

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Kenneth Rosen

94-01687

Name of Respondents

Herzog, Heine, Geduld, Inc.
Churchill Securities, Inc.

REPRESENTATION

For Claimant: Howard M. Sommers, Esq. of Karp & Sommers, New York, New York.

For Respondent Herzog Heine Geduld, Inc.: Charles Christofilis, Esq. of Herzog, Heine, Geduld, Inc., New York, New York.

For Respondent Churchill Securities, Inc.: Gary E. Botchman, Esq., Suffern, New York.

CASE INFORMATION

Statement of Claim filed: June 14, 1994.

Claimant's Submission Agreement signed on: June 13, 1994.

Statement of Answer filed by Respondent Herzog, Heine, Geduld, Inc. ("Herzog") on: August 5, 1994.

Respondent Herzog's Submission Agreement signed on: August 5, 1994.

Statement of Answer filed by Respondent Churchill Securities, Inc. ("Churchill") on: August 1, 1994.

Respondent Churchill's Submission Agreement signed on: August 1, 1994.

HEARING INFORMATION

Hearing Date / Sessions: April 7, 1995 / Two Sessions.

Hearing Location: Offices of the National Association of Securities Dealers, Inc.
located in New York City, New York.

CASE SUMMARY

Claimant alleged that prior to March 19, 1993, Claimant was employed as a registered representative and general securities principal by Respondent Churchill. Claimant further alleged that prior to March 19, 1993, Allied Capital, Inc. ("Allied"), represented to Claimant that it had purchased the accounts and customer list from Churchill (the "Allied Accounts") and that commencing March 19, 1993 Claimant began to perform services for Allied. Claimant next alleged that after Allied encountered regulatory problems, Claimant ceased working for Allied in or about April of 1993. Claimant alleged that on or about October 1, 1993 Claimant purchased the Allied Accounts from Allied and that on or about November 24, 1993, Claimant gave written notice to Herzog that he owned the Allied Accounts. Furthermore, Claimant alleged that on or about November 29, 1993, Churchill gave written notice to Herzog that it owned the Allied Accounts. Claimant then alleged that on or about May 10, 1994, Claimant sent a written request to Herzog (clearing broker and agent for Churchill and its customers) to transfer the Allied Accounts to National Financial Services and that Herzog refused to transfer the accounts. Claimant next alleged that as a result of the claim by Churchill to own the Allied Accounts and the failure of Herzog to transfer the Allied Accounts, Claimant has been unable to take possession of the assets he purchased.

Respondent Churchill maintained that Claimant was employed as a registered representative and general securities principal by Churchill but that it had no knowledge that Allied had represented to Claimant that it had purchased the accounts and customer list from Churchill. Respondent Churchill further maintained that on or about March 19, 1993 Claimant may have begun to perform services for Allied, but that a contemplated transfer of assets between Churchill and Allied was never consummated because Allied failed to meet the Net Capital Requirements of the NASD and because Allied was the subject of a securities and exchange investigation. Respondent Churchill further maintained that upon learning of Allied's regulator problems, it promptly rescinded the purported asset sale. Respondent also maintained that the accounts were left with Churchill and that Brian McGowan, president of Allied, insisted that Churchill maintain Allied's accounts. Respondent Churchill maintained that Claimant did not purchase any accounts from Allied since the assets were never transferred from Churchill to Allied. Additionally, Respondent Churchill maintained that it had no knowledge that Claimant had given written notice to Herzog that he owned the Allied Accounts. Respondent Churchill maintained that it had no knowledge that Claimant had given a written request to Herzog to transfer the Allied Accounts

to National Financial Services and had no knowledge that Herzog refused to transfer the Allied Accounts. Respondent Churchill denied that any accounts it owns are assets purchased by Claimant since the purported assets purchased by Claimant were never transferred to Allied with whom Claimant claimed to have a bill of sale.

Respondent Churchill maintained the following affirmative defenses: (1) Claimant was not entitled to any of the Churchill assets as Allied breached their original agreement with Churchill in that they failed to meet the net capital requirements of the NASD, making a transfer of assets from Churchill to Allied a nullity; (2) Claimant knew that Allied had gone out of business in April, 1993 some six months prior to when Claimant claimed to have purchased the assets of Churchill pursuant to a specific Asset Purchase Agreement dated October 1, 1993; (3) The purported Asset Purchase Agreement lacks consideration as Claimant claimed that he purchased thousands of customer accounts which possess millions of dollars in assets for the sum of \$750; (4) Claimant and Brian McGowan conspired to transfer the accounts when each party knew they did not have title to the accounts.

