant alleged that Steinitz used harassing and unrelenting sales tactics. Claimant alleged that Steinitz told Claimant to do whatever he could do including selling his shares of Guinness in order to purchase Judicate. Claimant alleged that Steinitz personally guaranteed the performance of Judicate. On December 23, 1992 on that basis, Claimant agreed to purchase 10,000 shares of Judicate at 1 1/4. Claimant alleged that on December 31, 1992, he received a bill for 10,000 shares of Judicate at 1 1/4 and for 10,000 additional shares at 1 5/16. Claimant alleged that the statement also reflected that Claimant's Guinness shares had a value of 7 3/4 per share. Claimant alleged that shortly afterwards messengers from Biltmore came to his office on a daily basis requesting \$25,000 to cover the Judicate trades. Claimant alleged that a representative from Biltmore called him and indicated that the balance on his account would be sent to him if he signed and returned a W-9 form, but that he refused to sign any forms. Claimant alleged that Respondents sold his shares of Guinness without the authority to effectuate the trade. Claimant alleged that on March 1, 1993, he called Biltmore and requested that his account be closed and that he be sent the proceeds. Claimant alleged that his account showed a balance of \$7,185 as of January 12, 1995, but that there was currently a balance of zero. Claimant alleged that an agent of Biltmore told him that she would get back

to him but that she never did so. As a result of the above, Claimant alleged that he has suffered damages for which Respondents should be held liable.

Respondents Biltmore and Steinitz, through their counsel Bernstein & Wasserman, LLP, New York, New York, categorically denied all allegations of wrongdoing asserted by Claimant. Respondents specifically maintained that all investments made by Claimant were suitable and that all transactions were discussed with and authorized by Claimant prior to the purchases being made. Respondents maintained that Steinitz fully disclosed the nature of all investments to Claimant and that no material misrepresentations or guarantees were ever made to Claimant by Steinitz. Respondents alleged that Claimant promised that he would pay for the Judicate trades but failed to do so. Respondents maintained that several attempts were made to seek payment of the trades by Claimant but Claimant failed to pay for the trades and Biltmore was forced to liquidate Claimant's account. Respondents maintained that after the Judicate share were liquidated there was a debit balance of \$5,655 and Biltmore was forced to liquidate Claimant's Guinness shares to cover the debit balance. As a result of the above, Respondents contended that they should not be held liable in this matter.

RELIEF REQUESTED

Claimant requested \$9,465.00 in actual damages.

Respondents requested that the Statement of Claim be denied and that they be awarded attorney's fees, and their costs and disbursements in connection with this proceeding.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc.'s Code of Arbitration Procedure, a single public Arbitrator, F. Conger Fawcett, Esq., was selected to review and determine the matter in controversy between the parties set forth in a submission to Arbitration signed by the Claimant on April 27, 1994 and by Respondent Steinitz on December 19, 1994 and by Respondent Biltmore on December 21, 1994.

And, the Arbitrator, having considered the proof and all submissions by the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. That Respondent Biltmore is liable to Claimant and shall pay to Claimant the sum of \$1,530.00; no pre-award interest is assessed on this amount.
2. The parties shall bear their respective costs.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. ("NASD") by the Claimant shall be retained by NASD. Respondents Biltmore and Steinitz shall jointly and severally bear half of Claimant's filing fee so that Biltmore and Steinitz shall pay to Claimant \$75.00 as reimbursement of half the filing fee.

ARBITRATOR'S ADDENDUM TO AWARD NO. 94-01632

Claim in Chief.

Claimant James F. Miglian complains generally of overly aggressive sales activity on the part of Respondent Philippe D. Steinitz and of directing him into unsuitable investments, asserting his (the Claimant's) inexperience in stock market investing matters. More specifically, he asserts certain representations by way of "guarantees" allegedly made by Mr. Steinitz. The Claimant also complains of the subsequent liquidation of securities in his account undertaken by Respondent Biltmore Securities, Inc., to cover unfunded purchases.

