

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

A. Joseph Fairbank

95-06099

Name of Respondents

Stratton Oakmont, Inc.
Daniel M. Porush
Daniel M. Porush

Representation

For Claimants appeared Susan N. Perkins of Susan N. Perkins, P.C., 575 Madison Avenue, New York, NY 10022.

For Respondents:

(a) Daniel M. Porush. Respondent Porush was represented by Wexler & Burkhart, P.C. of Mitchel Field, NY through December 24, 1996, on which date Wexler & Burkhart resigned. Porush was not represented by counsel as of the hearing date, February 3, 1997. By letter dated February 11, 1997, Mark E. Gelfand, Esq., 185 Great Neck Road, Great Neck, NY 10021, identified himself to the NASD as having been retained by Porush.

(b) Stratton Oakmont. Respondent Stratton Oakmont was represented by Wexler & Burkhart, P.C. of Mitchel Field, NY through December 24, 1996, on which date Wexler & Burkhart resigned. The arbitration was stayed with respect to Respondent Stratton Oakmont. No counsel appeared at the hearing on behalf of Stratton Oakmont.

Case Information

The Statement of Claim was filed on December 29, 1995. Claimant's Submission Agreement was signed on December 21, 1995.

In March 1996, in lieu of filing a response to the Statement of Claim, Respondents moved in New York State Supreme Court for a stay of the arbitration proceedings. By order dated May 13, 1996, the request for a stay of the arbitration proceedings was denied, but the claims for attorney fees and punitive damages were permanently stayed from consideration by the arbitration panel. Thereafter Respondents filed a Statement of Answer, Motion to Dismiss, and Motion to Strike on May 28, 1996. Respondents executed a Submission Agreement on May 31, 1996.

Hearing Information

Hearing Date: February 3, 1997. Two Sessions.

The hearing was held at the Hyatt Hotel, Buffalo, New York.

Case Summary

Fairbank opened a brokerage account with Stratton Oakmont ("Stratton") on January 26, 1994, after receiving a telephone call from Paul J. Greco, a Stratton broker. Over the next 60 days, Fairbank invested \$717,495 with Stratton, as follows:

January 27, 1994	\$ 4,675
March 1, 1994	\$187,500
March 17, 1994	\$200,000
March 29, 1994	<u>\$325,320</u>
Total	\$717,495

Fairbank alleged that he was the victim of a scam perpetrated by Stratton on Fairbank and other investors. According to Fairbank, Stratton would sell an investor a small investment that increased in value, thus earning the investor's confidence in Stratton. Thereafter, the investor was encouraged to invest substantially larger amounts in other securities. Unknown to the investor, Stratton substantially controlled the market in these securities, and was artificially inflating the price of the securities through aggressive sales practices. Stratton would profit from trading at high spreads, and its principals would profit from purchasing the securities prior to Stratton running up their price. Finally, the Stratton principals would sell their investment, Stratton would stop promoting the security, and the price would collapse, with the investor suffering the loss.

Fairbank's initial "confidence building" investment was in Nestle ADR's for \$4,675. In the weeks that followed, Greco persuaded Fairbank to purchase units in Octagon and Computer Marketplace. Both Octagon and Computer Marketplace were securities heavily touted by Stratton brokers, and both suffered the same fate - a substantial increase in price, followed by a collapse after Stratton withdrew its support.

In April 1994, Fairbank declined to invest further. In the months that followed Stratton engaged in a series of unauthorized trades in Fairbank's account, each time selling a portion of his portfolio and using the proceeds to purchase securities in other companies recently underwritten by Stratton. Two of these companies were IDM Environmental Corp., and Childrobics. By September 1994, the value of his Stratton account was just under \$22,000.

In October 1995 Fairbank learned that his account had been transferred to a new broker, Daniel Gallagher, who made yet another unauthorized trade, selling Computer Marketplace warrants and buying shares of Steven Madden. When he learned of this trade, Fairbank wrote to Stratton, disavowing the trade.

When he commenced this action in December 1995, the Stratton account held 3000 shares of Steven Madden, and a cash balance of just under \$4200.

