

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

First Option of Chicago, Inc.

Name of Respondents/Counter-Claimants

Arauca Trading Limited Partnership; Arauca General, Inc.;
Stephen G. Macklem; Henry Gosiene;
Brent Harrison; New Allegheny, Inc.; and
Hasco, Inc.

96-02855

Name of Cross-Claimants and Third Party Claimants

Arauca Trading Limited Partnership; Arauca General, Inc.;
Stephen G. Macklem; Henry Gosiene;
Brent Harrison; New Allegheny, Inc.

Name of Cross-Respondent

Hasco, Inc.

Name of Third-Party Respondents

Spear, Leeds & Kellogg; and
Harold A. Sneddon

REPRESENTATION

First Option of Chicago, Inc. ("First Option") and Spear, Leeds & Kellogg ("SLK") were represented by Stephen P. Bedell, Esq. and Timothy G. McDermott, Esq. of Gardner, Carton & Douglas, located in Chicago, Illinois.

Arauca Trading Limited Partnership ("ATLP"); Arauca General, Inc. ("AGI"); Stephen G. Macklem ("Macklem"); Henry Gosiene ("Gosiene"); Brent Harrison ("Harrison"); New Allegheny, Inc. ("NAI"), together known as the Arauca Parties, were represented by Howard S. Suskin, Esq. of Jenner & Block and Alan R. Borlack, Esq. of Bailey,

Borlack, Nadelhoffer & Carroll, both located in Chicago, Illinois.

Hasco, Inc. ("Hasco") was represented by John A. Lipinsky, Esq. of Rooks, Pitts & Poust, located in Lisle, Illinois.

Harold A. Sneddon ("Sneddon") was not required to appear.

CASE INFORMATION

Statement of Claim filed: July 3, 1996.

Claimant First Options' Submission Agreement signed on: July 1, 1996.

Statement of Answer, Counterclaim, Cross-Claim and Third Party Claim filed by ATLP, AGI, Macklem, Gosiene, Harrison and NAI on: July 16, 1996

ATLP's Submission Agreement signed on: July 11, 1996.

AGI's Submission Agreement signed on: July 11, 1996.

Macklem's Submission Agreement signed on: July 11, 1996

Gosiene's Submission Agreement signed on: July 15, 1996.

ATLP's, AGI's, Macklem's, Gosiene's, Harrison's and NAI's Motion for an Immediate Pre-Hearing Conference, Interim Injunctive Relief and for an Order that these Proceedings be Conducted on an Expedited Basis filed: July 16, 1996.

Third-Party Respondent Sneddon's Special and Limited Appearance filed: August 2, 1996.

Third-Party Respondent Sneddon's Response to Request for Injunctive Relief filed: August 2, 1996.

Hasco's Motion to Dismiss for Lack of Personal Jurisdiction and Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction filed: August 13, 1996.

Hasco's Answer to the Statement of Claim of First Options, Hasco's Answer to the Cross-Claim by the Arauca Parties and Hasco's Cross-Claim against ATLP, AGI, Macklem and Gosiene filed on: August 19, 1996.

First Options' Answer and Affirmative Defenses to the Arauca Parties' Counterclaim filed: August 19, 1996.

SLK's Answer and Affirmative Defenses to the Arauca Parties' Counterclaim filed: August 19, 1996.

Arauca Parties' Answer to the Claims of Hasco and Sneddon filed: August 26, 1996.

First Option's Motion to Bar the Arauca Parties from Offering Any Evidence or Argument at the Hearing filed: October 17, 1996.

Arauca Parties' Motion for an Order Compelling First Options to Return Wrongfully Taken Documents and For Sanctions filed: January 10, 1997.

First Options' Memorandum in Opposition to the Arauca Parties' Motion for an Order Compelling First Options to Return Wrongfully Taken Documents and For Sanctions filed: February 3, 1997.

First Options' Motion for Sanctions against ATLP, AGI, Macklem, Gosiene, Harrison and NAI filed on: February 3, 1997.

First Options' Motion for Leave to File Amended Statement of Claim filed: February 3, 1997.

First Options' Amended Statement of Claim filed: February 3, 1997.

First Options' Revised Amended Statement of Claim filed: February 25, 1997.

Answer, Counterclaim and Third-Party Claim of ATLP, AGI, Macklem, Gosiene, Harrison and NAI filed on: April 15, 1997.

