

NASD REGULATION, INC.
AWARD

In the Matter of the Arbitration Between

Name of Claimant

Nicholas Caricato

95-06052

Name of Respondents

Smith Barney, Inc.
Rickel & Associates, Inc.
Don Troiano

REPRESENTATION

Claimant Nicholas Caricato ("Claimant") appeared *pro se*.

For Respondent Smith Barney, Inc. ("Smith Barney") appeared Ann Parry, Esq., Associate General Counsel for Smith Barney, Inc.

For Respondent Rickel & Associates, Inc. ("Rickel") appeared Elliot Smith, Director of Compliance for Rickel & Associates, Inc.

Respondent Don Troiano ("Troiano") appeared *pro se*.

CASE INFORMATION

Statement of Claim was filed on December 28, 1995.

Claimant's Submission Agreement was signed on February 12, 1996.

Statement of Answer was filed by Smith Barney on April 10, 1996.

Smith Barney's Submission Agreement was signed on April 10, 1996.

Statement of Answer was filed by Rickel on March 15, 1996.

Rickel's Submission Agreement was signed on March 15, 1996.

Statement of Answer was filed by Troiano on November 13, 1996.

Troiano's Submission Agreement was signed on October 31, 1996.

HEARING INFORMATION

| | | | |
|-------------------------|-------------------|---|--------------|
| Pre-Hearing Conference: | December 16, 1996 | - | One Session |
| Hearing Dates/Sessions: | December 3, 1997 | - | One Session |
| | March 4, 1998 | - | Two Sessions |
| | March 11, 1998 | - | Two Sessions |

The hearings were conducted at the offices of NASD Regulation, Inc. located in New York, New York.

CASE SUMMARY

Claimant alleged that Troiano, a representative of Rickel, persuaded him to invest in Trans World Gaming, Inc. ("IBET"), and on December 15, 1994, he purchased 2,000 shares and 2,000 warrants. Claimant contended that he decided to sell his position in IBET at \$6.00 per share and he gave these instructions to Troiano, but Troiano stated that the stock would be sold at a 25% markdown. Claimant maintained that he told Troiano to break the trade, and he then called Rich Fielder ("Fielder"), at Smith Barney, to execute the trade for him. Claimant asserted that approximately ten days later Fielder called to request the stock certificates, which he did not have. Claimant further asserted that Fielder stated that it would be taken care of, but weeks later he was informed that Smith Barney had repurchased the shares for him because Rickel failed to deliver the stock certificates. Claimant further asserted that he was put in touch with Clark Ruiz, II ("Ruiz"), the head compliance officer of Rickel, who assured him that the matter would be looked into. Claimant also alleged that he then called Oppenheimer & Co., Rickel's clearing firm, and spoke with John D'Agastino ("D'Agastino"), who also promised to look into the matter. Claimant alleged that neither Ruiz nor D'Agastino ever got back to him.

Smith Barney denied all allegations of wrongdoing and any liability to Claimant. Smith Barney maintained that Claimant was a highly sophisticated investor who spoke with Fielder, his financial consultant, on an almost daily basis. Smith Barney asserted that, in January 1995, Claimant discussed with Fielder his desire to transfer the IBET shares from Rickel to Smith Barney for liquidation. Smith Barney alleged that, on January 27, 1995, Claimant authorized Fielder to enter an order to sell the shares and agreed to deliver the shares to Smith Barney to cover the short created by the sale. Smith Barney maintained that, as a favor to Claimant, Fielder attempted to contact Rickel to transfer the stock to no avail. Smith Barney stated that, on February 9, 1995, it sent Claimant a letter stating that they had been unable to collect the shares and, if they were unable to collect the shares by February 14, 1995, then the shares would be repurchased and Claimant would be charged. Smith Barney asserted that the deadline was extended to February 21, 1995, but the shares were not delivered, and it was required to repurchase the shares to cover the short in Claimant's account. Smith Barney maintained that the shares were received into Claimant's account, on or about March 22, 1995, where they remained until Claimant delivered them out in September 1995.

Rickel maintained that no sell order ticket was written by Troiano for the sale of 2,000 shares of IBET, and, therefore, no cancellation of such sale took place. Rickel asserted that Troiano

informed Claimant that there would be a \$0.25 (1/4) markdown for the transaction, but, when Claimant complained, Troiano replied that he would speak to the manager and call Claimant back immediately. Rickel further asserted that when Troiano called Claimant, Claimant told Troiano that the shares were sold at Smith Barney, and Claimant wanted the securities shipped to him. Rickel maintained that Troiano informed Claimant that in order to ship the securities, he needed to provide Rickel with written authorization and instructions. Rickel further maintained that no such instructions were received. Rickel denied that it told Claimant there would be a 25% markdown assessed, because it would be in violation of NASD Rules, as well as, a breach of Rickel policy. Rickel further maintained that Troiano terminated his employment with it on January 31, 1995, and Claimant's account was reassigned to Ruiz. Rickel further asserted that, when Ruiz spoke to Claimant about his account, Claimant never mentioned that the shares of IBET were sold or that he wanted them delivered to Smith Barney. Rickel maintained that, according to Ruiz, it was not until March 1995 that he was advised that Claimant was transferring his account to Smith Barney.