Fairbank claims that Respondent Porush was the president and chief executive officer of Stratton Oakmont during the relevant time periods, and is jointly and severally liable with Stratton for any damages suffered by Fairbank.

Fairbank alleges that Respondents breached a variety of obligations under the NASD Rules of Fair Practice, committed fraud and misrepresentation under the securities laws and common law, were negligent in supervision of the brokers assigned to Fairbank's account, violated NASD rules, and breached their fiduciary duty to Fairbank.

Respondents deny all allegations of inappropriate behavior. Respondents assert that Fairbank either authorized or ratified all transactions in his account, that he waived his claims by continuing to trade with Respondents after learning of the facts he alleged, and that certain damages claims (for attorney fees and punitive damages) are barred by prior order of the New York State Supreme Court.

Relief Requested

Fairbank sought compensatory damages of \$745,175.72, rescissory damages of \$24,010, punitive damages of \$1,000,000, and unspecified attorneys fees.

Other Issues Considered and Decided

(1) Stay of arbitration against Stratton. Stratton was forced into bankruptcy in January, 1997, prior to the arbitration. As a result of the bankruptcy, Fairbank's claims in this arbitration against Stratton were automatically stayed. The automatic stay did not apply to the claims against Porush, and the arbitration on those issues continued.

(2) Porush's Motion to Reopen the Hearing. Neither Porush nor an attorney on his behalf attended the arbitration proceeding on February 3, 1997. By letter dated February 27, Mr. Porush's attorney, Mark E. Gelfand, moved to reopen the hearing on the grounds that Porush did not receive adequate notice of the hearing, did not have a full and fair opportunity to be heard, and that the hearing date was improperly accelerated to the detriment of Porush.

The panel denied the motion for the reasons set forth below. A brief review of the circumstances and relevant dates leading up to the hearing is appropriate.

During a prehearing telephone call relating to discovery in November 1996, Respondents' counsel, Wexler and Burkhart indicated their first availability for a hearing date was in May 1997, because of other matters they were handling. Claimant objected to the delay, noting that the pre-hearing discovery matters would be resolved no later than 30 days after the chair issued its written order concerning the discovery dispute, and that the arbitration should proceed promptly thereafter. The chair of the panel agreed to postpone the hearing until the May 1997 hearing date. By letter dated November 18, 1996, the NASD scheduled the hearing for May 19 through 23, 1997.

In early December 1996, Stratton was expelled by the NASD. By letter dated December 13, 1997, Fairbank requested the hearing date be accelerated on the grounds that Stratton was likely to be deprived of the ability to earn income as a result of the expulsion.

By letter dated December 16, 1997, the chair issued its decision relating to pre-hearing document disclosure. Under that decision, all prehearing document disclosure was to be completed by mid-January 1997.

Wexler and Burkhart resigned as counsel to Respondents on December 24, 1996. Thereafter, the NASD sent correspondence in this matter to Stratton's office, addressed to "General Counsel", and to Porush at his home.

The NASD sent Porush a copy of the chair's pre-hearing document disclosure notice on January 2, 1997, and that was received at Porush's home on January 9, signed for by "N. Porush."

By letter dated January 5, 1997, the chair granted Fairbank's request to accelerate the proceeding. Anticipating Respondents' counsel's earlier objections to the inconvenience of a prompt hearing date, the chair directed that if Respondents' counsel was not available on such short notice, the hearing should nonetheless proceed, with a direction to Respondents to obtain substitute counsel.

By letter dated January 14, 1997, the NASD notified the panel that the hearing had been rescheduled, with the first hearing date being February 3, 1997. Stratton received a copy of that letter at Stratton's office, signed for by "A. Martinez".

On January 15, 1997, the NASD notified the parties that one of the arbitrators on the panel had been replaced. That notice was received by Stratton at its office on January 21, signed for by "A. Martinez", and by Porush at his home on January 21, signed for by "M. Porush."

By letter dated January 20, 1997, Claimant's counsel anticipated that Respondents would move to adjourn the hearing (although as of that date no such request had been received from Respondents), and requested that the panel deny the adjournment.

