

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Harvey & Company, Inc.

95-03603

Name of Respondents

Eli Dror
Biltmore Securities, Inc.

REPRESENTATION

Claimant Harvey & Company, Inc. ("Claimant") was represented by Janet K. DeCosta, Esq., Law Offices of Janet K. DeCosta, P.C., Washington, D.C.

Respondents Biltmore Securities, Inc. ("Biltmore") and Eli Dror ("Dror") were represented by Peri Erlanger, Esq., Bernstein & Wasserman, New York, New York.

CASE INFORMATION

The Statement of Claim was filed July 26, 1995.
Claimant's Response to the Counterclaim was filed October 1, 1996.
Claimant's Uniform Submission Agreement was signed July 21, 1995.

The Joint Statement of Answer of Biltmore and Dror (collectively "Respondents") was filed October 6, 1995.
Biltmore filed a Counterclaim on September 27, 1996.
Biltmore did not file an executed agreement to arbitrate.
Dror's Uniform Submission Agreement was signed August 16, 1995.

HEARING INFORMATION

Prehearing Date/Sessions: September 24, 1996/one session

Hearing Dates/Sessions: January 6, 1997/two sessions
January 7, 1997/two sessions
January 8, 1997/two sessions
January 9, 1997/one session
January 10, 1997/two sessions

Hearing Location: NASD Headquarters
Washington, D.C.

Hearing Dates/Sessions: January 16., 1997/two sessions
January 17, 1997/one session

Hearing Location: ANA Hotel
Washington, D.C.

CASE SUMMARY

Claimant alleged, among other things, that Harvey & Company, Inc. is a minority owned consulting firm located in Washington, D.C. which invested, between July 1993 and January 1994, \$111,583.55 with Respondents. Claimant alleged that in July 1993, Dr. Barron Harvey ("Dr. Harvey") received a "cold call" from a representative of Biltmore, inviting the Claimant to open an account. Shortly thereafter, Claimant alleged that Dr. Harvey received a call from Dror during which Dr. Harvey's reiterated that he was not an experienced investor, that Harvey & Company had no investments, had limited liquidity, and could not risk losing capital by making speculative investments. Claimant alleged Dr. Harvey also informed Respondents that Harvey & Company wanted to invest in safe, stable, conservative companies with a history of steady growth.

Claimant also alleged that Dror assured Dr. Harvey that he would recommend only stocks consistent with the Company's goals and risk tolerance. Claimant alleged, however, that Dror's true intent was to obtain the Claimant as a client by recommending a safe stock, and then move the Claimant into speculative securities, irrespective of the Claimant's goals and objectives. Claimant further contended that the recommendation to purchase Heinz, followed by recommendations to purchase speculative stock including Harmony Holdings, Inc., (HAHO) in August and November 1993; Dollartime Group Inc. (DLRT) in September 1993; Healthcare Imaging Services, Inc. common stock and warrants (HISS and HISSW) in December 1993 and January 1994; and M.H. Meyerson & Co., Inc. (MHMCU) in January 1994 evidence this intent to disregard the Claimant's objectives and needs. Claimant further alleged that the Respondents made material misrepresentation and omitted material facts in connection with the purchase and sale of these securities.

Claimant alleged also that all trading activity in the account was solicited by the Respondents. Claimant alleged that the trading activity evidenced a pattern of improper in and out trading whereby Dror solicited the purchase and sale of securities irrespective of the economic benefit such transactions conferred on the Claimant. In addition, Claimant alleged that Harvey & Company's Biltmore account was excessively traded, churned, and contained securities which were not suitable in light of the Claimant's objectives and tolerance for risk. In this regard, Claimant contended that its account was turned over 8.6 times on an annualized basis and had a break-even return of 87%. Claimant also alleged that Biltmore failed to properly supervise Dror.

Claimant further contended that the Respondents engaged in market manipulative activities. Claimant alleged that these activities included high pressure sales tactics, frontrunning by principals, insiders and associated persons in connection with HAHO, DLRT, and HISSW, charging excessive markups, and failing to disclose markups. For example, Claimant contended that principals, associated persons, and insiders of Respondent Biltmore acquired HISSW as bonuses in November 1993 and sold those warrants at a profit of \$1,504,625.

