

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Jay Polonsky

95-00753

Name of Respondent

Arthur Bergen

REPRESENTATION

For Claimant Jay Polonsky ("Claimant") appeared Gerald A. Kaufman, Esq., New York, New York.

For Respondent Arthur Bergen ("Respondent") appeared Edmund S. Purves, Esq. of the law firm Clifford, Gelband & Purves located in Larchmont, New York.

CASE INFORMATION

The Statement of Claim was filed on February 6, 1995. Claimant's Submission Agreement was executed on February 6, 1995.

Respondent filed a Statement of Answer on May 5, 1995. Respondent's Submission Agreement was executed on April 27, 1995.

HEARING INFORMATION

The hearing took place at the National Association of Securities Dealers, Inc. offices located in New York, New York on October 12, 1995 and lasted one session.

CASE SUMMARY

Claimant alleged that on or about July 26, 1994, Respondent entered into a written agreement with both Claimant, a principal of Associated Investors Corporation ("Associated"), and Associated concerning the settlement of an arbitration matter pending before the NASD against Claimant, Associated and Respondent. Pursuant to the terms of the settlement agreement, Claimant and Associated agreed to advance the full settlement amount of \$35,000 with Respondent promising to pay to Associated or its nominee the sum of \$17,500 as his share of the settlement with payment due on or before October 26, 1994. Claimant further alleged that Respondent, as part of the settlement agreement, agreed to sign a promissory note to secure the obligation of \$17,500 which would grant a security interest and lien to all securities owned or to be owned by Respondent to the extent of \$17,500. Claimant alleged that he is the nominee and that Respondent has failed to deliver such a note or security or pay the \$17,500 sum as agreed to in the settlement of the arbitration claim.

Respondent maintained that he is not obligated to pay Claimant the amount sought because the claim was

caused by the improper actions of Associated and Claimant in the handling of public offering of Diversifax, Inc. in that when the price of Diversifax went below the offering price, Claimant and Associated took over the investment and made it a firm investment; Claimant and Associated failed to advise the customer that he had three days to rescind the purchase; and Claimant and Associated violated the rules and regulations of the NASD in the handling and offering of the shares. As a result, Respondent maintained the agreement is unenforceable. Respondent further maintained his signature was obtained by misrepresentation and coercion.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$17,500 or alternatively, collateral security in the form of negotiable securities, stocks or bonds in an amount in excess of \$17,500; interest from October 26, 1994 until the judgment is paid; and costs, expenses and disbursements, including reasonable attorneys' fees.

Respondent requested the Statement of Claim be dismissed and that he recover his costs and disbursements, including reasonable attorneys' fees.

AWARD

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

1. The Respondent shall pay to the Claimant the sum of \$ 17,500.00 together with interest at the rate of 9% per annum from July 26, 1994 until time of payment.
2. Each party shall bear their respective costs, including attorneys' fees, except that Respondent shall reimburse Claimant the sum of \$800.00 representing forum fees deposited by the Claimant with the NASD.
3. All other claims be and hereby are denied.

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the arbitrator has determined that the NASD shall retain the non-refundable filing fee and \$300.00 hearing session deposit previously deposited by Claimant with the NASD.

Arbitrator's Signature
Name


John J. O'Neill, Esq.

I, John J. O'Neill, Esq., do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.


John J. O'Neill, Esq.

NASD November 16, 1995
Date of Decision