By letter to the NASD dated January 28, 1997, attorney Mark E. Gelfand stated he was writing "on behalf" of Porush to report that Stratton had filed for bankruptcy. Mr. Gelfand provided three telephone numbers in his letter, and Deborah DeJesus, senior attorney for the NASD, attempted to contact him at each of those numbers but was unsuccessful. She did leave a message on an answering machine at one of those numbers that the hearing would proceed against Porush, notwithstanding the automatic stay against Stratton.

On January 31, 1997, the NASD sent Porush notice that the hearing would proceed notwithstanding the stay against Stratton. That notice was received and signed for at Porush's home by "M. Porush" on Saturday, February 1.

The hearing took place on February 3, 1997, and Porush did not appear, nor contact the NASD on that date. At the beginning of the hearing, Ms. DeJesus participated by conference call and recited the actions the NASD had taken to notify Porush of the hearing date. The panel determined that Porush had received adequate notice and had failed to request an adjournment, and therefore the arbitration would proceed.

On February 11, 1997, Mr. Gelfand again wrote to the NASD stating that he had been retained to represent Mr. Porush, and requested that the NASD provide him with a complete copy of the pleadings and correspondence. Finally, on February 27, Mr. Gelfand wrote to the NASD requesting that the hearing be reopened for the grounds stated above.

The request to reopen the hearing is denied. Porush was doubtlessly aware that Wexler and Burkhart had resigned as his counsel as of late December 1996. Thereafter, Mr. Porush received a series of communications from the NASD indicating that actions relating to this arbitration were proceeding. He could have retained substitute counsel, or contacted the NASD directly, but he did neither. Mr. Gelfand's role prior to February 11 is, at best, unclear. He was not known to the NASD (except as the notary on Porush's submission agreements in May, 1996) until his January 27, 1997 letter "on behalf" of Mr. Porush. Mr. Gelfand may or may not have been acting as legal representative of Mr. Porush prior to the February 11 letter in which he clearly notified the NASD of his status. In either case, Porush failed, either through counsel or personally, to communicate with the NASD prior to the scheduled hearing to request an adjournment. Mr. Porush had adequate notice of the hearing date and failed to timely move to adjourn the hearing. The hearing date was not unreasonably accelerated based on the facts and circumstances of this case, and in any event Porush failed to timely object to the accelerated hearing date.

(3) Respondents Motion to Strike; Respondents Motion to Dismiss. Respondents moved to strike certain exhibits attached to the Claimant's Claim as prejudicial, and moved to dismiss the Claimant's Claim to the extent it was based on an alleged violation of NASD Rules of Fair Practice. Both motions were denied.

Decision and Award

The panel holds that Fairbank was damaged by the improper actions of Stratton, and that Porush is jointly and severally liable for that damage. The panel holds that Porush is liable under the doctrine of respondeat superior, and also liable under the securities law rules relating to control person liability.

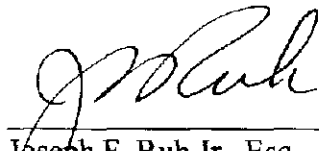
Claimant is awarded compensatory damages in the amount of \$822,000. There is no award for attorneys fees or punitive damages.

Because of the stay against Stratton, the panel makes no decision concerning the current balance of Claimant's brokerage account with Stratton.

Forum Fees

The forum fees shall be allocated 100% to Respondent Porush.

Arbitrator's Signatures

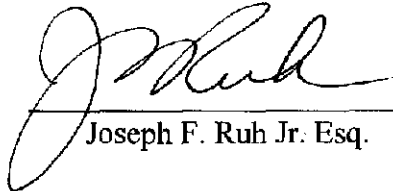


Joseph F. Ruh Jr., Esq.
Public Arbitrator, Chairperson

Francis G. Leonard
Industry Arbitrator

George W. Laub
Public Arbitrator

I, **Joseph F. Ruh Jr.**, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.




Joseph F. Ruh Jr. Esq.

Date of Decision: April 18, 1997

Arbitrator's Signatures

Joseph F. Ruh Jr., Esq.
Public Arbitrator, Chairperson


Francis G. Leonard
Industry Arbitrator

George W. Luth
Public Arbitrator

I, Francis G. Leonard, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.


Francis G. Leonard

Date of Decision: April 18, 1997