Claimant asserted that the foregoing acts of Respondents Dror and Biltmore violated the federal securities laws; the common law of respondeat superior, fraud, negligence, and breach of fiduciary duty; as well as the NASD Rules of Fair Practice.

Respondents generally denied Claimant's allegations and averred that Claimant, through its agent Dr. Harvey, represented that he had an annual income of \$200,000, a net worth of \$1,000,000 and that his investment objectives were growth and speculation. Respondents further stated that Dr. Harvey was sent a form containing these representations, as well as a letter apprising Claimant of the risks attendant in the purchase of speculative securities and the nature of Respondents' business. The letter also contained a request that Claimant note any discrepancies contained on the form and return it to Respondents, which Claimant did not do. Respondents further averred that each and every transaction was directed and authorized, that the investments were suitable for Claimant, that the account was not churned and that Claimant could not recover for punitive damages or attorney's fees.

Respondents subsequently amended their Statement of Answer and added a Counterclaim. Respondents averred that, on August 23, 1993, Dr. Harvey signed a trading authorization form giving all authority to direct trading activity in the account to Claimant's controller Donald Council and containing an indemnification provision for all losses incurred as a result of this authorization. Respondents further averred that all communications regarding Claimant's account were with Council. On February 14, 1994, Respondents were informed that Claimant had suspended Council for investing company funds without approval. Upon receiving this information, Respondents referred Claimant's account to its compliance department and no subsequent purchases were made. Soon thereafter, Claimant informed Respondents that it had retained the services of another financial advisor to review the account and to sell out the remaining positions, which he did. Certain warrants remained in the account until their expiration date of November 1996.

Respondents counter-claimed that, in the event Respondents were found liable to Claimant for any of the transactions directed and/or authorized by Council or the financial advisor, that the Panel find Claimant liable for indemnification and reimburse Respondents for amounts assessed against them.

Respondents further denied that Claimant was entitled to attorney's fees under New York law or commissions and markups in its damages recovery. Respondents denied Claimant's market manipulation allegations at the hearing and in a post-hearing memorandum.

RELIEF REQUESTED

Claimant requested relief in the amount of compensatory damages of \$191,365; punitive damages in the amount of \$382,730; attorney's fees based upon 1/3 of the total compensatory and punitive damages award; expert witness fees in the amount of \$11,214; as well as the costs and expenses of this arbitration. Claimant also seeks an award of attorney's fees and expenses in the amount of \$12,040.63 and expert witness fees in the amount of \$3,613.00 as sanctions for abusive discovery practices by the Respondents.

Respondents requested that the Statement of Claim be dismissed.

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 panel considered Claimant's Motion For Sanctions and Respondents' Response thereto and deny the Motion in its entirety.

That pursuant to the by-laws of the NASD, the panel determined that Respondent Biltmore was required to submit to this arbitration, notwithstanding its failure to submit an executed agreement to arbitrate. Therefore, Respondent Biltmore is bound by the panel's rulings and determinations.

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 Claimant's claims are denied in their entirety.
2. That the claim for punitive damages is denied.
3. That the Respondent's Counterclaim is denied.
4. That each party shall bear its own costs and expenses except as specified in the Forum Fees section below.
5. That any and all relief not specifically addressed herein is denied.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

1 prehearing session x \$300.00 =	\$ 300.00
12 sessions x \$750.00 =	<u>\$9,000.00</u>
Total Forum Fees	\$9,300.00

Forum Fees are assessed to 50% to Claimant and 50% to Respondent Biltmore. Claimant is to receive credit for the \$750.00 hearing session deposit previously submitted to the NASD Regulation leaving a net assessment for Claimant of \$3,900.00. Respondent Biltmore is to receive credit for the \$750.00 hearing session deposit previously submitted to the NASD Regulation at the time of filing the Counterclaim, leaving the Respondent Biltmore with a net assessment due of \$3,900.00.

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

DATE

CONCURRING ARBITRATORS' SIGNATURES

2/14/97

Paul A. Yates
Paul A. Yates, Chairman
Public Arbitrator

2/14/97

Julia B. Williams
Julia B. Williams
Public Arbitrator

2/14/97

Joseph E. Godridge, Jr.
Joseph E. Godridge, Jr.
Industry Arbitrator

Date Decision Served by NASD Regulation:

February 27, 1997