

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Mark P. Marshall,

Claimant,

and

No. 96-00376

Texas Capital Securities Inc.
David Frederick Bahr, Thomas Buckley,
Patrick Smetek, Don Katz, Nancy Martin,
Jeff Loth, Lawrence L. Kohler

Respondent.

REPRESENTATION OF PARTIES

Claimant Mark P. Marshall was represented by John E. Dees, Jr., Esquire of Dallas, Texas.

Respondent David Frederick Bahr was not represented in pleadings or at the hearing in this matter.

CASE INFORMATION

Mark P. Marshall's Statement of Claim was filed on or about January 25, 1996. Mark P. Marshall's Revised Statement of Claim was filed on or about February 6, 1996. Mark P. Marshall's Amended Statement of Claim was filed on or about June 10, 1996. Mark P. Marshall's Submission Agreement was signed on December 21, 1995.

David Frederick Bahr did not file a Statement of Answer with the NASD Regulation, Inc. Office of Dispute Resolution. The NASD Regulation, Inc. Office of Dispute Resolution has no record of a properly executed Submission Agreement from David Frederick Bahr.

HEARING INFORMATION

A pre-hearing conference was held on August 15, 1996 for one (1) session.

The hearing was held on April 29, 1997 for one (1) session.

The hearing was held in Dallas, Texas.

CASE SUMMARY

Claimant Mark P. Marshall ("Claimant" or "Mr. Marshall") brought this action to recover losses allegedly sustained as a result to the unauthorized trades, omissions and misrepresentations of material facts, unlawful sales of securities by an unlicensed broker, and other illegal acts committed by respondent David Frederick Bahr ("Respondent" or "Mr. Bahr").

According to Claimant, he opened an account with Respondent in February 1992 and transferred this account to several brokerage firms in which Respondent moved to. Claimant stated that prior to opening the initial account with Respondent, Mr. Marshall had very limited investment experience in Bulletin Board and illiquid stocks, the bulk of his assets being in the form of oil and gas properties. Claimant asserted that throughout the period of time that he dealt with Mr. Bahr, Mr. Bahr engaged in numerous unauthorized transactions that involved large numbers of highly speculative, low priced securities, often Canadian penny stocks, which would suddenly appear in Mr. Marshall's account. Claimant further asserted that when Mr. Bahr was questioned about these transactions, he had a series of excuses that typically were that the trade was in error and would be corrected, that the trade was profitable and that it should be kept, or, on at least one occasion, that one of Mr. Marshall's money managers had made the purchase and that he, Mr. Bahr, did not make the trade. In addition, Claimant stated that Mr. Bahr often violated express instructions to sell certain securities and, when asked, would claim that the trade had occurred when, in fact, it had not. Finally, Claimant alleged that Respondent was never registered in any jurisdiction or with any regulatory agency.

Claimant asserted violations of: § 33 of the Texas Securities Act; §34 of the Texas Securities Act; common law fraud, statutory fraud pursuant to § 27.01 of the Texas Business and Commerce Code, and breach of fiduciary duty; and § 17.41 et. seq. of the Texas Deceptive Trade Practices - Consumer Protection Act.

RELIEF REQUESTED

Mark P. Marshall requested an award for: entitlement to selectively rescind any and all transactions conducted in his account by David Frederick Bahr or, in the alternative, actual damages in an amount of not less than \$170,000.00, plus commissions and other compensation paid of not less than \$50,000.00; interest on such amount at the statutory rate; costs and expenses; legal fees; and punitive damages in an amount not less than three (3) times the amount of his actual losses.

OTHER ISSUES CONSIDERED AND DECIDED

Upon review of the file and the representations made by/on behalf of claimant Mark P. Marshall, claimant, the undersigned arbitrators have determined that respondent David Frederick Bahr has been properly served with the Statement of Claim pursuant to §§ 10302 and 10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that

respondent David Frederick Bahr had received due notice of the hearing as required under § 10318 of the Code.

