

NASD AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Louis M. Clements

96-03468

Name of Respondents

John Liselli  
Salvatore Marasa  
Smith Benton & Hughes  
Robert Hanney

REPRESENTATION

Claimant Louis M. Clements ("Claimant") was represented by Bernard C. Daley, Esq., Law Offices of Joseph C. Daley, New York, NY.

Respondents John Liselli ("Liselli") and Robert Hanney ("Hanney") were represented by Thomas E. Wagner, Quantitative Assessment Management, Inc., New York, NY.

Respondent Salvatore Marasa ("Marasa") was represented by Michael A. Zimmerman, Esq., New York, NY.

Respondent Smith Benton & Hughes ("SBH") did not appear.

CASE INFORMATION

The Statement of Claim was filed August 12, 1996.

The Amended Statement of Claim was filed November 13, 1996.

Claimant's Uniform Submission Agreement was signed December 6, 1996.

The Statement of Answer of Respondent Liselli was filed November 5, 1996.

The Statement of Answer of Respondent Marasa was filed November 5, 1996.

The Statement of Answer and Crossclaims of Respondent SBH was filed October 28, 1996.

The Statement of Answer to the Amended Statement of Claim of Respondent SBH was filed December 4, 1996.

The Joint Statement of Answer to the Amended Statement of Claim of Respondents Liselli, Marasa and Hanney was filed May 5, 1997.

The Joint Stipulation of the Dismissal of Crossclaims was filed May 9, 1997.

Liselli's Uniform Submission Agreement was signed November 4, 1996.

Marasa's Uniform Submission Agreement was signed November 4, 1996.

Hanney's Uniform Submission Agreement was signed May 2, 1997.

SBH did not file an executed agreement to arbitrate.

### HEARING INFORMATION

Hearing Dates/Sessions: April 22, 1997/one session  
June 3, 1998/one session  
June 25, 1998/two sessions  
June 26, 1998/two sessions  
July 2, 1998/two sessions

Hearing Location: NASD Regulation  
New York, NY

### CASE SUMMARY

Claimant alleged that Respondents SBH, Marasa, Liselli and Hanney (collectively "Respondents") engaged in unauthorized trading in his account which resulted in a breach of contract and fraud. Specifically, Claimant alleged that on January 26, 1994 he instructed Respondents to purchase as many shares of Newbridge Networks Corp. ("NNC") stock using as the cash balance in his account would buy. Claimant asserted that after a purchase of 1,000 shares of NNC on January 25, 1994, his account had \$20,025.00 in cash and 3,300 shares of NNC. Claimant alleged that on January 28, 1994 2,100 shares of NNC were purchased for his account at a cost of \$140,895.00, resulting in a margin account balance of \$121,274.70. Claimant contended that his instructions should have resulted in the purchase of approximately 300 shares and thus this transaction resulted in 1,800 more shares of stock than he authorized. Claimant alleged that as soon as he noticed the large margin balance he contacted Respondents and that they admitted the error and said that it would be rectified.

Claimant alleged that Respondents actions resulted in all of Claimant's shares of NNC being sold as well as the loss of the cash balance which had been in his account. Claimant alleged that Respondents continuously stated that the error would be corrected and Claimant would be made whole but that it never happened.

In the Statement of Answer filed, Respondent SBH denied the allegations of wrong-doing as asserted in the Statement of Claim and maintained that Claimant notified them of the allegedly unauthorized purchase in his account. SBH raised the affirmative defenses of a failure to state a claim upon which relief can be granted; a failure to mitigate; waiver; estoppel; laches; the doctrine of unclean hands; unjust enrichment; ratification; and any alleged damages were the proximate cause of third parties.

Respondents Liselli, Marasa and Hanney denied the allegations of wrong-doing asserted in the Claimant's claims. Respondents maintained that Claimant's instructions on January 28, 1994 were to purchase as many shares of NNC as possible, in his margin account, not to purchase only the amount which could be obtained with his cash account balance. Respondents Liselli, Marasa and Hanney raised the affirmative defenses of a failure to state a cause of action upon which relief may be granted; laches; unclean hands; waiver; and that any damages suffered by Claimant were the result of Claimant's trading decisions.

### **RELIEF REQUESTED**

Claimant requested a return of 2,917 shares of NNC in exchange for the return of the cash balance of \$27,207.00, cash equivalent at the time of \$99,682.50, as well as the cost of this proceeding including reasonable attorneys' fees; and punitive damages of \$50,000.00.

Respondent SBH requested that the Statement of Claim be denied.