Respondents deny the charging allegations, generally and specifically. With respect to the suitability of the investment recommendations, they outline certain telephone conversations between Mr. Steinitz and the Claimant and (after request) furnished to the Arbitrator a copy of the New Account Form contemporaneously completed by Mr. Steinitz and mailed to the Claimant, to which (they assert) no rejoining comment or protest was received. Notably, to my mind, is the notation on the Form for "Investment Objective" the words "Growth/Spec" (which latter I interpret to mean "Speculative" or "Speculation"). The Form and both parties' written submissions also identify the Claimant as a person of not-insubstantial means, whatever his actual experience in the stock market. Both parties' papers also show that there was considerable discussion between the Claimant and Mr. Steinitz respecting the investment recommendations. The Claimant characterizes this as high-pressure tactics, but for immediate purposes it also belies

any suggestion that the Respondents were acting on their own, without the Claimant's knowledge and (at least grudging) assent and authorization.

Acting pursuant to the parties' submission on a written record I am bound by the papers as submitted. On that basis, I am obliged to hold that the Claimant, who has the burden of proof on the matter, has failed to establish his claim for unsuitability of the investment recommendations made. Similarly, with no opportunity to examine witnesses, and faced with a flat denial by the Respondents, I must hold that the Claimant has failed to establish the making of any promises or guarantees by Mr. Steinitz.

As to the activity of Biltmore Securities in liquidation of the account for payment of sums owing on subsequent purchases, I can not find anything amiss. The Claimant does not deny that the purchase orders were in fact placed; that being so, payment was due, and the Respondents appear to have acted not improperly nor unusually in their resort to the account, for the purpose.

As for the Claimant's protest of high-pressure sales tactics on the part of broker Steinitz, this I can readily enough believe. It is perhaps an unpleasant characteristic of the business. The fact (or, law) of the matter is, however, that, absent something more, aggressive (and even offensive) high-pressure salesmanship is not actionable.

Accordingly, I find that the Claimant has failed to establish a basis for recovery on his claim in chief, and so hold for the Respondents on this part of the action.

Disposition of the Account Balance.

I reach a different result, respecting the ultimate disposition of the account balance after satisfaction of all sales activity. Believing the issue sufficiently raised in the Claimant's statement but insufficiently briefed, I asked the parties for supplemental comment on the issue, which I subsequently received.

Biltmore Securities advises that it subjected the \$1,530.00 account balance to backup withholding, and that subsequently its clearing house (Bear, Stearns Securities) paid the funds over to the Internal Revenue Service -- all quite properly, Biltmore asserts, because of the Claimant's failure to complete and return the W-9 form provided to him. This is not my understanding of the law.

Backup withholding comes into play only with respect to interest, dividends, or gains on sales -- that is, only to taxable earnings. In the Claimant's case, the account had no earnings --

no interest, no dividends, and only losses on sales -- with the result that the \$1,530 balance represented only a diminished original investment of capital. In such circumstances, the presence or absence of a duly executed W-9 was immaterial; no taxable incident had arisen, no tax was due, and hence the backup withholding was improper.

Under the circumstances, then, Biltmore's failure to return the funds to the Claimant was as a legal matter conversion of those funds.

The Claimant may or may not have received an economically equivalent tax benefit, by reason of the payover. The record of course does not show. Regardless, the result is the same. No one (including the IRS, with its backup withholding requirements properly applied) authorized Biltmore to make a gratuitous tax payment on the Claimant's behalf.

I have considered and rejected an award of punitive damages. Biltmore's internal procedures may have been, and in my opinion were, sloppy; but there is no suggestion that malice was involved, nor will this record support a conclusion that the error was so pervasive as to warrant an exemplary award. Similarly, I have considered and decided against pre-Award interest. Although the incident occurred quite some time ago, it is clear (at least on this record) that Biltmore did not profit personally from the withholding; nor is there any showing that the Claimant ever made a clear and focused demand for return of the funds.

According, I find for the Claimant and against Respondent Biltmore Securities (but not against Respondent Steinitz, whom I assume had no part in the matter) in the sum of \$1,530.00

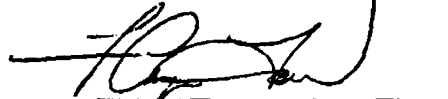
Post-award interest, following usual NASD rules, will not attach if the awarded sum is paid within 30 days of the Award; if not paid within the said 30-day period, interest will attach, from the date of the Award, at the jurisdictional rate.

Each side shall bear his or their own costs and attorneys' fees. Any NASD arbitration fees and charges shall be borne equally by the two sides.

Miglian Award
Case Number 94-01632
Page 6

AFFIRMATION

I, **F. CONGER FAWCETT, ESQ.**, do hereby affirm upon my oath of arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



Signature of Arbitrator

Date Award Served by the NASD: February 23, 1996