

NASD REGULATION AWARD

In the Matter of the Arbitration Between

Name of Claimant

George W. Fogleman

95-03791

Name of Respondent

Christopher Testerman

REPRESENTATION

For claimant George W. Fogleman ("claimant") appeared John F. Bloss, Esq. of the law offices Clark, Wharton & Berry located in Greensboro, North Carolina.

For respondent Christopher Testerman ("respondent") appeared Michael Q. Carey, Esq. of the law offices Carey & Associates located in New York, New York. At the hearing conducted on November 12, 1997 respondent appeared without his counsel.

CASE INFORMATION

Statement of Claim was filed on: July 31, 1995.

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

Statement of Answer was filed by respondent on: December 19, 1996.

Respondent did not submit a properly executed Submission Agreement.

HEARING INFORMATION

Hearing Dates/Sessions:	July 15, 1997	-	2 sessions
	July 16, 1997	-	3 sessions
	November 12, 1997	-	2 sessions

The hearings conducted on July 15 and 16, 1997 were held at the Embassy Suites Hotel located in Raleigh, North Carolina. The hearing conducted on November 12, 1997 was held at the Raleigh Plaza Hotel located in Raleigh, North Carolina.

CASE SUMMARY

Claimant alleged that, during August 1993, he opened an account with respondent at F.N. Wolf

& Co., Inc. ("FN Wolf"). Claimant alleged that before he opened his account, respondent agreed to the following conditions: that claimant wanted long term growth and capital appreciation with safety of capital; that he would not place claimant in any initial public offerings; that no stocks would be sold out of FN Wolf's inventory or where FN Wolf was the market maker; and that he would only purchase stocks in a solid financial company with growth potential that were not over priced. Claimant contended that he purchased unsuitable stocks because respondent made misrepresentations about FN Wolf, his buyers, himself and his ability to pick stocks. In addition, claimant contended that respondent recommended the following stocks: Great American Rec, American Safety Closure, Capital Gaming, Cortex, Digital Products, Metal Clad Corp, and Site Base Media and made misrepresentations as to each of those recommendations. Claimant also alleged that although he expressed concerns about the decreasing stock prices, respondent told him that he was worrying unnecessarily.

Respondent generally denied all allegations asserted against him. Respondent asserted the following affirmative defenses: 1) failure to state a claim upon which relief could be granted; 2) statute of limitations; 3) waiver, estoppel, and ratification; 4) contributory negligence and assumption of risk; 5) failure to allege fraud with particularity; 6) failure to mitigate losses; and 7) failure to state any basis for an award of punitive or treble damages. In addition, respondent contended that, pursuant to Section 8110 of the Procedural Rules of the NASD, claimant had no private right of action, that respondent owed no fiduciary duty to claimant, and that the laws of North Carolina did not apply to claimant's claims.

RELIEF REQUESTED

Claimant requested actual damages in the amount of \$63,331.58 plus interest, and costs and expenses. In addition, claimant requested punitive and treble damages.

Respondent requested that the Statement of Claim be dismissed and that costs be assessed against claimant.

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.

By letter dated October 7, 1997, the parties were notified that the arbitrators had reviewed all correspondence submitted by the parties regarding the issue of scheduling hearings in this matter. The parties were also notified that the panel determined to schedule the hearings for November 12, 13 and 14, 1997 and ordered counsel for all parties to appear before the panel on those dates.

At the hearing conducted on November 12, 1997, respondent appeared without his counsel, Michael Q. Carey. Respondent made a request for a postponement because of a scheduling conflict of his counsel. The panel considered all submissions and arguments and, after due deliberation, the panel denied the request for a postponement.

After the panel denied respondent's request for a postponement and explained that the hearing would proceed with or without respondent's participation, respondent chose to leave the hearing. The hearing then proceeded without the participation of respondent.