Respondents Liselli, Marasa and Hanney requested that the Statement of Claim be dismissed in its entirety, that all references to this arbitration be expunged from Central Registration Depository ("CRD") records and that all costs and hearing fees be assessed against Claimant and that Respondents Liselli, Marasa and Hanney be awarded their expenses and legal fees in connection with the defense of this matter.

### **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.

Respondent SBH did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim is bound by the determination of the arbitration panel on all issues submitted.

The panel was informed that by stipulation of the Respondents, the Crossclaims were withdrawn.

### **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. That the Statement of Claim is denied; and
2. That the claim for punitive damages is denied; and
3. That all references to this arbitration shall be expunged from Respondent Marasa's records maintained by the Central Registration Depository ("CRD"); and
4. That Respondents' request for expenses and attorney's fees is denied; and
5. That each party shall bear its own costs and expenses, including attorney's fees, with the exception of the forum fees as specified below; and
6. That any and all relief not specifically addressed herein are denied.

### OTHER COSTS

Pursuant to Rule 10333 of the Code, Respondent SBH was assessed a member surcharge of \$300.00 which has been paid.

Respondent SBH was assessed an adjournment fee of \$600.00 which has been paid, and Respondents Liselli, Marasa and Hanney were assessed an adjournment fee of \$166.66 each, which has not been paid.

### FORUM FEES

Pursuant to Rule 10332(c) of the Code, the following Forum Fees are assessed:

8 hearing sessions x \$750.00 = \$6,000.00

Forum Fees are to be assessed to Claimant, and Respondents SBH, Marasa, Liselli and Hanney at \$1,200.00 each.

Claimant is to receive credit for the \$200.00 filing fee and the \$450.00 hearing session deposit previously submitted to the NASD Regulation, for forum fees due of \$750.00 in addition to the \$30.00 administrative costs leaving Claimant with total fees due of \$780.00.

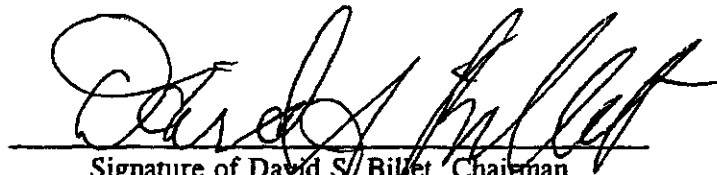
Respondent SBH is to receive credit for the filing fee on the crossclaim of \$500.00, the adjournment fee of \$600.00, the member surcharge of \$300.00 and the \$1,050.00 hearing session deposit previously submitted to the NASD Regulation, leaving Respondent SBH with a net forum fee assessment due of \$150.00.

Respondents Marasa, Liselli and Hanney each have an adjournment fee of \$166.66 due as well as the forum fees assessment due of \$1,200.00 for total fees due of \$1,366.66.

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

**AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE**

I, **DAVID S. BILLET, ESQ.**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

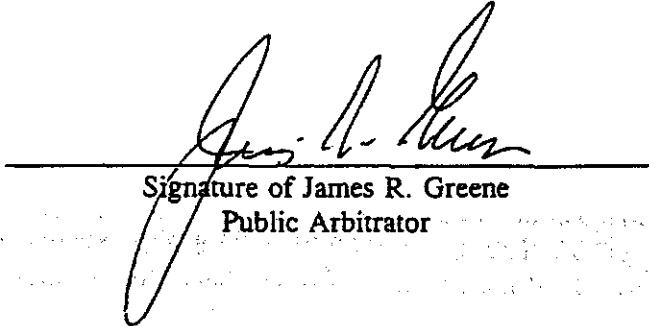
  
Signature of David S. Billet, Chairman  
Public Arbitrator

Date Decision Served by NASD Regulation:

Aug. 10, 1998

**AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE**

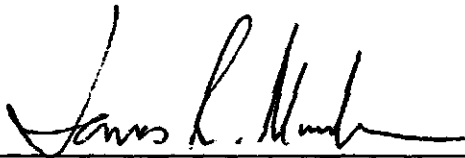
I, **JAMES R. GREENE**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

  
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Signature of James R. Greene  
Public Arbitrator

Date Decision Served by NASD Regulation: Aug 10, 1998

**AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE**

I, JAMES R. MADAN, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

A handwritten signature in dark ink, appearing to read "James R. Madan", is written over a horizontal line.

Signature of James R. Madan  
Industry Arbitrator

Date Decision Served by NASD Regulation:

Aug. 10, 1998