

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Universal National Bank

94-04910

Name of Respondents

Marcus, Stowell & Beye Government Sec.  
Marcus, Stowell & Beye Inc.  
Meridian Securities Inc  
Philip Boyd

Name of Third-Party Respondents

George Feldenkreis  
Moises Chorowski  
Gary W. Dix  
A.D. Fuller  
Larry Perl  
Peter E. Ryan  
S. B. Topf

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**REPRESENTATION**

For Claimant Universal National Bank ("Universal"): Neale J. Poller, Esq., of Stuzin and Camner, P.A., Miami, Fl.

For Respondent Meridian Securities Inc. ("Meridian"): William P. Thornton, Esq. of the law offices of William P. Thornton, Reading Pa.

For Respondent Marcus, Stowell & Beye Government Sec. ("MSBG"), Marcus, Stowell & Beye Inc. ("Marcus, Inc."), David L. Hoffberg, Esq. of Nixon, Hargrave, Devans & Doyle, Rochester, NY

Respondent Philip Jeff Boyd ("Boyd") is pro se.

**CASE INFORMATION**

Statement of Claim filed on: December 8, 1994.

Amended and Supplemental Statement of Claim filed on: April 3, 1995.

Claimant's Second Supplement to Amended and Supplemental Statement of Claim filed on: July, 27, 1995.

Claimant's Submission Agreement signed on: November 16, 1994 by Peter Ryan on behalf of Universal.

Statement of Answer filed jointly by Respondents Marcus, Inc. and Boyd, on : April 26, 1995.

Statement of Answer to the Amended and Supplemental Statement of Claim filed by Respondent Meridian on: May 12, 1995.

Statement of Answer to the Second Supplement to Amended and Supplemental Statement of Claim filed by Respondent Meridian on: July 13, 1995.

Statement of Answer to the Second Supplement to Amended and Supplemental Statement of Claim filed by Respondents Marcus, Inc. and Boyd on: July 28, 1995.

Respondent, Meridian did not file a Submission Agreement as required by Rule 10314 of the NASD Code of Arbitration Procedure (see "Other Issues").

Respondent Marcus, Inc. Submission Agreement signed on: April 20, 1995 by Marion Martin on behalf of Marcus, Inc.

Respondent MSBG's Submission Agreement signed on: April 20, 1995 by Marion Martin on behalf of MSBG.

Respondent Boyd's Submission Agreement signed on: April 20, 1995.

### **HEARING INFORMATION**

On April 15, 16, and 17, 1996, August 6, 7, and 8, 1996, and October 1 and 2, 1996 in Fort Lauderdale, Florida, hearings lasting (16) sessions were conducted.

### **CASE SUMMARY**

Claimant, Universal, a Seventy Million (\$70,000,000) community bank at the time this claim ripened, alleges that Respondents, Marcus, Inc., MSBG and Boyd, were liable for violations of Section 10b(5) of the Securities Exchange Act, breach of fiduciary duty, violations of Florida Statute Section 517.301, common law fraud and negligence. Claimant alleges that Respondents induced Claimant to buy extremely volatile and complex securities, wholly unsuitable for its portfolio, with the knowledge (or duty to know), that these types of high risk securities were unsuitable for Claimant's portfolio. Claimant relied upon Respondents for guidance and

supervision in its portfolio. Claimants alleged that Respondents breached the fiduciary duty owed to Claimant by recommending the unsuitable securities. Further, Respondents Marcus, Inc. are at fault and therefore negligent for failing to supervise their agent, Respondent Boyd, and for allowing Boyd to place these securities in Claimant's portfolio.

