

# NASD REGULATION AWARD

In the Matter of the Arbitration Between

Name of Claimant

Eugene R. Berger

95-00704

Name of Respondents

Investors Associates, Inc.  
David Daniel Adams

---

**REPRESENTATION**

For Claimant, Eugene R. Berger ("Claimant"), appeared Gerald B. Kline Esq., located in Atlanta, Georgia. Claimant appeared Pro Se at the hearing.

For Respondents, Investors Associates, Inc. ("IAI"), and David Daniel Adams ("Adams"), (jointly "Respondents") appeared, Lawrence R. Gelber Esq., in-house counsel for Investors Associates, Inc.

**CASE INFORMATION**

The Statement of Claim was filed on February 27, 1995. Claimant's Submission Agreement was signed on February 8, 1995. An Amended Statement of Claim was filed on November 14, 1995.

Respondents' Joint Statement of Answer was filed on April 12, 1995. Respondent IAI's Submission Agreement was signed on March 8, 1995. Respondent Adam's Submission Agreement was signed on April 12, 1995.

**HEARING INFORMATION**

Pre-Hearing Conference:	January 4, 1996	-	One Sessions
Hearing dates/sessions:	February 13, 1997	-	Two Sessions

The hearings were held at the offices of NASD Regulation, Inc., located at New York, New York.

**CASE SUMMARY**

Claimant alleged that in early November he was hired by R.J. Mathews ("Mathews"), the executive vice-president of the Atlanta branch of IAI, as a "cold caller" and at that time Adams was President of the Atlanta branch. Claimant further alleged that he worked in this position until mid-December 1992 when the cold caller position was eliminated. Claimant also alleged that Mathews promised him he could

become a broker if he loaned him \$9,000.00 so he could purchase call options. Claimant asserted that, on December 23, 1992, he signed an Employment Acceptance Agreement ("Contract") with IAI and started working as a broker in late 1993. Claimant further asserted that he was fired from this position a week later. Claimant also asserted that during this time Mathews was his registered representative. Claimant contended that, on February 17, 1993, he entered into a Seminar Partnership Agreement ("Agreement") by which Mathews agreed to develop a business called "Successful Money Management Seminars" ("Seminars"). Claimant further contended the Agreement provided he would work as the personal administrative assistant to Mathews and thus, under NASD rules, his relationship with Mathews would be as a "public customer" and not as an "associated person".

Claimant also contended that the Agreement was analogous to a limited partnership with R.J. Mathews as the general partner and claimant as a limited partner and thus qualified as a security. Claimant maintained that, pursuant to the Agreement, he invested \$20,000.00 into the Seminar business and "rolled" into the enterprise the previous \$9,000.00 loaned by him to Mathews for a total investment of \$29,000.00. Claimant further maintained that only \$7,000.00 was spent on the Seminars and that no seminars were ever conducted and Mathews paid himself a salary of \$4,000.00 a month for three months. Claimant also maintained that the remaining money was converted to the use of Mathews, Adams and IAI in violation of the Georgia Racketeer Influenced and Corrupt Organizations Act ("RICO"), Federal RICO statutes and the rules and regulations of NASD and the Securities and Exchange Commission ("SEC"). Claimant alleged that Mathews committed the following predicate acts required under the RICO statutes: manipulation of his employment status and fraudulent securities purchases to convert his money; commission of mail fraud by using the United States Postal Service to franchise fraudulent Seminars; and taking a salary for establishing the non-existent Seminars. Claimant further alleged that Mathews violated the Georgia Securities Act of 1973 by selling him an interest in the Seminar, accepting compensation for an outside business activity (the Seminar) without prior approval of the corporate compliance office at IAI, selling claimant an unsuitable security, and failing to perform due diligence concerning the sale of the security. Claimant also alleged that Adams was required to supervise Mathews and therefore was an accomplice in the wrongdoing committed against him. Claimant asserted that Adams and Mathews used part of the money he invested in the Seminars to travel on IAI business. Claimant also asserted that, if IAI was unaware of the corporate use of claimant's funds, it is guilty of criminal negligence. Claimant contended that Mathews and the respondents falsely claimed he was an associated person to avoid the consequences of criminally converting the assets of a public customer.