First Options' Reply to Counterclaim filed: May 6, 1997

SLK's Motion to Dismiss filed: May 6, 1997.

First Options' Motion to Compel More Particular Allegations of Fraud and Misrepresentation filed: May 6, 1997.

First Options' Motion to Strike and for Sanctions filed: May 13, 1997.

First Options' Motion to Stay Arbitration filed: May 13, 1997.

Arauca Parties' Response in Opposition to SLK's Motion to Dismiss filed: May 14, 1997

Arauca Parties' Response in Opposition to First Options' Motion to Compel More Particular Allegations of Fraud and Misrepresentation filed on: May 29, 1997.

Arauca Parties' Response in Opposition to First Options' Motion to Strike and for Sanctions filed: May 29, 1997.

Arauca Parties' Response in Opposition to First Options' Motion to Stay Arbitration filed: May 29, 1997.

First Options' Motion to Require the Posting of \$1.3 million, or in the alternative, to Bar filed on: May 29, 1997.

Arauca Parties' Response in Opposition to First Options' Motion to Require the Posting of \$1.3 million, or in the alternative, to Bar filed on: May 29, 1997.

First Options' Supplemental Reply to Counterclaim filed on: June 9, 1997.
Supplemental Answer, Counterclaim and Third-Party Claim of ATLP, AGI, Macklem, Gosiene, Harrison and NAI filed on: July 15, 1997.

Arauca Parties' Motion to Enter Declaration as to Proposed Amendment No. 1 and to Dismiss Counts II, III, IV, V, VI and VII of the Revised Statement of Claim filed: August 13, 1997.

Arauca Parties' Motion to Dismiss Counts X, XI, and XII of the Revised Statement of Claim filed: August 13, 1997.

Arauca Parties' Motion to Dismiss Count XIII of the Revised Statement of Claim filed: August 13, 1997.

First Options' Response to the Arauca Parties' Three Motions to Dismiss filed: September 3, 1997.

Arauca Parties' Motion to Dismiss Counts VIII and IX of the Revised Statement of Claim filed: September 5, 1997.

First Options' Response to the Arauca Parties' Motion to Dismiss Counts VIII and IX of the Revised Statement of Claim filed: October 3, 1997.

First Options' Motion for Sanctions Against the Arauca Parties and Counsel filed on: December 18, 1997.

Arauca Parties' Response in Opposition to First Options' Motion for Sanctions filed: January 12, 1998.

First Options' Motion to Enforce the Arbitrators' June 30, 1997 Order and to Bar Evidence concerning the Arauca Parties' Purported Pre-Settlement Damages filed on: February 24, 1998.

Arauca Parties Response in Opposition to First Options' Motion to Bar Evidence Concerning Damages filed: March 5, 1998.

First Options' Reply Memorandum in Support of its Motion to Enforce the Arbitrators' June 30, 1997 Order and to Bar Evidence concerning the Arauca Parties' Purported Pre-Settlement Damages filed on: March 6, 1998

First Options' Motion to Strike Allegations Regarding Confidential Settlement Negotiations filed on: April 9, 1998.

Arauca Parties' Response in Opposition to First Options' Motion to Strike Allegations Regarding Confidential Settlement Negotiations and In support of the Alternative Cross-Motion to Strike filed: April 13, 1998.

Arauca Parties' Alternative Cross-Motion to Strike filed: April 13, 1998.

First Option's Trial Brief filed: April 20, 1998.

Arauca Parties' Pre-Hearing Brief filed: April 20, 1998.

Arauca Parties' Post-Hearing Brief in Support of the Arauca Parties' Counterclaims against First Options and SLK and in Opposition to First Options' Claims filed: January 15, 1999.

Post-Hearing Memorandum of First Options and SLK filed: January 15, 1999.

Post-Hearing Reply Memorandum of First Options and SLK filed: February 1, 1999.

Arauca Parties' Post-Hearing Reply Brief filed: February 1, 1999.

HEARING INFORMATION

Pre-Hearing Conferences: August 5, 1996 for Two sessions before One arbitrator; October 30, 1996 for One session before One arbitrator; November 5, 1996 for One session before a full panel; March 11, 1997 for One session before a full panel; May 19, 1997 for One session before a full panel; June 30, 1997 for Two sessions before a full panel; September 10, 1997 for Two sessions before a full panel; December 9, 1997 for Two sessions before a full panel; February 6, 1998 for Two sessions before a full panel; and March 10, 1998 for One session before a full panel.