Respondent Herzog maintained that on May 26, 1988, Herzog executed a clearing agreement with Churchill, signed on behalf of Churchill by Claimant, which provided that Herzog act as clearing broker and agent for Churchill and its customers. Respondent Herzog further maintained that on or about November 24, 1993, Claimant gave written notice to Herzog of an alleged claim asserting his ownership of the customer accounts carried on the books of Herzog for Churchill. Next, Respondent Herzog maintained, that on or about November 29, 1993, Churchill gave Herzog written notice that such customer accounts were still owned and controlled by Churchill. Respondent Herzog maintained that on November 29, 1993 conversations took place between Herzog, Claimant's attorneys, and Churchill wherein Herzog informed the parties that if the conflicting claims to the Churchill accounts were not resolved by midweek Herzog would report the situation to the NASD for its guidance. Respondent Herzog then maintained that it gave Claimant written notice that Claimant could not have an ownership interest in the Churchill customer accounts unless the individual costumers transferred their ownership to Claimant in writing. Respondent maintained that it subsequently gave Claimant written notice that the Churchill customer accounts could not be transferred unless and until the normal procedure requiring customers to sign a Form 412 (Instructions to Transfer Account) had been satisfied.

Respondent Herzog maintained the following affirmative defenses: (1) Claimant's Statement of Claim failed to set forth any factual or legal basis for a claim against Herzog; (2) Herzog had no direct dealing or contact with the Claimant, except in Claimant's former capacity as a corporate representative of Churchill, and that Herzog had no duty or obligation to Claimant individually due to lack of privity; (3) Customer accounts carried on the books and records of a clearing agent belong to individual customers, not to Claimant and the normal and customary procedure to transfer ownership of such accounts is for the customer to complete and sign an Automated Customer Account Transfer form ("ACATS"), which instructions were not conveyed to Herzog; (4) Pursuant to the clearing agreement between Herzog and Churchill, though

Herzog owes no duty to Claimant, Herzog does have an obligation to Churchill to transfer Churchill customer accounts upon receipt of written instructions to do so. Herzog maintained that it was provided with such notification and was, at the time of its Statement of Answer, in the process of effecting a tape to tape transfer of the Churchill customer accounts to Weiss, Peck and Greer in accordance with the usual custom and practice in the securities industry, Herzog has a duty to transfer customer accounts when an introducing firm moves from one clearing firm to another.

RELIEF REQUESTED

Claimant requested:

1. An award against Respondents that Claimant owns the Allied Accounts.
2. An award against Respondents that Herzog should transfer the Allied Accounts in accordance with Claimant's request.
3. Compensatory damages.
4. Interest at a rate of 9% per annum.
5. Reimbursement of the claim filing fee.
6. Reasonable attorney's fees.
7. Any such other relief as the arbitrator deems appropriate.

Respondent Churchill requested:

1. Claimants claims be denied as against Churchill.
2. Churchill be awarded reimbursement of the surcharge and reasonable attorneys' fees.
3. Such other and further relief as the arbitrator deems appropriate.

Respondent Herzog requested:

1. That this claim in Arbitration against it be dismissed in its entirety and that costs be assessed against Claimant.

AWARD

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

1. All Claims against Respondent Herzog are dismissed.
2. As against Respondent Churchill, Claimant is awarded either one of the following two options:
 - a) Claimant shall accept rescission and Churchill shall pay to Claimant the sum of \$50,000 in damages, or in the alternative,
 - b) Claimant can demand the contract be executed and the accounts be transferred. Churchill will facilitate the transfer and shall pay to Claimant the sum of \$25,000 in damages.

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

2 sessions X \$600 = \$1200 minus hearing session deposit of \$600 = net \$600 due.

Forum fees Assessed Against:

1. Respondent Churchill is assessed the sum of \$600 which represents the net amount of forum fees due. Respondent Churchill is liable and shall pay to the NASD the sum of \$600.

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

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Arbitrator's Signature

Name

G. Robert Abrams

Industry Arbitrator

Date of Decision: May 10, 1995

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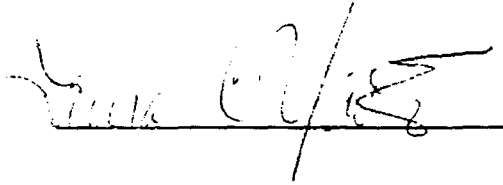
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STATE OF: *NY*

SS:

COUNTY OF: *NY*

On this *07* day of *March*, 1995, before me personally appeared G. Robert Abrams 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.

A handwritten signature in cursive script, appearing to read "Laura C. Yacko", is written over a horizontal line.

LAURA C. YACKO
Notary Public, State of New York
No. 31-4845791
Qualified in New York County
Commission Expires January 27, 199*7*