

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Richard B. Perlman

94-02402

Name of Respondents

D.H. Blair & Company
Alfred Palagonia
J. Morton Davis

REPRESENTATION

For Claimant: Ralph A. Gant, New York, New York.

For Respondent: Carole R. Bernstein of Bachner, Tally, Polevoy & Misher, New York, New York.

CASE INFORMATION

Statement of Claim filed: June 4, 1994.

Claimant's Submission Agreement signed on: June 3, 1994.

Statement of Answer filed by Respondent Alfred Palagonia on: September 12, 1994.

Joint Statement of Answer to Addendum to Statement of Claim filed by Respondents, Alfred Palagonia, J. Morton Davis, and D.H. Blair & Co., Inc., filed on: January 27, 1995.

Respondents, Alfred Palagonia, J. Morton Davis, and D.H. Blair & Co., Inc., did not submit Submission Agreements as required pursuant to section 25(b)(1) of the NASD Code of Arbitration Procedure.

HEARING INFORMATION

Hearing Date / Sessions: March 31, 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 failed to execute Claimant's order to sell 25,000 shares of Fountain Pharmaceuticals, Inc. ("FPHI"). Claimant further alleged that on or about November 20, 1993, claimant instructed Respondent Alfred Palagonia ("Palagonia") to sell 25,000 common shares of Fountain Pharmaceuticals, Inc., ("FPHI") at the average price of approximately \$1.00 per share. Claimant alleged that on or about November 30, 1993, Respondent Palagonia gave Claimant false information with respect to the trading volume and trading prices of FPHI. Claimant further alleged that Respondent Palagonia failed to comply in a timely manner with the documentary requirements necessary for Claimant to sell the FPHI shares and that the share certificates were in the possession of Respondent D.H. Blair & Co., Inc. ("Blair") since 1991. Claimant also alleged that the Respondents breached their fiduciary duty by failing to inform claimant of the date that the FPHI registration statement was to become ineffective. In addition, Claimant alleged that Respondent Palagonia personally and jointly owned potentially 150,000 shares of FPHI and that Respondent Palagonia may have traded his shares between November 20, 1993 and November 30, 1993, neglecting to sell Claimant's shares. Claimant alleged that Blair was the employer of Palagonia and failed to properly supervise Palagonia. Claimant also alleged that D.H. Blair Investment Banking Corp. was an affiliate of Blair and potentially owned 4,375,000 shares of FPHI and that Blair made substantial sales of its holdings during the period from November 20, 1993 to November 30, 1993 and interfered with sale of Claimant's shares. Claimant additionally alleged that Blair and Palagonia had a conflict of interest in that they traded their own shares and failed to meet their fiduciary obligations as brokers to Claimant. Claimant also alleged that the Blair trading in FPHI was directed by and for the benefit of Respondent J. Morton Davis.

Respondents maintained that Claimant did not in any way communicate a sale order to Respondent Palagonia. Respondents further maintained that Claimant failed to unambiguously communicate his instructions to Respondents. Additionally, Respondents maintained that Claimant ratified the transaction by subsequently ordering Respondent Palagonia not to sell the FPHI positions.

Respondents maintained the following defenses to Claimant's Statement of Claim: (1) Claimant's Statement of Claim failed to state a cause of action upon which relief could be granted; (2) Claimant received confirmations and account statements in a timely fashion indicating the securities purchased and sold in his account, Blair's market making role to various securities in his account, and the net worth of his account and that Claimant never notified

Respondents either orally or in writing of any complaint arising out of his account and so Claimant waived his claims and was estopped from asserting them against Respondents; (3) Claimant's continued dealing with Palagonia and Blair and failure to complain amounted to a ratification of any alleged acts claimed to have been committed by Respondents; (4) Claimant failed to mitigate his damages; (5) Throughout the time that Palagonia was Claimant's account representative, he acted at all times in a professional manner and in conformity with all applicable rules and regulations and fulfilled his duties and responsibilities in connection with Claimant's account in good faith and without knowledge of any alleged improper activity; (6) Claimant's claims were barred by the applicable statutes of limitations and by the doctrine of laches; (7) Claimant had full knowledge of all material facts concerning his account and authorized and directed the execution of all transactions in his account and was accordingly estopped from bringing this action; (8) Claimant was a sophisticated investor and assumed the risks of investing in the securities market; (9) Claimant's losses, if any, were caused by his own conduct; (10) All risks concerning Claimant's investments were properly disclosed to Claimant, and he knowingly, willingly and voluntarily decided to assume those risks; (11) Claimant's causes of action were barred by the Statue of Frauds provision set forth in Section 8-319(c) of the Uniform Commercial Code due to Claimant's failure to send written objection to the sale confirmations within ten days of his receipt; (12) Any losses suffered by Claimant were the result of market conditions and/or fluctuations normally associated with investments in the securities markets.

RELIEF REQUESTED

Claimant requested:

1. Damages in the amount of \$25,000 for out of pocket losses.
2. Interest at 9% starting from November 30, 1994.
3. Arbitration costs.
4. Reasonable attorney fees.
5. Any other damages as may be established at the hearing, including punitive and/or exemplary damages.

