

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Gary Millner,
Claimant,

v.

No. 95-04107

Pauli & Company,
Respondent.

REPRESENTATION OF PARTIES

Claimant Gary Millner ("Claimant") was represented by Donald J. Meehan, Jr., Esq., of Moline & Shostak, St. Louis, Missouri.

Respondent Pauli & Company ("Respondent") was represented by Daniel G. Vogel, Esq., of Johnson & Neuman, L.C., St. Louis, Missouri.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about August 25, 1995. Claimant's Submission Agreement was signed on August 24, 1995.

Respondent's Statement of Answer was filed on or about November 16, 1995. Respondent's Submission Agreement was signed on September 20, 1995.

HEARING INFORMATION

The hearing was held on February 11 and 12, 1997 for two (2) sessions each day in St. Louis, Missouri.

CASE SUMMARY

Claimant alleged that: The securities recommended and purchased by Jeffrey A. Gelber ("Gelber"), a registered representative of Respondent, were speculative, risky, and wholly unsuitable for his account, as was purchasing on margin in the account; on numerous occasions, Gelber indicated on the confirmations for transactions that the transactions were "unsolicited" when, in fact, Gelber solicited and initiated the transactions; on numerous occasions, Gelber made unjustified predictions that his recommendations would produce future profits and failed to disclose to Claimant the risks inherent in investing in the securities Gelber recommended; Gelber guaranteed performance of certain stocks purchased for Claimant's account; Gelber recommended securities purchased for Claimant's account without adequate and reasonable basis for such recommendations and without a reasonable investigation; Gelber's recommendations were unsuitable and inappropriate for Claimant; Gelber's conduct constitutes violations of the anti fraud provisions of the Federal Securities Laws and as such is actionable and in violation of §10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) thereunder; Respondent is vicariously liable for the actions and inactions

and conduct of Gelber while he was in Respondent's employ; and Respondent is directly liable for its failure to supervise Gelber. The allegations arose out of seven purchases over a period from February 14, 1994 to October 7, 1994 of Beta Well Service, Inc. securities, an oil and natural gas services concern.

Unless otherwise admitted in its Answer, Respondent denied the allegations set forth in the Statement of Claim. Respondent also asserted the following affirmative defenses: Claimant failed to state a claim upon which relief can be granted; Claimant is estopped from asserting a claim on the unsuitability of investments due to his contrary representations of his investment obligations; Claimant's prayer for attorneys' fees is without basis in law or fact and should be stricken; Claimant's prayer for punitive damages is barred by New York law, which governs this transaction, nor has Claimant alleged any facts entitling him to punitive damages even under Missouri law; Claimant's claim is barred by estoppel because of his unreasonable delay in asserting it; and even if Claimant is awarded damages, Respondent is entitled to a set-off against all of Claimant's damages in the amount of \$9,350.05 (the amount of Respondent's arbitration award on the debit balance in Claimant's account) plus interest and ongoing attorney's fees.

RELIEF REQUESTED

Claimant requested an award in the amount of : (a) \$57,217.48 against Respondent as compensatory damages; punitive damages in an amount to be determined by the arbitration panel; and interest and attorneys' fees.

Respondent requested that the arbitrators deny this claim and awarded their costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

On or about June 10, 1996, Respondent filed a Motion to Dismiss the Statement of Claim. After consideration of the parties respective positions, and deliberation, the panel denied the motion.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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) Respondent is liable for and shall pay to the Claimant the sum of \$5,000 as satisfaction of his claim for compensatory damages.
- (2) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each pre-hearing conference, if any. There were four (4) sessions x \$500 = \$2,000 in forum fees. Pursuant to §10332(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$150 and shall retain as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, Respondent is liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution a non-refundable member surcharge in the amount of \$300.

Additional forum fees in the amount of \$500 are assessed by the arbitrators against the Claimant.

Additional forum fees in the amount of \$1,000 are assessed by the arbitrators against the Respondent.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

C.J. McEnery, Jr.
C.J. McEnery, Jr.
Public Arbitrator, Presiding Chair

/s/

February 21, 1997

Richard J. Zaegel
Richard J. Zaegel
Industry Arbitrator

/s/

February 24, 1997

Bryan Goetz
Bryan Goetz
Public Arbitrator

/s/

February 24, 1997