The panel made the following determinations concerning respondent who did not file a Submission Agreement:

1. Pursuant to Rule 10101 of the Code of Arbitration Procedure ("Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that respondent was a person associated with a member of the NASD at the time this controversy arose. Accordingly, the panel found personal jurisdiction over respondent pursuant to Rule 10301 of the Code.
3. The panel found that respondent was required to file a Submission Agreement with NASD Regulation pursuant to Rule 10314(b) of the Code. In this regard, the panel found that the Statement of Claim was properly served upon respondent pursuant to Rule 10314(a) of the Code.

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. The panel hereby finds that respondent engaged in clear and willful fraud and breached the fiduciary duty owed to claimant.
2. Respondent be and hereby is liable for and shall pay to claimant compensatory damages in the sum of **SIXTY THREE THOUSAND FIFTY DOLLARS** (\$63,050.00).
3. Respondent be and hereby is liable for and shall pay to claimant punitive damages in the sum of **FIVE THOUSAND DOLLARS** (\$5,000.00). The panel awarded punitive damages in accordance with the case law referenced in Claimant's Arbitration Brief.
4. Respondent be and hereby is liable for and shall pay to claimant attorneys' fees in the amount of **TEN THOUSAND SIX HUNDRED SEVENTY NINE DOLLARS** (\$10,679.00). The panel awarded attorneys' fees in accordance with the case law referenced in Claimant's Arbitration Brief and the Customer Agreement (see Arbitrators' Exhibit 19).
5. Respondent be and hereby is liable for and shall pay to claimant pre-hearing interest in the sum of **TEN THOUSAND EIGHTY SEVEN DOLLARS** (\$10,087.00).

- 6 Respondent be and hereby is liable for and shall pay to claimant post-hearing interest at the rate of 8% per annum from November 12, 1997 until date of payment.
- 7 Respondent be and hereby is liable for and shall pay to claimant costs in the sum of **NINE HUNDRED TWENTY THREE DOLLARS** (\$923.00)
- 8 Respondent be and hereby is liable for and shall pay claimant the sum of \$500.00 to reimburse claimant for the hearing session deposit previously paid to NASD Regulation, Inc.
9. All other requests for relief are hereby denied.

FORUM FEES

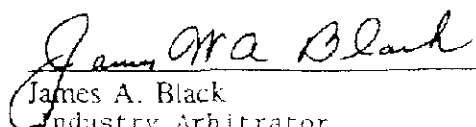
Pursuant to Rule 10332(c) of the Code, the panel has determined that NASD Regulation, Inc. shall retain the \$150.00 non-refundable filing fee previously deposited by claimant and has assessed the following forum fees:

7 hearing sessions x \$500.00	=	\$3,500.00
-------------------------------	---	------------

1. Respondent be and hereby is liable for the sum of \$3,500.00, representing the total amount of forum fees assessed. Claimant previously deposited \$500.00 with NASD Regulation, Inc. and, therefore, respondent shall pay the balance of \$3,000.00 to NASD Regulation, Inc.
2. Respondent shall pay claimant the sum of \$500.00 in accordance with the "Award" section above.

Arbitrators' Signatures

James Edward Neal
Chairperson-Public Arbitrator


James A. Black
Industry Arbitrator

Alan L. Button
Public Arbitrator

Date of Decision: December 16, 1997

Arbitrators' Signatures

James Edward Neal
Chairperson-Public Arbitrator

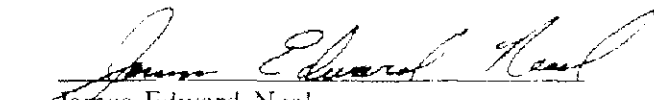
James A. Black
Industry Arbitrator



Alan L. Button
Public Arbitrator

Date of Decision: December 16, 1997

Arbitrators' Signatures


James Edward Neal
Chairperson-Public Arbitrator

James A. Black
Industry Arbitrator

Alan L. Burton
Public Arbitrator

Date of Decision: December 16, 1977