Respondents requested:

1. A determination denying Claimant's claims for relief as against them.
2. Respondents be awarded costs and disbursements, including attorneys, fees incurred by Respondents as a result of this proceeding.

OTHER ISSUES CONSIDERED & DECIDED

Respondent J. Morton Davis filed a Motion to Dismiss the Claimant's Statement of Claim with respect to J. Morton Davis and the Motion was referred to the panel of arbitrators for decision. At the close of Claimant's case, Respondents moved to dismiss the claim in its entirety against all respondents for failure to state a claim. The motion was granted as to Claimant's claims against Respondent J. Morton Davis. All of Claimant's claims against J. Morton Davis were dismissed in their entirety. The remainder of the matter was resolved on the merits of the claim.

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. All of Claimant's Claims against all Respondents are dismissed in their entirety.
2. Each party shall bear their own respective costs, including attorney's fees.
3. Respondent Palagonia is liable and shall pay to Claimant the sum of \$100 which represents partial reimbursement of the forum fees paid by Claimant.
4. Respondent Blair is liable and shall pay to Claimant the sum of \$100 which represents partial reimbursement of the forum fees paid by Claimant.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

Claim Filing Fee = \$100.

2 sessions X \$400 = \$800.

Total Forum Fees = \$900.

Less \$100 nonrefundable filing fee and \$400 hearing session deposit paid by Claimant.

Net Forum Fees Due = \$400.

Forum fees Assessed Against:

1. Respondent Palagonia is assessed the sum of \$300 which represents one-third of the total forum fees due less \$100 reimbursement to Claimant leaving \$200 due. Respondent Palagonia is liable and shall pay to the NASD the sum of \$200.
2. Respondent Blair is assessed the sum of \$300 which represents one-third of the total forum fees due less \$100 reimbursement to Claimant leaving \$200 due. Respondent Blair is liable and shall pay to the NASD the sum of \$200.

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

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Concurring Arbitrators' Signatures

Name

Public Chairperson

Marilyn J. Salzman
Marilyn J. Salzman, Esq.

Name

Public Panelist

Richard W. Vallario
Richard W. Vallario, Esq.

Name

Industry Panelist

James A. Tricarico
James A. Tricarico, Esq.

Date of Decision: _____

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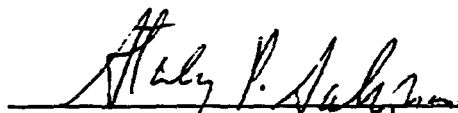
NASD Award #94-02402

STATE OF: *New York*

SS:

COUNTY OF: *Nassau*

On this *9th* day of *May*, 1995, before me personally appeared **Marilyn J. Salzman, 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.



STANLEY P. SALZMAN
NOTARY PUBLIC, State of New York
No. 8746425

Qualified in Nassau County

STATE OF: *Commission Expires August 31, 1996*

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **Richard W. Vallario, 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.

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **James A. Tricarico, 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.

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Concurring Arbitrators' Signatures

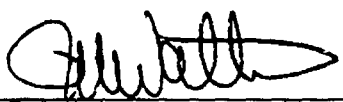
Name

Public Chairperson

Marilyn J. Salzman, Esq.

Name

Public Panelist



Richard W. Vallario, Esq.

Name

Industry Panelist

James A. Tricarico, Esq.

Date of Decision: _____

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NASD Award #94-02402

STATE OF:

SS:

COUNTY OF:

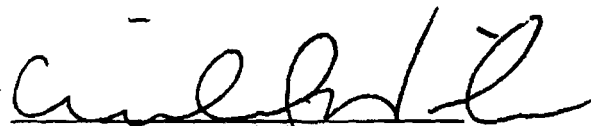
On this day of , 1995, before me personally appeared **Marilyn J. Salzman, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF:

SS:

COUNTY OF:

On this 15 day of May , 1995, before me personally appeared **Richard W. Vallario, 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.



MICHAEL J. VIOLA
Attorney at Law
State of New Jersey

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **James A. Tricarico, 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.

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NASD Award #94-02402

Concurring Arbitrators' Signatures

Name

Public Chairperson

Marilyn J. Salzman, Esq.

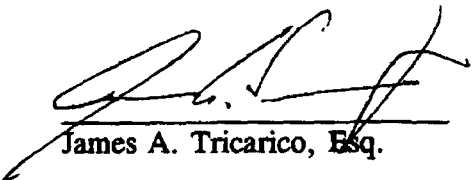
Name

Public Panelist

Richard W. Vallario, Esq.

Name

Industry Panelist


James A. Tricarico, Esq.

5/2/95

Date of Decision: _____

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NASD Award #94-02402

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared Marilyn J. Salzman, 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.

STATE OF:

SS:

COUNTY OF:

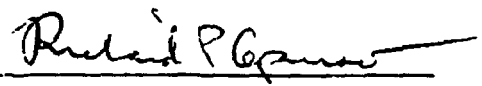
On this day of , 1995, before me personally appeared Richard W. Vallario, Esq. known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF: New York

SS:

COUNTY OF: New York

On this 12th day of May , 1995, before me personally appeared James A. Tricarico, 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.



RICHARD P. CAPURSO
Notary Public, State of New York
No. 01CA5019705
Qualified in Queens County
Commission Expires November 1, 1995