

NASD REGULATION, INC.  
AWARD

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In the Matter of the Arbitration Between

Name of Claimant

Barry Habib

96-03970

Name of Respondents

H.J. Meyers & Co., Inc.  
Thomas James Associates, Inc.  
Mark Allen  
Robert Seteducatti

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**REPRESENTATION**

For Claimant Barry Habib ("Habib") appeared Dan Brecher, Esq., a sole practitioner with offices located in New York, New York.

For Respondents H.J. Meyers & Co., Inc. ("Meyers"), Thomas James Associates, Inc. ("Thomas James") and Robert Seteducatti ("Seteducatti") appeared James C. Cosby, Esq. of the law offices of Maloney Huennekens Parks Gecker and Parsons located in Richmond, Virginia.

For Respondent Mark Allen ("Allen") appeared John J. Phelan, III, Esq., a sole practitioner with offices located in New York, New York.

**CASE INFORMATION**

Habib's Statement of Claim was filed on October 7, 1996.  
Habib's Submission Agreement was signed on August 29, 1996.

Meyers, as successor to Thomas James, and Seteducatti's Joint Statement of Answer was filed on February 24, 1997.

Meyers did not file an executed Submission Agreement.  
Seteducatti did not file an executed Submission Agreement.

Allen's Statement of Answer was filed on December 12, 1997.  
Allen's Submission Agreement was signed on February 25, 1997.

### HEARING INFORMATION

Pre-Hearing Conferences:	January 6, 1998	One Session - Full Panel
	February 3, 1998	One Session - Full Panel
Hearing Dates/Sessions:	May 27, 1998	Two Sessions
	May 28, 1998	One Session

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

### CASE SUMMARY

Habib alleged that Michael Bergin ("Bergin"), an employee of Thomas James, solicited him to invest in Acculyte by representing to him that the investment had a guaranteed 9% return and there was no chance of risk. Habib alleged that he relied on the misrepresentations of Bergin and those in the Private Placement Memorandum and, on January 31, 1994, he invested in Acculyte. Habib asserted that, on October 18, 1994, he learned through a memorandum from Thomas James to Acculyte Preferred Shareholders that the private placement offering was unsuccessful in raising sufficient capital for Acculyte and, therefore, it was not a viable public offering candidate. Habib further asserted that the memorandum stated that Thomas James' attempt to market additional financing had failed and Acculyte's assets had been seized by Astra under the terms of Acculyte's \$250,000.00 obligation to it. Habib alleged that, on October 21, 1994, he learned through another memorandum from Acculyte to its preferred share Holders, that the company had failed and his investment was lost. Habib alleged that Thomas James and Meyers violated the RICO Act. Habib alleged that the Respondents violated the Securities Exchange Act of 1934 and Rule 10b(5). Habib asserted that Thomas James is liable for the actions of its agents under the Exchange Act. Habib further asserted that the Respondents breached their fiduciary duties, committed fraud, were negligent and made negligent misrepresentations. Habib alleged that Thomas James breached its contract and is liable under the doctrine of respondeat superior. Habib further alleged that Meyers is liable as successor to Thomas James.

Meyers, Thomas James and Seteducatti (collectively "Respondents") maintained that the Private Placement Memorandum was drafted by Acculyte and contained representations as to the company's present condition and future prospects. Respondents asserted that before participating in the Acculyte offering, Habib executed Subscription Documents in which he represented that he had reviewed and relied only on the Private Placement Memorandum, had adequate opportunity to review the books and records of the company with his attorney and/or accountant and had reasonable opportunity to ask questions of Acculyte. Respondents further asserted that Habib represented that he was an accredited investor as defined under Rule 501 of Regulation D of the Securities Act of 1933 and was, therefore, able to participate in the private placement.

Respondents maintained that the Private Placement Memorandum, stated, in bold type: "These securities involve a high degree of risk and their purchase should be considered only by persons who can afford to sustain a total loss of their investment." Respondents asserted that, by reading and relying on the Private Placement Memorandum, Habib was aware of the risks involved.

Respondents maintained that Habib was an experienced investor with substantial experience in speculative securities. Respondents further maintained that Habib spoke with officers of Acculyte and was given the opportunity to withdraw his investment.

Allen maintained that he was never head of investment banking at Meyers but rather worked in the investment banking department. Allen maintained that he never made any representations or provided information to Habib. Allen further maintained that he was not a controlling person of Meyers and had no duty to supervise or perform any particular duty. Allen maintained that he was not a fiduciary to Habib and was not managing Habib's funds or securities.

### **RELIEF REQUESTED**

Claimant requested:

- (a) On his first, second, and third claims for relief against Thomas and Meyers, damages in an amount as authorized by 18 U.S.C. 1964(c) and reasonable attorneys' fees;
- (b) On his fourth claim for relief against Respondents, damages in an amount of not less than \$50,000.00, and punitive damages;
- (c) On his fifth claim for relief against Thomas, damages in an amount totaling not less than \$50,000.00;
- (d) On his sixth and seventh claims for relief against Respondents, damages in an amount totaling not less than \$50,000.00 and punitive damages;
- (e) On his eighth and ninth claims for relief against Respondents, damages in an amount totaling not less than \$50,000.00;
- (f) On his tenth and eleventh claims for relief against Thomas, damages in an amount totaling not less than \$50,000.00;
- (g) On his twelfth claim for relief against Meyers, damages as authorized by law; and
- (h) On all claims for relief, interest as authorized by law; the costs and disbursements incurred for the arbitration herein, and reasonable attorneys' fees; and such other and further relief as the panel deems appropriate.