Respondents maintained they are included in the arbitration only because the claimant needed a "deep pocket" to recover from his bad business deal with Mathews. Respondents further maintained that claimant's joint business venture with Mathews does not constitute a limited partnership or a security. Respondents also maintained that they were not parties to the Agreement between claimant and Mathews, did not receive any kind of remuneration from claimant, or in any way, directly or indirectly, cause Claimant's loss. Respondents asserted that they did not participate in the \$9,000.00 loan Claimant made to Mathews. Respondents further asserted that, while the Agreement may have been unfair to the claimant because it allows Mathews to meet his own personal living expenses out of the money provided by claimant, it fails to satisfactorily allege a fraud against Mathews, much less against the Respondents. Respondent also asserted that, since they played no role whatsoever in the business transaction about which claimant complains, they could not have violated RICO or any securities laws or common law duties. Respondents contended that claimant admits they were not parties to the Agreement or were even mentioned in it. Respondents further contended that claimant alleged Mathews defrauded IAI, thus IAI cannot be liable to claimant for the fraudulent acts of Mathews.

Respondents alleged that claimant's employment dispute with IAI is based on a non-existent contract between him and IAI and that the "Employment Acceptance Agreement" was merely an unsigned

document obligating a registered representative to comply with applicable rules.

Respondents further alleged, as affirmative defenses, that the Statement of Claim failed to state a claim upon which relief may be granted, the claims are barred by the doctrines of waiver, estoppel and ratification, claimant assumed the risk of his business relationship with Mathews, claimant failed to mitigate his damages, the claims are barred by the doctrine of unclean hands, and the securities fraud claims are barred by the applicable one year statute of limitations.

### **RELIEF REQUESTED**

Claimant requested that: IAI apologize for failure to supervise its Atlanta Branch employees; admit that Claimant, as of February 17, 1993, was a Public Customer and not an "Associated Person"; IAI amend Claimant's U-5 to show that he was terminated in late January 1993; he be awarded actual damages of \$29,000.00; treble damages under RICO for a total \$87,000.00; punitive damages in the amount of \$300,000.00; and interest, attorney fees and the cost of the arbitration.

Respondents requested: the Statement of Claim be dismissed in its entirety, costs, fees, and reasonable attorneys fees of not less than \$8,500.00; sanctions against the Claimant; and such other relief as is just.

### **OTHER ISSUES CONSIDERED AND DECIDED**

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**

#### **ARBITRATORS' REPORT**

The arbitrators made the following findings:

1. The transaction between Mr. Berger and Mr. Mathews was a private loan transaction, and was not a security. Therefore, neither Investors Associates nor Mr. Adams had any supervisory liability.
2. The parties to the loan agreement were Mr. Berger and Mr. Mathews only. Therefore, neither Investors Associates nor Mr. Adams had any supervisory liability.
3. There was no security or security transaction involved. The loan was for the purpose of purchasing educational materials and for Mr. Mathews personal use without restriction.
4. The educational material was for the purpose of conducting seminars during which securities may be recommended and sold. However, no seminars were ever conducted, so we believe no securities were ever sold related to the seminars.

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 Eugene R. Berger's claims be and hereby are dismissed in their entirety.
2. All requests for attorney fees are denied.
3. All requests for punitive damages are denied.
4. All requests for sanctions are denied.
5. All other requests for relief are denied.

**FORUM FEES**

Pursuant to Rule 10205 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$750.00 non-refundable filing fee previously deposited by the Claimant and have assessed the following forum fees:

1 Pre-Hearing Session x \$300.00	= \$ 300.00
2 Hearing Sessions x \$750.00	= \$1,500.00
Total	= \$1,800.00

The arbitrators have determined that claimant shall bear one-half the cost of arbitration and that respondents Investors Associates, Inc. and David Daniel Adams shall jointly and severally bear one-half the cost of arbitration.

Claimant, Eugene R. Berger, be and hereby is liable and shall pay to NASD Regulation Inc. \$900.00 representing one-half of the total amount of forum fees assessed. Claimant previously deposited \$750.00 dollars to NASD Regulation, Inc. Therefore, Claimant, Eugene R. Berger, shall pay to NASD Regulation, Inc. the sum of \$150.00.

Respondents, Investors Associates, Inc., and David Daniel Adams, are jointly and severally liable for \$900.00 representing one-half of the forum fees assessed.

Fees are payable to NASD Regulation, Inc.

ARBITRATORS' SIGNATURES

F. John Herrmann

F. John Herrmann  
Chairperson


Date of Decision 4/28/97

\_\_\_\_\_  
Michael Storn  
Panelist

\_\_\_\_\_  
Chesley V. Morton, Jr.  
Panelist

ARBITRATORS' SIGNATURES

\_\_\_\_\_  
F. John Herrmann  
Chairperson

  
\_\_\_\_\_  
Michael Stern  
Panelist

Date of Decision 4/28/97

\_\_\_\_\_  
Chesley V. Morton, Jr.  
Panelist

**ARBITRATORS' SIGNATURES**

\_\_\_\_\_  
F. John Herrmann  
Chairperson

\_\_\_\_\_  
Michael Stern  
Panelist

  
Chesley V. Morton, Jr.  
Panelist

Date of Decision 4/28/97