Regular Hearing Dates/Sessions before Full Panel: April 20, 1998 for Two sessions; April 21, 1998 for Two sessions; May 11, 1998 for Two sessions; May 13, 1998 for Two sessions; May 14, 1998 for Two sessions; June 22, 1998 for One session; August 25, 1998 for Two sessions; August 26, 1998 for Two sessions; August 27, 1998 for Two sessions; September 23, 1998 for Two sessions; September 24, 1998 for Two sessions; September 25, 1998 for Two sessions; October 5, 1998 for Two sessions; October 6, 1998 for Two sessions; October 7, 1998 for Two sessions; October 20, 1998 for Two sessions; October 21, 1998 for Two sessions; October 22, 1998 for Two sessions; October 28, 1998 for Two sessions; October 29, 1998 for Two sessions; November 10, 1998 for Two sessions; November 11, 1998 for Two sessions; November 12, 1998 for Two sessions; November 23, 1998 for Two sessions; November 24, 1998 for Two sessions; December 4, 1998 for Two sessions; December 7, 1998 for Two sessions; December 8, 1998 for Two sessions; December 14, 1998 for Two sessions; December 15, 1998 for Two sessions; December 16, 1998 for One session; and February 15, 1999 for Two sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

First Options of Chicago, Inc. ("First Options") initiated this arbitration against Respondents Arauca Trading Limited Partnership, Arauca General, Inc., Stephen G. Macklem, Dr. Henry Gosiene, Dr. Brent Harrison, New Allegheny, Inc. and Hasco,

Inc. seeking declaratory relief with respect to a prospective clearing arrangement set forth in the parties' Settlement Agreement. Eight months later, on March 25, 1997, First Options filed its Revised Amended Statement of Claim against these Respondents.

First Options contended that the clearing arrangement set forth in the Settlement Agreement was void and against public policy (Count I). In addition, First Options claimed that the unexecuted Amendment to the parties' Settlement Agreement was unenforceable because (a) it was fraudulently induced (Count II); (b) it was procured under a mistake of fact and lack of consent (Counts III & IV); and (c) the clearing arrangement violated the Illinois Credit Agreements Act (Count V).

First Options further contended that, in any event, it was discharged from performing under the Settlement Agreement and the unexecuted Amendment because of Respondents' wrongful conduct. First Options alleged that certain Respondents: (a) breached their implied covenants to negotiate in good faith (Counts VII and VIII); and (b) violated the Federal Electronic Privacy Act and the Illinois Computer Crime Prevention Law (Count VI). First Options also sought monetary damages in connection with these alleged computer-related violations (Counts X and XI). First Options further sought damages in connection with the Respondents' unjust enrichment (Count IX) and their breach of the non-disclosure provision of the Settlement Agreement (Count XIII). Finally, based upon First Options' status as a limited partner in Arauca Trading Limited Partnership, First Options sought an accounting of (Count XIV), and the appointment of a receiver for (Count XV), Arauca Trading Limited Partnership.

With the exception of Hasco, Inc., the Respondents filed an Answer, Counterclaim and Third-Party Claim against First Options and its parent company, Spear, Leads & Kellogg. As alleged in the pleadings, the settlement agreement between the Arauca Parties and First Options was to have resolved the Arauca Parties' claims for \$3 million in damages against First Options and SLK for First Options' wrongful liquidation of ATLP's account in 1994. In exchange for release and dismissal of the claims, the Arauca Parties accepted a favorable credit and trading arrangement with respect to ATLP's future trades at First Options. However, after the Arauca Parties released their claims and began efforts to implement this new relationship with First Options, First Options purportedly discovered that the arrangement was illegal and could not be delivered, depriving ATLP of the benefit of the settlement and causing approximately \$7 million in damages. Based upon these allegations, First Options either negligently or deceptively induced the Arauca Parties to relinquish their claims. It was further alleged that the illegal portion of the contract could have been excised and the remainder of the contract enforced. Furthermore, the Arauca Parties did not seek to enforce the proposed amendment to the original settlement agreement, which was never fully executed, making Counts II through VIII moot. Finally, the disputes between the

Arauca Parties and Hasco did not have any bearing on First Options' failure to perform the terms of the agreement.

