

NASD REGULATION, INC. AWARD

NASD REGULATION, INC.

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In the Matter of the Arbitration Between

Name of Claimant

James Calcagnini

95-01669

Name of Respondent

Fidelity Investments Institutional Svcs

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**REPRESENTATION**

For Claimant James Calcagnini ("claimant") appeared John P. Cione, Esq. located in Solana Beach, CA.

For Respondent Fidelity Investments ("respondent") appeared John Jenkins, Esq. of the firm Shanley & Fisher, located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed: April 4, 1995.

Claimant's Submission Agreement signed on: March 17, 1995.

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

Respondent's Submission Agreement signed on: June 2, 1995.

**HEARING INFORMATION**

Hearing Dates/Sessions:	October 10, 1995	-	2 sessions
	April 24, 1996	-	2 sessions
	January 10, 1997	-	1 session
	January 22, 1997	-	2 sessions
	March 7, 1997	-	2 sessions

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

**CASE SUMMARY**

Claimant alleged that he maintained an account with respondent and, on November 18, 1993, owned in excess of 8,500 shares of Lafayette American Bank and Trust ("LABK"). Claimant further alleged that on November 19, 1993, LABK announced a rights offering to its stockholders, which provided that shareholders of record on November 18, 1993 will receive rights entitling them to subscribe to the bank's common stock at \$2.20 per share. Claimant contended that on December 21, 1993, January 18, 1994

and January 28, 1994, he sold 2,000, 6,000 and 500 shares respectively. Claimant further contended that respondent breached its duty by not notifying claimant on his confirmations that his shares were sold with rights and never notifying him in his monthly statements that he was short rights in his account from December 1993 to February 1994. Claimant alleged that, during March 1994, he received notice from respondent that he was short 8,500 shares of LABK in his account due to the exercise of the rights by whomever purchased his shares and was subsequently advised that the purchaser of his 8,500 shares oversubscribed to another 12,100 shares, making his account short a total of 20,600 shares. Claimant further alleged that respondent sold the remaining 2,500 shares of LABK in his account and then wrongfully debited his account for the purchase of 18,100 shares. Claimant contended that respondent has charged his account interest on the debit created by respondent in charging his account for the shares purchased by whoever did the oversubscription.

Respondent maintained that there is no regulatory requirement that confirmations reference the sale of rights. Respondent further maintained that claimant sold 8,500 shares of Lafayette American Bancorp, Inc., LABK's parent company, after the record date for eligibility for rights distribution, which was November 18, 1993, but prior to the ex-date, which was February 2, 1994. Respondent contended that since any stock traded between the record date and the ex-date is traded "cum rights", i.e., with rights until the ex-date, the buyer of claimant's shares was entitled to these rights. Respondent further contended that claimant's failure to deliver the rights caused both the 8,500 share short position with respect to the basic subscription and the 12,100 share short position with respect to the oversubscription. Respondent maintained that it should not be held liable for the consequences of claimant's failure to deliver the rights properly sold to a third party.

#### **RELIEF REQUESTED**

Claimants requested: reimbursement of \$22,036.50 charged to his account for the illegal oversubscription, interest at 8%, replacement of 2,500 shares of LABK common stock illegally withdrawn from his account, any interest erroneously charged to his account, punitive damages of \$50,000, costs and attorney's fees of \$20,000.

Respondent requested: that the claimant's claim be dismissed and legal fees be awarded.

#### **OTHER ISSUES CONSIDERED & 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.

The parties stipulated that respondent shall remit to claimant an overcharge in the amount of \$3,674.23 plus interest at 9% from March 1, 1994 through the date of this award.

#### **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. All claims against respondent be and hereby are dismissed.
2. The parties shall bear their respective costs, including attorney's fees.

3. All other claims be and hereby are dismissed.

**FORUM FEES**

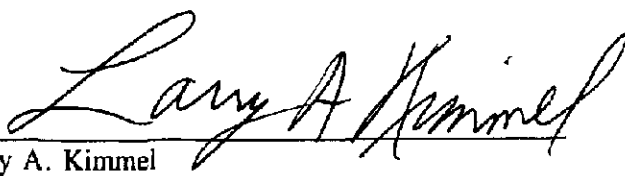
Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$150.00 non-refundable filing fee deposited by the claimant and have assessed the following Forum Fees.

9 hearing sessions      x      \$500.00      =      \$4,500.00

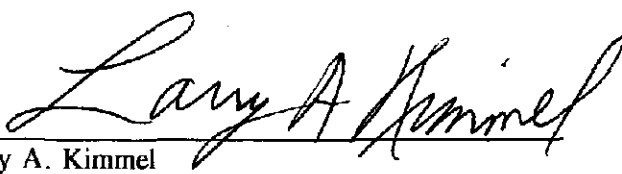
Claimant be and hereby is liable for \$2,250.00 representing one half of forum fees assessed. Claimant previously deposited \$900.00 with NASD Regulation, Inc. Therefore, claimant owes \$1,350.00.

Respondent be and hereby is liable for \$2,250.00 representing one half of forum fees assessed.

Fees are payable to the NASD Regulation Inc.

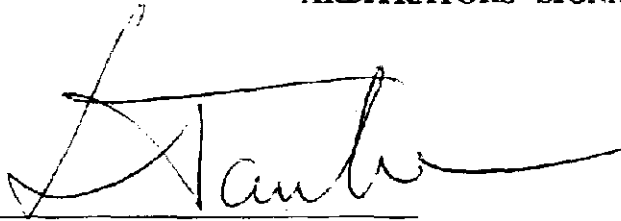
  
Larry A. Kimmel

I, Larry A. Kimmel, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
Larry A. Kimmel

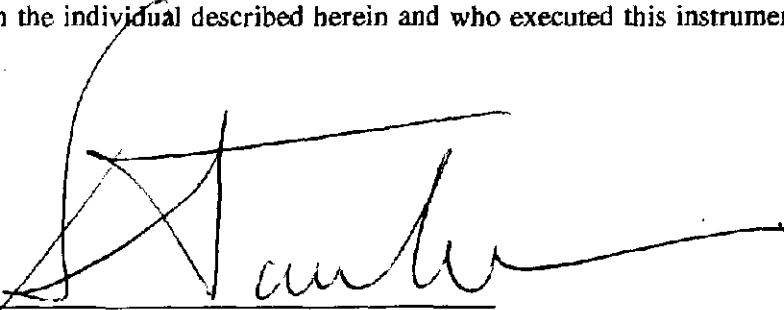
DATE OF DECISION: APRIL 23, 1997

ARBITRATORS' SIGNATURES

A handwritten signature in cursive script, appearing to read 'S. Taube', written over a horizontal line.

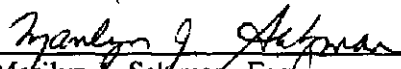
Seth T. Taube, Esq.

I, Seth T. Taube, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

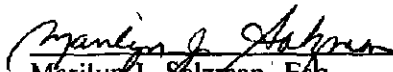
A handwritten signature in cursive script, appearing to read 'S. Taube', written over a horizontal line.

Seth T. Taube, Esq.

DATE OF DECISION: APRIL 23, 1997

  
Marilyn J. Salzman, Esq.

I, Marilyn J. Salzman, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
Marilyn J. Salzman, Esq.

DATE OF DECISION: APRIL 23, 1997