

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Robert Thomas Securities, Inc.

95-03950

Name of Respondent

Douglas McCaskey

REPRESENTATION

For Claimant Robert Thomas Securities, Inc. appeared John N. Critchlow, Esq., in-house counsel at Robert Thomas Securities, Inc.

Respondent Douglas McCaskey did not enter an appearance in this matter.

CASE INFORMATION

The Statement of Claim was filed on August 16, 1995. Claimant's Submission Agreement was signed on August 14, 1995.

Respondent Douglas McCaskey did not file a Statement of Answer as required pursuant to Section 25(b) of the Code of Arbitration Procedure.

Respondent Douglas McCaskey did not file a Submission Agreement as required pursuant to Section 25(b) of the Code of Arbitration Procedure.

HEARING INFORMATION

Hearing Date/Session: April 11, 1996 - One Session

The Hearing was held at the NASD offices located in New York City, New York.

CASE SUMMARY

Claimant Robert Thomas Securities, Incorporated ("Robert Thomas") alleged that Respondent Douglas McCaskey ("McCaskey") failed or refused to pay for shares purchased at this request. Specifically, on or about December 1, 1994 Respondent contacted Claimant to open a securities brokerage account. On December 5, 1994 Respondent contacted Claimant to place an order of 30,000 shares of Marcorp Incorporated ("MRCRD") at the price of 10-3/4 limit. This order was filled and confirmed that day. On December 6, 1994 Respondent again contacted Claimant to place another order for 10,000 shares of MRCRD at the price of 10-3/4 limit. This order was filled and confirmed that same day. The settlement

date for the orders was December 12, 1994 and December 13, 1994, respectively. On December 8, 1994 the Securities and Exchange Commission suspended all trading in MRCRD. Trading in the stock has never been resumed. Claimant maintained that despite its demand for payment, Respondent has not paid for the MRCRD shares purchased at his request. As a result of Respondent's failure or refusal to pay, there allegedly remains a debit balance in Respondent's account in the amount of \$430,006.00.

OTHER ISSUES CONSIDERED & DECIDED

The arbitration panel made the following ruling as to Respondent who failed to file and present a properly executed Submission of the dispute to NASD Arbitration (i.e. Submission Agreement), a Statement of Answer and failed to appear at the one New York Evidentiary hearing conducted in this matter without obtaining any adjournment/postponement thereof:

- 1) Pursuant to Section 10101 of the NASD Code of Arbitration Procedure ("Code") the panel found subject matter jurisdiction over this entire controversy.
- 2) The panel found that Respondent was a public customer of a NASD member, namely, Robert Thomas Securities, Inc., at the time this controversy arose. Consequently, the panel found personal jurisdiction over Respondent pursuant to Section 10301(a) of the Code. Additionally, Respondent executed a pre-dispute arbitration agreement to arbitrate this dispute with Claimant at NASD Arbitration.
- 3) In view of (2) above, Respondent was required to execute and file with the NASD a Submission Agreement pursuant to Section 10314(b) of the Code. In this regard the panel found that the NASD properly served the Claimant's claims upon Respondent pursuant to Section 10314(a) of the Code.

RELIEF REQUESTED

Claimant requested an award for damages in the amount of Four Hundred Thirty Thousand Six and 00/100 Dollars against Respondent, Douglas McCaskey and for pre-judgment interest, costs, attorney's fees and for such other and further relief as the panel deems just and proper.

AWARD

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

1. Respondent Douglas McCaskey be and hereby liable and shall pay Claimant Robert Thomas Securities, Inc. the sum of \$430,006.00.
2. All claims for interest be and hereby are denied.
3. All other relief requests are denied.

FORUM FEES

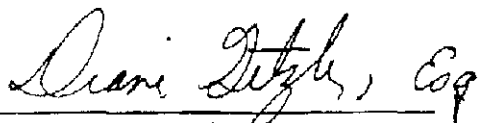
Pursuant to Section 10205 of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$500.00 non-refundable filing fee and \$750.00 hearing session deposit in full satisfaction of all forum fees assessed.

ARBITRATOR'S SIGNATURE



Diane Getzler, Esq.

I, **DIANE GETZLER, ESQ.**, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.



Diane Getzler, Esq.
Public Chairperson

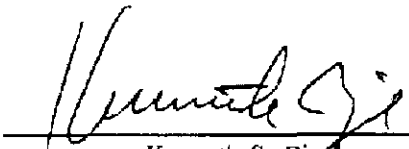
Date of Decision: October 30, 1996

Page Four
Award #95-03950

ARBITRATOR'S SIGNATURE

Kenneth S. Bigel

I, **KENNETH S. BIGEL**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.