Respondent David Frederick Bahr did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration, but is required to submit to arbitration pursuant to § 10301 of the NASD Code of Arbitration Procedure and is bound by the determination of the arbitration panel on all issues submitted.

Originally, claimant Mark P. Marshall ("Claimant") named Texas Capital Securities, Inc. ("Texas Capital"), Thomas Buckley, a principal of Texas Capital, Patrick Smetek, a principal of Texas Capital, Nancy Martin, branch manager of the Texas Capital offices in Newport Beach, California, Don Katz, compliance officer of Texas Capital, and Bill Lundy, a registered representative of Texas Capital, as co-respondents. In response thereto, Texas Capital, Thomas Buckley, Patrick Smetek, and Don Katz brought a cross-claim against David Frederick Bahr and Nancy Martin. Nancy Martin in turn brought a counterclaim against Texas Capital, and third-party claims against Jeff Loth, an employee or independent contractor of Texas Capital, and Larry Kohler, an employee or independent contractor of Texas Capital and the branch manager of Texas Capital's Scottsdale, Arizona office. Pursuant to Claimant's letter dated February 25, 1996, Bill Lundy was dismissed without prejudice. Pursuant to Claimant's letter dated August 12, 1996, Nancy Martin was dismissed without prejudice. Pursuant to Claimant's letter dated April 25, 1997, Texas Capital, Patrick Smetek, Thomas Buckley, and Don Katz entered into a settlement agreement with Claimant and were thus dismissed. In addition, Texas Capital, Patrick Smetek, Thomas Buckley, Don Katz, and Nancy Martin agreed to dismiss the actions that each of them has brought in the above arbitration proceeding against the other, as well as any claim against Jeff Loth and Lawrence Kohler. Consequently, this case proceeded to hearing on the claims of Claimant against respondent David Frederick Bahr only.

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 David Frederick Bahr wilfully and maliciously made untrue statements of fact to claimant Mark P. Marshall ("Claimant") that David Frederick Bahr knew to be false, and upon which Claimant relied to his detriment. David Frederick Bahr, having committed fraud upon the Claimant, shall be liable for and pay to Mark P. Marshall, the sum of \$205,705.83 as compensatory damages.
2. Respondent David Frederick Bahr is liable for and shall pay Mark P. Marshall the sum of \$800,000.00, in punitive damages based on the perpetrated fraud.

3. Other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 = \$300, and there was one (1) hearing session x \$1,000 = \$1,000. Total forum fees are thus \$300 + \$1,000 = \$1,300. Pursuant to § 10332 (b) of the NASD Code of Arbitration Procedure (the "Code") 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 § 10322 (c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$250 and shall **retain** as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by claimant Mark P. Marshall.

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Texas Capital Securities, Inc.

Pursuant to § 10333 of the Code, Texas Capital Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$500.

Pursuant to §§ 10322 (a) and (f) of the Code, Texas Capital Securities, Inc., Thomas Buckley, Patrick Smetek, and Don Katz are jointly and severally liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable filing fee in the amount of \$250 for its cross-claim.

Pursuant to § 10205 (a) of the Code, Nancy Martin is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable filing fee in the amount of \$500 for her counterclaim, and the non-refundable filing fee in the amount of \$500 for her third-party claim.

Respondent David Frederick Bahr is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$300 (= \$1,300 total forum fees - \$1,000 hearing session deposit by claimant Mark P. Marshall).

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

Concurring Arbitrators' Signatures

/s/ Arthur H. Geffen

May 19, 1997

- Arthur H. Geffen, Esquire, P.C.
Chairperson
Public Arbitrator

Dated:

/s/ George S. Thumlert

May 30, 1997

George S. Thumlert, Jr., CPA
Panelist
Public Arbitrator

Dated:

/s/ Ned B. Young

May 21, 1997

Ned B. Young
Panelist
Industry Arbitrator

Dated:

For NASD use only:

Date Award was served on the parties: _____