In response, First Options and Spear, Leads & Kellogg denied wrongdoing and affirmatively claimed that the Respondents' counterclaim was barred because:

- (1) express provisions of the Settlement Agreement foreclosed the action against First Options and Spear, Leads & Kellogg;
- (2) various Respondents lacked standing;
- (3) the Settlement Agreement was illegal and the performance thereof was impossible;
- (4) the Respondents had unclean hands, having engaged in fraudulent and criminal wrongdoing;
- (5) the Respondents breached the contract and related implied covenants; and
- (6) the Respondents failed to state a cause of action against First Options or Spear, Leads & Kellogg.

In addition, First Options and Spear, Leads & Kellogg asserted specific affirmative defenses relating to rescission of the Settlement Agreement. Finally, First Options and Spear, Leads & Kellogg asserted that the following doctrines barred Respondents' counterclaims: (1) the doctrines of estoppel and judicial estoppel; (2) the doctrines of material mistake of fact and *in pari delicto*; (3) the economic loss doctrine; and (4) the equitable doctrine of laches.

Hasco asserted that as a subordinated lender, it had agreed to accept the proposed settlement upon certain conditions regarding the distribution of the \$1.3 million being met. The parties agreed and a settlement agreement was executed, but after the terms were negotiated, Macklem restructured the distribution to the subordinated lenders resulted in a lower payment to Hasco. Hasco never agreed to this distribution, refusing to sign the distribution agreement and the subsequent amendment. Hasco never received the sums due it under the settlement agreement. Hasco's cross-claims were removed from this arbitration pursuant to court order.

RELIEF REQUESTED

First Options requested declaratory relief in regard to the parties' rights and obligations under the Settlement Agreement and Amendment No. 1 of the agreement pursuant to Counts I, II, III, IV, V, and VI of the Amended Claim, including that the original settlement was void and illegal. In addition, First Options sought damages in the amount of \$725,000, plus the sum of commissions, fees and interest, under Counts VII, VIII, and

IX of the Amended Claim. First Options requested actual damages, attorneys' fees and costs under Counts X and XI. Finally, under Counts XIV and XV, First Options requested an Accounting and Appointment of a Receiver to protect its interest in the Arauca Partnership property. First Options further requested that the Arauca Parties' Counterclaim be denied.

ATLP, AGI, Macklem, Gosiene, Harrison and NAI requested that the claims and all counts asserted by First Options be dismissed and denied in the entirety. In addition, ATLP, AGI, Macklem, Gosiene, Harrison and NAI requested entry of an award against First Options and SLK for an amount of not less than \$7 million for the alleged breach of contract and misrepresentation asserted in their counterclaim.

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 originals remain on file with the NASD.

Harrison, NAI and Hasco did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but are required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, counterclaimed, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.

Hasco's Motion to Dismiss for Lack of Personal Jurisdiction and Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction filed August 13, 1996 was denied by the panel.

The Arauca Parties' Motion for an Order Compelling First Options to Return Wrongfully Taken Documents and For Sanctions filed January 10, 1997 was withdrawn.

First Options' Motion for Sanctions against ATLP, AGI, Macklem, Gosiene, Harrison and NAI filed on February 3, 1997 was denied by the panel.

At the hearing on October 30, 1996, the panel denied First Options' Motion to Bar the Arauca Parties from Offering Any Evidence or Argument at the Hearing filed on October 17, 1996.

By order of the Circuit Court of Kanawha County, West Virginia entered March 6, 1997, the cross-claims and Third-Party claims in this arbitration between the Arauca Parties,

Harold A. Sneddon and Hasco, Inc. were stayed. The panel took no further action and these matters were left to the courts of West Virginia for resolution. The claim made by First Options against Hasco, Inc. remained before the panel.

First Options' Motion for Leave to File Amended Statement of Claim filed February 3, 1997 was granted by the panel at the hearing of March 11, 1997.

At hearing on May 19, 1997, SLK's Motion to Dismiss was denied by the panel after review of the pleadings and argument.

First Options' Motion to Compel More Particular Allegations of Fraud and Misrepresentation filed May 6, 1997, Motion to Strike and for Sanctions filed May 13, 1997, and Motion to Stay Arbitration filed May 13, 1997 were denied by the panel.

The panel denied First Options' Motion to Require the Posting of \$1.3 million, but granted the alternative Motion to Bar filed on May 29, 1997.