Troiano maintained that he initially contacted Claimant to inform him of an IPO of IBET, and gave Claimant information from the prospectus. Troiano further maintained that Claimant purchased 2,000 shares and 2,000 warrants of IBET. Troiano asserted that a few weeks later Claimant contacted him to sell the shares of IBET. Troiano further asserted that he told Claimant that there would be a markdown of 1/4 in order to execute the transaction. Troiano maintained that Claimant stated that if they did not waive the mark down he would sell the shares elsewhere. Troiano asserted that when he called Claimant to say that the mark down would not be waived, Claimant stated that he had sold the shares elsewhere. Troiano further asserted that at no time did Claimant request that the securities be shipped or transferred to another firm.

RELIEF REQUESTED

Claimant requested damages for the cancellation of fraudulent trade in the amount of \$14,200.00, lost of wages in the amount of \$600.00, punitive damages against Smith Barney in the amount of \$25,000.00, and punitive damages against Rickel in the amount of \$60,000.00.

Smith Barney requested that the Statement of Claim be dismissed and that it be awarded its reasonable costs in defending this matter.

Rickel requested that the Statement of Claim be dismissed.

Troiano 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 original remains on file with the NASD.

By letter dated January 8, 1998, Claimant informed NASD Regulation, Inc. that he dismissed

all claims against Smith Barney, Inc. with prejudice.

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. Claimant's claims are hereby dismissed in their entirety.
2. Claimant's request for punitive damages is hereby denied.
3. The parties shall bear their respective costs, including attorney's fees.
4. All other requests for relief are hereby denied.

FORUM FEES

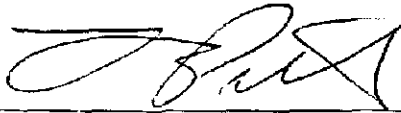
Pursuant to Rule 10332(c) of the NASD Regulation Code of Arbitration Procedure, the arbitrators have determined that the NASD will retain the \$150.00 non-refundable filing fee paid by Claimant, the \$300.00 member surcharge paid by Smith Barney, and the \$300.00 member surcharge deposited by Rickel. In addition, the arbitrators have assessed the following Forum Fees:

| | |
|-------------------------------------|---------------------|
| 1 pre-hearing conference x \$300.00 | = \$ 300.00 |
| 5 Hearing Sessions x \$500.00 | = <u>\$2,500.00</u> |
| Total Forum Fees | = \$2,800.00 |

1. Claimant is hereby liable for the sum of \$1,400.00, representing one-half of the total forum fees assessed. Claimant previously deposited \$500.00 with NASD Regulation, Inc., and, therefore, Claimant shall pay the balance of \$900.00.
2. Claimant is hereby liable and shall pay to NASD Regulation, Inc. the sum of \$500.00, representing the postponement fee previously assessed.
3. Rickel is hereby liable and shall pay the sum of \$1,400.00, representing one-half of the total amount of forum fees assessed.

Fees are payable to NASD Regulation, Inc.

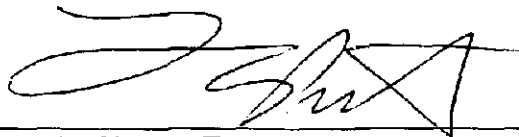
Arbitrators' Signatures

A handwritten signature in black ink, appearing to be 'L. Pittore', written over a horizontal line.

Lawrence A. Pittore, Esq.
Chairperson - Public Arbitrator

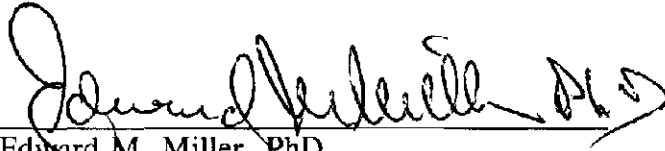
Date of decision: April 3, 1998

I, **Lawrence A. Pittore, Esq.**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

A handwritten signature in black ink, appearing to be 'L. Pittore', written over a horizontal line.

Lawrence A. Pittore, Esq.

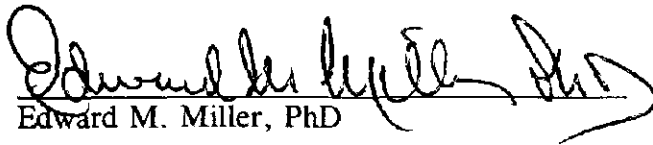
Arbitrators' Signatures

A handwritten signature in cursive script, reading "Edward M. Miller, PhD", written over a horizontal line.

Edward M. Miller, PhD
Public Arbitrator

Date of decision: April 3, 1998

I, **Edward M. Miller, PhD**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

A handwritten signature in cursive script, reading "Edward M. Miller, PhD", written over a horizontal line.

Edward M. Miller, PhD

Arbitrators' Signatures

Kenneth B. Cutler

Kenneth B. Cutler, Esq.
Industry Arbitrator

Date of decision: April 3, 1998

I, **Kenneth B. Cutler, Esq.**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Kenneth B. Cutler

Kenneth B. Cutler, Esq.