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AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

**© National Association of
Securities Dealers**

Names of Claimants

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**ANTHONY C. MARCACCIO AND
MARIE E. MARCACCIO**

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CASE NUMBER 95-04134

Names of Respondents

***PRUDENTIAL SECURITIES AND
VICTOR N. BROOK**

REPRESENTATION

Claimants Anthony C. Marcaccio and Marie E. Marcaccio were represented by Rustin S. Polk, Esq. of Patton Boggs, L.L.P. located in Dallas, Texas.

Respondent Prudential Securities Inc. was represented by Donald R. Littlefield, Esq. of Prudential Securities, Inc. located in Dallas, Texas

Respondent Victor N. Brook was not represented

CASE INFORMATION

The Statement of Claim was filed on or about July 19, 1996

Claimants Anthony C. Marcaccio and Marie E. Marcaccio's Submission Agreement was signed on June 12, 1995.

The Statement of Answer of Respondent Prudential Securities Inc. was filed on or about November 2, 1995.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

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The Hearing was held on: September 23, 1996 for two (2) sessions; and
 September 24, 1996 for two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimants Anthony C. Marcaccio and Marie E. Marcaccio ("the Marcaccio's") alleged:

1. that they decided in September of 1993 to provide their son with a full power of attorney over their accounts because Dr. Marcaccio had suffered a stroke; that they met with the Victor Brooks ("Brook"), their account executive with Prudential Securities, Inc. ("Prudential"); that their son, Dino, was to be contacted for prior approval to any changes to the accounts; and that pursuant to this understanding, various accounts of the Marcaccio's were established at Prudential;
2. that they had little or no experience in securities; that their objective was safety of principal and long term growth; and that they were touted on highly speculative securities;
3. that a new account was established allegedly with Claimant's approval which circumvented a power of attorney set up by the Claimants; that Claimant's stock was transferred into the new account without the approval of the son; that in the new account Brook sold 4,000 shares of Borden Chemicals without the knowledge of the Claimant's or their son; and that the Respondents refused to rescind the transaction;
4. Claimants made allegations against Prudential and Brook including unauthorized trading; failure to inform; and violation of prior instructions regarding transactions;
5. that there was no ratification despite confirmations and statements because Claimants were without adequate information regarding the transaction;
6. that there was fraud and deceit by making unauthorized transactions; failure to abide by specific instructions to add their son, Dino, to the accounts with a power of attorney; and a failure to inform Claimant's of changes made in their accounts.

Respondents Prudential Securities, Inc. and Victor Brook denied the allegations of wrongdoing contained in the Statement of Claim and asserting:

1. that Dr. Marcaccio, aged seventy-nine, practiced Dentistry until his retirement at the age of seventy-five and had a long history of actively managing various brokerage accounts for investments with a buy and hold strategy prior to a stroke in June, 1993. That in July of 1993, Dr Marcaccio transferred various accounts to Prudential which included his IRA account containing the Borden Chemical stock in issue; that in September of 1993, inter alia, Claimants opened a Managed Asset Account (MAC account) and granted a discretionary power of attorney to an Asset manager of which Claimants' son, Dino, was aware. The parties knew that equities transferred into the managed account were sold to purchase other equities as determined by the Manager of the discretionary account;

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2. that at a home visit by Brook to the Marcaccios in December of 1993, just prior to knee replacement surgery of Dr. Marcaccio, Dr. Marcaccio transferred his IRA account at Prudential to a new MAC account without the consent, advice or knowledge of his son, Dino, which resulted in a transfer of his equities (including the Borden Chemical stock) from the IRA account into the new MAC account;
3. that once the new MAC IRA account was established, the control of the equities in the IRA account was discretionary to the Account manager and that the sale of the Borden Chemical stock in the MAC asset account was an authorized trade made by virtue of the discretionary power granted to the Asset manager;
4. that the transaction was made in accordance with legal and regulatory accounts;
5. that the claim was barred by the statute of limitations;
6. that the claim was barred by virtue of ratification, laches, waiver and estoppel;
7. that there was a failure to mitigate losses;
8. that there was no breach of duty nor misrepresentation; and
9. that Marie E Marcaccio is not an owner of the IRA account and thus cannot make a claim.

RELIEF REQUESTED

Claimants requested entry of an award against the Respondents in the amounts \$60,000.00 for compensatory damages; \$180,000.00 for punitive damages, \$3,000.00 in expenses as well as costs and attorney's fees.

Respondents requested that the Statement of Claim be dismissed and that they be awarded their costs.

OTHER MATTERS

A first amended Statement of Claim which added a churning allegation was presented at the hearing. The amended Statement of Claim was filed with the NASD Regulation, Inc. Office of Dispute Resolution and served on Respondent on September 16, 1996, less than ten days before the hearing. After reviewing all relevant submissions and after hearing oral arguments, the arbitrators decided that the Claimants' motion for leave to file the first amended Statement of Claim was denied.

Upon review of the file and the representations made by/on behalf of the Claimants, the undersigned arbitrators determined that Respondent Victor Brook had been properly served with the Statement of Claim pursuant to Sections 10302 and 103 14 of the Code of Arbitration Procedure (the "Code"). The undersigned arbitrators also determined that Respondent Victor Brook received due notice of the hearing as required under Section 103 15 of the Code and that arbitration of the matter would proceed pursuant to Section 103 18 of the Code.

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Respondent Victor Brook did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration or an answer but is required to submit to arbitration pursuant to Section 10301 of the Code and having answered the claim and testified by telephone on behalf of Prudential at the hearing is bound by the determination of the arbitration panel on all issues submitted.

The Statement of Answer of Respondent Prudential Securities, Inc. footnoted that Respondent Victor Brook joined in the answer. At the hearing, when Brook was called as a witness for Prudential to give telephone testimony, Brook admitted to receipt of the Statement of Claim, notice of the hearing and notice of the arbitrators.

AWARD

After considering the pleading, 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. That the Claimants Anthony C. Marcaccio and Marie E. Marcaccio's take nothing and that the Statement of Claim filed by Claimants Anthony C. Marcaccio and Marie E. Marcaccio against Respondents Prudential Securities, Inc. and Victor Brook is dismissed with prejudice;
2. That the parties shall bear their own costs including attorneys' fees except for those fees, including forum fees, specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied in its entirety

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session. There were four (4) sessions x \$750.00 = \$3,000.00 in forum fees. Pursuant to Section 10332(b) of the Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrator(s), including a per-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 10332(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers Regulation, Inc. ("NASD Regulation, Inc.") Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD Regulation, Inc. by Claimants Anthony C. Marcaccio and Marie E. Marcaccio. Claimants Anthony C.

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Marcaccio and Marie E. Marcaccio are hereby, jointly and severally, liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$750.00 in additional forum fees.

Pursuant to Section 10333 of the Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the member surcharge in the amount of \$350.00 previously submitted by Respondent Prudential Securities, Inc. Respondents Prudential Securities, Inc. and Victor Brook are hereby, jointly and severally, liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,500.00 in forum fees.

Fees made by made payable to the National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution.

Arbitrators' Signatures:

Dated:

Donald H. Fidler, Esq.

November 1, 1996

Donald H. Fidler, Esq.

Public Arbitrator, Chairman

Sherry R. Wetsch, Esq.

November 4, 1996

Sherry R. Wetsch, Esq.

Public Arbitrator, Panelist

Wilma Delores Mefford-Martin

November 4, 1996

Wilma Delores Mefford-Martin

Industry Arbitrator, Panelist

Date served by the NASD Regulation, Inc.: November 8, 1996