After review of the papers and hearing, the Arauca Parties' Three Motions to Dismiss Counts II, III, IV, V, VI, VII, X, XI, XII, and XIII were denied by order of the Panel dated September 15, 1997.

The Arauca Parties' Motion to Dismiss Counts VIII and IX of the Revised Statement of Claim filed September 5, 1997 was denied by the panel.

On February 11, 1998, the panel denied First Options' Motion for Sanctions dated December 18, 1997.

On March 11, 1998, the panel denied First Options' Motion to Enforce the Arbitrators' June 30, 1997 Order and to Bar Evidence concerning the Arauca Parties' Purported Pre-Settlement Damages filed on February 24, 1998. However, the panel reaffirmed its June 30, 1997 order.

First Options' Motion to Strike Allegations Regarding Confidential Settlement Negotiations filed on April 9, 1998 was denied by the panel at hearing on April 20, 1998.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All parties have stipulated, on the record, that specific performance of the June 1995 Settlement and Release Agreement's trading and clearing arrangement is not an option for this panel's consideration or decision: the parties do not want a future trading or clearing arrangement.
2. The June 1995 Settlement and Release Agreement require no further performance by the parties subsequent to this decision (the payment and release provisions continue as accomplished.)
3. It is deemed to be just and proper that any partnership interest that First Options and/or Spear, Leeds, and Kellogg may have in or with Arauca Trading Limited Partnership be extinguished together with any claims against the partnership or its partners that might have been brought arising from the partnership interest.
4. The June 1995 Settlement and Release Agreement was not subsequently amended or modified by the parties and no enforceable rights accrue to any party from the activity intending to accomplish Amendment No. 1. First Options is not required to clear the trading account of Arauca Trading Limited Partnership.
5. The First Options preferred stock contemplated by paragraph 4 of the June 1995 Settlement and Release Agreement shall not be issued.
6. All further relief requested by the Claimant in Counts I through XV is denied, with prejudice.
7. All further relief requested by the Respondents in their Answer, Counterclaim and Third Party Claim is denied, with prejudice.
8. All forum fees paid shall be retained by the N.A.S.D. and the balance of all forum fees shall be assessed against First Options.
9. It is the intention of this panel that all claims and counterclaims that were or could have been presented to it are being resolved by this decision and determination.

OTHER COSTS

Pursuant to Rule 10333 of the Code, First Option of Chicago, Inc. has paid to NASD

Regulation Inc. the \$350.00 member surcharge previously invoiced.

FORUM FEES

Pursuant to Rule 10205[c] of the Code of Arbitration Procedure, the following Forum Fees are assessed: Three pre-hearing sessions before One Arbitrator x \$300.00 = \$900.00; Twelve pre-hearing sessions before a full panel x \$1,500.00 per session = \$18,000.00; Sixty-Two hearing sessions before a full panel x \$1,500.00 per session = \$93,000.00; Total forum fees due = \$111,900.00.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$500.00 claim filing fee and, as forum fees, the \$600.00 hearing session deposit paid by First Option of Chicago, Inc. In addition, NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$300.00 claim filing fee and, as forum fees, the \$3,700.00 deposit paid by Arauca Trading Limited Partnership; Arauca General, Inc.; Stephen G. Macklem; Henry Gosiene; Brent Harrison; and New Allegheny, Inc.

First Option of Chicago, Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$107,600.00 for the remaining forum fees due.

Concurring Arbitrators' Signatures

Name

Bradford S. Allen

Bradford S. Allen, Esq.

Public Arbitrator

Chairperson

Date

May 24, 1999

Lee H. Goodman

Public Arbitrator

Carmen P. Michelotti

Industry Arbitrator

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Date of Decision: _____

Regulation Inc. the \$350.00 member surcharge previously invoiced.

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Concurring Arbitrators' Signatures
Name

Date

Bradford S. Allen, Esq.
Public Arbitrator
Chairperson

Lee H. Goodman
Public Arbitrator

Carmen Michelotti
Carmen P. Michelotti
Industry Arbitrator

May 24, 1999

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Date of Decision: _____

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Name

Date

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Public Arbitrator
Chairperson

Lee H. Goodman
Public Arbitrator

Carmen P. Michelotti
Industry Arbitrator

For ODR Use Only
Date of Decision: _____

I DISSENT FROM THE AWARD. *Lee H. Goodman*, PUBLIC ARBITRATOR
5-25-99