Kenneth S. Bigel
Industry Panelist

Date of Decision: October 30, 1996

Dissenting Opinion of: Gerald Alpert - Public Arbitrator

In this arbitration, Claimant seeks recovery of damages in the sum of \$430,000. For purchases of 30,000 shares of Marcorp, Inc. @ \$10.75 per share ordered by Respondent and for which no payment was made. Respondent failed to appear, either by filing an answer to the claim or by attendance at the hearing, although duly notified thereof.

What appeared to be a simple claim for non-payment of a stock purchase, developed into a unique scenario of facts at the hearing calling into play the conduct of claimant in the execution of two buy-orders on behalf of Respondent, a person unknown to claimant, in the sum of \$430,000

A brief summary of the evidence indicates:

- (a) Respondent had no prior account with and was unknown to Claimant, but was referred by a friend or associate of the branch manager of claimant's Connecticut office;
- (b) That "Client's Account Agreement" (EX. 1) was prepared and signed by claimant on 12/8/94, subsequent to the execution of respondent's buy orders on 12/5-6/94;
- (c) That no credit check was made of respondent prior to the purchase of stock for his account but that a telephone call was made to a credit agency after the purchase indicating that respondent had not been in default on other brokerage accounts; that no written confirmation of such report was obtained and no memorandum of such report was made for claimant's file. (It may be noted that respondent, in a NASD telephone conference prior to hearing, stated that he had filed a bankruptcy petition prior to the account with claimant)
- (d) That Claimant's witness, Guy Thomas, the employee of claimant who handled the subject transactions, was a guarantor with the branch manager, of any loss suffered by claimant as a result of a customer's default in payment of a stock purchase regardless of fault or negligence of the brokerage house, and that \$40,000. had been paid to claimant pursuant to such guarantee;
- (e) That Marcorp, Inc. was still a viable corporation and doing business, although there is no market for the stock;
- (f) (It may be noted that the Client Account Agreement (EX.1) in evidence states: "You (claimant) are authorized to obtain credit reports on me (respondent) from any agency".

Conclusion:

Failure of Respondent to appear at the hearing does not relieve the arbitrators of their obligation as a fact finding body relative to the claim. The facts elicited at the hearing may fall within two phases: that of liability, and if found, that of actual damages suffered. As to the first, this panelist finds that the conduct of Claimant in its dealing with Respondent constitutes gross negligence accompanied by a notable indifference to normal and reasonable practices universally followed by brokerage houses and financial

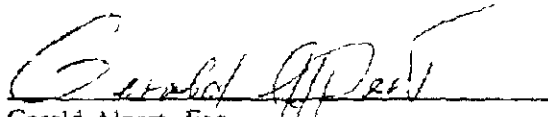
institutions. Such conduct raises a questions of estoppel in the bringing of this claim, even in the absence of Respondent to plead it. More Specifically, Claimant's purchase of \$430,000. worth of stock for a stranger with out having made a basic credit check which could have disclosed Respondent's bankruptcy or lack of financial responsibility creates an aura of suspicion regarding Claimant's operation, particularly since the stock traded (Marcorp) was taken off the market by S.E.C. two days after the execution of Respondent's second buy-order and where such purchases were made two days prior to Claimant's signing the Client Account Agreement.

The reimbursement guarantee by the broker, Guy Thomas, raises a further question as to whether there has been a subrogation of the claim to Mr. Thomas making him the real party in interest instead of the named claimant, thereby giving rise to a jurisdictional question.

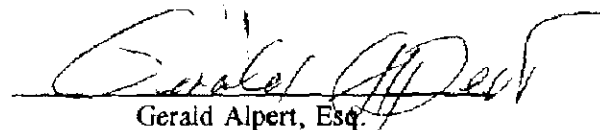
If, as in the case at hand, a majority of the panel finds in favor of Claimant, then the question of damages comes into play and it is incumbent upon the panel to determine the actual loss of claimant. The alleged \$40,000. payment received by Claimant under the said guarantee should be credited to Respondent in diminution of damages. Also to be considered is whether the said loss has been written off by Claimant for which a tax credit has been received thereby further reducing the damages claimed.

The above analysis is not intended to convey the impression that I have assumed the role of advocate for the absent Respondent. It was given only to express dissent to the allowance of a claim which could have been simply avoided with Claimant's use of ordinary care in accordance with established brokerage, commercial and banking practices in the transactions which are the subject of this arbitration.

ARBITRATOR'S SIGNATURE


Gerald Alpert, Esq.

I, **GERALD ALPERT, ESQ.**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.


Gerald Alpert, Esq.
Public Panelist

Date of Decision: October 30, 1996