Meyers, Thomas, and Seteducatti requested that the Statement of Claim be dismissed in its entirety and that they be awarded their costs and fees.

Allen requested that the Statement of Claim be dismissed, that he be awarded attorneys' fees and that all forum fees and costs be assessed against Habib.

### **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.

The panel wished to note that H.J. Meyers & Co., Inc. is the legal successor to Thomas James Associates.

At the hearing, Habib withdrew his claims against Allen and Seteducatti, with prejudice. The panel determined that the Motions to Dismiss of Allen and Seteducatti were moot, since they were withdrawn as parties to this arbitration.

At the hearing, H.J. Meyers made a Motion to Dismiss. The panel denied this motion.

The panel made the following determinations concerning Meyers and Seteducatti who did not file Submission Agreements:

1. Pursuant to Rule 10101 of the Code of Arbitration Procedure (the "Code"), the arbitrators found subject matter jurisdiction over this entire controversy.
2. The panel found that Meyers was a member of the NASD at the time this controversy arose. Accordingly, the panel found jurisdiction over Meyers and Thomas James pursuant to Rule 10301 of the Code.
3. The panel found that Seteducatti was a person associated with a member of the NASD at the time this controversy arose. Accordingly, the panel found personal jurisdiction over Seteducatti pursuant to Rule 10301 of the Code.
4. The panel found that Meyers and Seteducatti were required to file Submission Agreements with NASD Regulation pursuant to Rule 10314(b) of the Code.

#### **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. Meyers, as successor to Thomas James, be and hereby is liable for and shall pay to Habib compensatory damages in the amount of \$25,000.00, plus interest at 6% per annum accruing from February 1, 1994 until the date the award is satisfied.
2. Meyers, as successor to Thomas James, be and hereby is liable for and shall pay to Habib the sum of \$520.00 as reimbursement of the \$120.00 non-refundable filing fee and \$400.00 hearing session deposit previously paid by Habib.
3. All other requests are hereby denied.

#### **OTHER COSTS**

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Meyers has paid to NASD Regulation, Inc. the \$200.00 member surcharge previously invoiced.

### 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 \$120.00 non-refundable filing fee deposited by Habib and have assessed the following Forum Fees:

2 Pre-hearing conferences (Full Panel) x \$400.00	=	\$ 800.00
3 Hearing sessions x \$400.00	=	\$1,200.00
Total Forum Fees	=	\$2,000.00

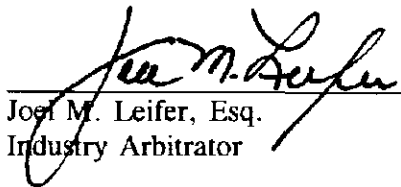
1. Meyers be and hereby is liable for the sum of \$2,000.00 representing the total forum fees assessed. Habib previously deposited \$400.00 with NASD Regulation, Inc. and, therefore, Meyers is liable for and shall remit the \$1,600.00 remaining balance.
2. Meyers be and hereby is liable for and shall pay the sum of \$520.00 to Habib as provided for in the "Award" section above.

Fees are payable to NASD Regulation, Inc.

**ARBITRATION PANEL**

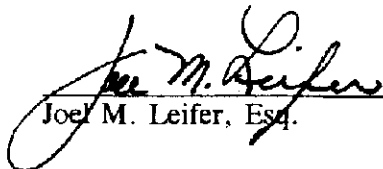
Theodore M. Simon, Esq.	-	Public Chairperson
Arthur J. Kresch	-	Public Arbitrator
Joel M. Leifer, Esq.	-	Industry Arbitrator

**CONCURRING ARBITRATOR'S SIGNATURE**

  
Joel M. Leifer, Esq.  
Industry Arbitrator

Date of decision:       JULY 27, 1998      

I, **Joel M. Leifer, 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.

  
Joel M. Leifer, Esq.

**ARBITRATION PANEL**

Theodore M. Simon, Esq.	-	Public Chairperson
Arthur J. Kresch	-	Public Arbitrator
Joel M Leifer, Esq.	-	Industry Arbitrator

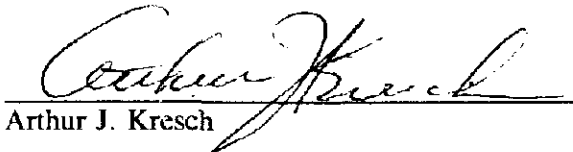
**CONCURRING ARBITRATOR'S SIGNATURE**



Arthur J. Kresch  
Public Arbitrator

Date of decision:     JULY 27, 1998    

I, **Arthur J. Kresch**, 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.

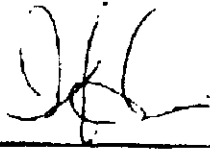


Arthur J. Kresch

**ARBITRATION PANEL**

Theodore M. Simon, Esq. - Public Chairperson  
Arthur J. Kresch - Public Arbitrator  
Joel M. Leifer, Esq. - Industry Arbitrator

**CONCURRING ARBITRATOR'S SIGNATURE**



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Theodore M. Simon, Esq.  
Chairperson - Public Arbitrator

Date of decision: \_\_\_\_\_ JULY 27, 1998

I, Theodore M. Simon, 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.



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Theodore M. Simon, Esq.