Respondents, Marcus, Inc., MSBG and Boyd, alleged that Claimants erred in their Second Supplement to Amended and Supplemental Statement of Claim, where Claimants alleged that Respondents had exercised de facto control over Claimant's securities account, and (a) churned the account; (b) charged illegal markups; and (c) sold Claimant five unsuitable securities. The churning allegations were dismissed at the close of Claimant's proof. The mark-up claims were withdrawn by Claimant prior to the commencement of the arbitration hearing. In its proof, Claimant refined the suitability claim to allege that the five securities, all purchased in the second half of 1993 and placed in Claimant's Held for Sale Account, were unsuitable for trading. At the time the securities were purchased, Respondents alleged that the bond market was very favorable for investors. Respondents denied any cognizable legal claim for lack of suitability for trading. Respondents alleged that Claimants failed to show that the bonds were unsuitable, and particularly that they were unsuitable for trading. Further, Respondents argued that Claimant's trading activity was done by it with full knowledge of the risks of such activity, including the risks articulated in the FFIEC Statement dated February 10, 1992 which applied to Claimant Bank. It is uncontroverted that the bond market took an unfavorable turn beginning early in February, 1994. That turn adversely affected the bond market, and adversely affected the five securities in question.

### **RELIEF REQUESTED**

Claimant requested the following damages:

1. Actual and Compensatory Damages from Respondents Meridian, MSBG, Marcus, Inc., and Boyd, in the amount of \$905,000.00.
2. Costs, punitive damages, attorney's fees, and treble damages.

Respondents requested that the panel deny Claimant's claim for damages, that no relief be entered against Respondent or in favor of the Claimant.

3. Respondents, Marcus, Inc. and Boyd, requested punitive damages in their counter-claim against the Claimant.

### **OTHER ISSUES CONSIDERED & DECIDED**

Claimant withdrew its claim against Meridian and the Panel granted the motion to dismiss all other individuals in the Third Party Claim. The following parties were dismissed without prejudice pursuant to Claimant's Motion to Strike Third Party Claim from the arbitration prior to the hearings: George Feldenkreis, Moises Chorowski, Gary W. Dix, A.D. Fuller, Larry Perl, Peter E. Ryan and S.B. Topf. Nevertheless Meridian was required to execute a Submission

Agreement since Meridian was an NASD member firm at the time the costs giving rise to the controversy occurred.

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 the NASD.

### **AWARD**

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

1. Claimant's request for actual damages from all Respondents is denied.
2. Claimant's request for costs, punitive damages, and attorney's fees are denied.
3. Respondents' request for damages is denied.

### **OTHER COSTS**

Other than the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

### **FORUM FEES**

Pursuant to Rule 10332(c) (formerly Section 43c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$16,000.00 (16 sessions X \$1,000.00).

1. Claimant, Universal is hereby assessed \$8,000.00 for which the NASD shall retain the \$1,000.00 hearing session deposit paid by the Claimant and \$250.00 over-payment, in partial satisfaction, leaving a balance of \$6,750.00 due to the NASD.
2. The NASD shall retain the \$250.00 non-refundable filing fee previously paid by the Claimant.
3. Respondents, Marcus, Inc. and MSBG and Boyd are hereby assessed \$8,000.00, jointly and severally for which the NASD shall retain \$600.00 previously paid by Marcus, Inc., in partial satisfaction, leaving a balance of \$7,400.00 due to the NASD.
4. Respondent, MSBG still owes \$100.00 pursuant to Rule 10333 (formerly Section 45) Member Surcharge payable to the National Association of Securities Dealers, Inc.
5. Respondent, Marcus, Inc., still owes \$500.00 Rule 10333 (formerly Section 45) Member Surcharge payable to the National Association of Securities Dealers, Inc.

6. The NASD shall refund to Respondent Meridian the \$200.00 paid by them in error to the NASD.

Fees are payable to the National Association of Securities Dealers, Inc.  
Concurring Arbitrators' Signatures

\_\_\_\_\_/s/\_\_\_\_\_  
Lewis J. Levey, Esq.

Chairperson/ Public

\_\_\_\_\_/s/\_\_\_\_\_  
Edward Burstein

Industry

\_\_\_\_\_/s/\_\_\_\_\_  
John Brekka

Public

Date of Decision: November 27, 1996