

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Nicholas Mirabile

No. 95-01502

Name of Respondents

Bear Stearns & Company
Douglas L. Berger

REPRESENTATION

The Claimant, Nicholas Mirabile ("Mirabile"), was represented by Charles Hamilton of Law Offices of H. Dawson French located in Dallas, Texas.

The Respondents, Bear Stearns & Co. (Bear Stearns") and Douglas Berger ("Berger") were represented by Terek F. M. Saad of Hughes & Luce located in Dallas, Texas.

CASE INFORMATION

The Statement of Claim was filed on March 22, 1995.

Claimant's Submission Agreement was signed on February 9, 1995.

The Joint Statement of Answer was filed by Respondents, Bear Stearns and Berger, on June 15, 1995.

Respondent, Bear Stearns, Submission Agreement was signed by Mark Lehman on September 21, 1995.

Respondent, Berger's, Submission Agreement was signed on September 19, 1995.

HEARING INFORMATION

One (1) Pre-Hearing Conference was held on October 6, 1995 for one (1) session.

Hearing Dates were October 10, 1995 for two (2) sessions, October 11, 1995 for three (3) sessions and October 12, 1995 for three (3) sessions.

The Hearing Location was Dallas, Texas.

CASE SUMMARY

Claimant, Mirabile, alleged that Respondents wrongfully induced and encouraged Claimant to purchase various high risk securities, options, and futures. Specifically, Claimant's alleged that Respondents gave a false and misleading prospectus or oral communication under the 1933 Act, Securities Fraud under Section 10(b) and Rule 10b-5 under the 1934 Act, Negligence, Bad Faith and Breach of Fiduciary or Special Duties, Securities Fraud under the Texas Act, Deceptive Trade Practice under the DTPA, Securities and Real Estate Fraud under Texas Law, Common Law Fraud, Civil Action for Damages Under the Commodities Exchange Act,

Breach of Contract, and sought Attorney's Fees and Punitive Damages.

Respondents alleged that Mirabile was responsible for the losses he incurred as a result of his own investment decisions. Specifically, Respondents alleged that in opening his non-discretionary account, Mirabile provided Respondents with financial information showing a net worth of over \$1.4 million. Further Mirabile relied on investment advice obtained from financial television and radio shows, investment publications, journals and news articles, rather than listening to Respondents' input and advice regarding risks. When Claimant's trading and losses increased, Respondents thoroughly reviewed with him the risks, and he assured Respondents that he was fully aware of the status of his account and that he would not deplete his account below a cash balance of \$150,000. Respondents alleged that Claimant acknowledged in writing that his losses resulted from his actions alone and Respondents were in no way responsible. Claimant then tried to procure a guarantee from Respondents that they could recover his losses. Respondents refused to give such a guarantee. When Mirabile's account fell below the \$150,000.00 floor, Claimant's account was terminated. Despite never asserting a complaint about his account during the time his account was open, Claimant file a complaint.

RELIEF REQUESTED

Claimant requested that the panel enter judgment granting rescission to Claimant of his purchase of the Securities at issue and awarding him recovery from Respondents, joint severally, of consideration paid for such Securities, or the unrecovered balances of his investment, with legal interest thereon as provided by law, and ordering Respondents, jointly and severally, to pay exemplary damages to Claimant together with reasonable attorney's fees in connection with the action, court costs, and general relief, at law or in equity, to which Claimant might justly be entitled.

Respondents requested that the Claimant take nothing by his Statement of Claim, that Respondents be dismissed with their costs and that Respondents be granted such other relief to which they are entitled.

OTHER ISSUES CONSIDERED & DECIDED

The panel made the findings with regard to Douglas J. Schultz, who was offered as an expert in this case, as follows:

- (1). Mr Schultz has no current Commodities License and that his prior license held pursuant to Series 3 had expired;
- (2). Mr. Schultz has never had a supervisory position with a Securities Dealer and/or Commodities Broker;
- (3). Mr. Schultz has never taken an exam that would qualify him to be a Compliance officer;
- (4). Mr. Schultz failed to disclose on Claimant's Exhibit #1 that he had been registered with Doviak Securities, Inc.;
- (5). Mr. Schultz did not know if the conduct of the Dealer and/or its registered representative, alleged to have been improper, was only governed by the rules of the CFTC rather than the NASD.

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 and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

(1). That the Respondents are jointly and severally liable for and shall pay the Claimant \$81,000.000 in actual damages with 10% pre-judgment interest from March 22, 1995 through December 31, 1995;

(2). That the Respondents are jointly and severally liable for and shall pay post judgment interest at the legal rate 18% only if the award is not paid within 30 days of receipt of the award.

(3). That the award is strictly based on negligence and no attorneys fees or expert fees are to be awarded to Claimant. Based on the finding noted above, the panel gave no weight to Mr. Schultz's testimony as an expert witness therefor his testimony as a lay witness with an opinion as to the transaction involved in this case did not support the award of any fees for an expert for Claimant.

(4). That other than the forum fees which are addressed below, any relief not specifically awarded is denied.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

9 sessions X \$750.00 = \$6,750.00 minus hearing session deposit of \$750.00 = \$6,000.00 net due the NASD.

Forum fees are assessed against the Respondents, jointly and severally.

The NASD shall retain the \$200.00 filing fee previously paid for by Claimant. Pursuant to Section 45 of the Code Respondent Bear Stearns & Company shall pay its member surcharge in the amount of \$350.00.

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

Concurring Arbitrators' Signatures

Name:

Date:

/s/ Patrick Lanier
Patrick Lanier, Esq.
Chairperson
Public Arbitrator

June 10, 1996

/s/ Arvel McCulloch
Arvel McCulloch
Public Arbitrator

6-7-96

/s/ Alice Hughes
Alice Hughes
Industry Arbitrator

6-7-96

For NASD Use Only

Date Award served on the parties : June 12, 1996