

**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 J. Giganti, M.D.

95-00516

**Name of Respondents**

Greenway Capital Corp.  
Marc A. Russo

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**REPRESENTATION**

For Claimant: James A. Devito, Esq. of Devito & Colen P.A., Largo, FL.

For Respondent, Greenway Capital Corp. ("Greenway"): Ruthann G. Niosi, Esq., New York, NY.

For Respondent, Marc A. Russo ("Russo"): Marc J. Ross, Esq., New York, NY.

**CASE INFORMATION**

Statement of Claim filed: February 15, 1995.

Claimant's Submission Agreement signed on: January 30, 1995.

Statement of Answer filed by Respondent Greenway on: March 4, 1996.

Respondent Greenway did not file a Submission Agreement as required by Rules 10301 and 10314 of the Code of Arbitration Procedure ("Code").

Statement of Answer filed by Respondent Russo on: April 6, 1995.

Respondent Russo's Submission Agreement signed on: April 4, 1995.

**HEARING INFORMATION**

On March 4, 1996, a telephonic pre-hearing conference was conducted with the Chairperson.

On January 14, 1997 in Tampa, FL a hearing lasting two sessions was conducted.

### **CASE SUMMARY**

Claimant alleged that before he opened his account with Greenway, his portfolio of investments contained investments in mature companies which provided him with retirement income and limited risk suitable for a person of 79 years of age. The Claimant further alleged the following: that his past investment experience and activities had never included an active trading account in high risk small-capitalized securities as promoted by Respondents; that he was totally uninformed and inexperienced concerning the meaning and affect of Greenway's position as a market-maker in the solicited transactions; that Respondents engaged in high pressure telephone sales tactics and promoted securities intended to benefit their market-maker activities at the expense of and to the detriment of Claimant; that Respondents knew or should have known that the securities recommended and purchased for Claimant's account were unsuitable; and, that the activities engaged in by the Respondents violated their duties under Sections 1, 2, 3, and 4 of Article III of the NASD Rules of Fair Practice and/or constituted negligent misconduct in the management of Claimant's account.

Respondent Greenway denied all allegations of inappropriate misconduct. Respondent Greenway further alleged that during the course of Claimant opening his account with Greenway, he stated that although he was 79 years old, he was an extraordinarily wealthy individual and, consequently, his age was not a determining factor in assessing the suitability of a more speculative investment objective which he sought to attain with Greenway. In addition, Greenway alleged that Claimant discussed at length with Russo that he was well aware of the attendant increased and high risks of purchasing lower priced NASDAQ issues, but that he could well afford to lose his investments without any disruption in his lifestyle.

Respondent Russo denied all material allegations contained within the Statement of Claim. Russo further alleged the following: that all investments conducted through him were executed according to instructions as given by Claimant; that the Claimant should not be permitted to use his age as an excuse for avoiding the outcome of his own well-considered investment decisions; that the Claimant had participated in a plethora of investment activities over the years; that he made informed and educated decisions to begin investing in small capitalization issues with his discretionary funds; and, that to claim that such investments were "unsuitable" for a person of his advanced years and situation is baseless.

### **RELIEF REQUESTED**

Claimant requested compensation for his damages in an amount not less than \$194,000.00, pre-judgement interest, and all reasonable costs incurred in bringing this action.

Respondent Greenway requested dismissal of the claim.

Respondent Russo requested dismissal of the claim in its entirety and that he be granted all costs and expenses incurred in the course of defending this action.

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

On January 8, 1997 the NASD received, via facsimile, a copy of a letter from Claimant's counsel addressed to Respondent Russo's counsel confirming that Respondent Marc A. Russo had been dismissed from this action with prejudice. Russo did not appear at the final hearing.

At the hearing on January 14, 1997 Ms. Niosi, Respondent Greenway's counsel, stated that she was not advised of the dismissal of Russo from these proceedings until the day before the hearing. In addition, Ms. Niosi stated that Russo was an essential witness for the defense of the claims against her client. Ms. Niosi requested that the panel leave the record open until she was able to locate Russo and have him available to provide testimony. The Claimant objected to any delay in the proceedings. After discussions with both parties present, the panel denied Greenway's request to leave the record open. The Chairperson did execute an Order of Appearance for Russo dated January 14, 1997, which was sent via facsimile by Greenway's counsel to Russo's counsel on the morning of the hearing. Mr. Russo did not appear, either telephonically or in person, by the conclusion of the hearing.

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) Respondent Greenway Capital Corp. is found liable and shall pay to the Claimant the amount of \$175,000.00.
- 2) Claimant's requests for pre-judgement interest and costs are denied.

### **OTHER COSTS**

Other than as provided 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) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$1,800.00 (one pre-hearing conference x \$300 plus two hearing sessions x \$750.00).

- 1) Claimant is hereby assessed \$900.00 for which the NASD shall retain the \$750.00 previously deposited in partial satisfaction thereof leaving a balance due to the NASD of \$150.00.

- 2) Respondent Greenway is hereby assessed \$900.00 payable to the NASD.
- 3) Respondent, Greenway is still owing the previously assessed fee of \$1,000.00 for Greenway's second request for postponement of the previously scheduled hearing that was granted by the Panel on October 8, 1996.
- 4) Respondent, Greenway is still owing the previously assessed member surcharge of \$350.00.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/s/

Public

James A. Cormack

/s/

Industry

Dan G. S. Wright

/s/

Public

Walter E. Brittain

February 11, 1997

Date of Decision: \_\_\_\_\_