

**NASD AWARD**

**NASD Regulation, Inc. Office of Dispute Resolution**

**In the Matter of the Arbitration Between**

**Name of Claimant**

Marvin N. Fountain

Case No. 96-03973

**Name of Respondents**

H.J. Meyers & Co., Inc. (formerly known as Thomas James Associates, Inc.)  
Robert Setteducati  
Mark Allen

**REPRESENTATION**

For Claimant Marvin N. Fountain ("Claimant"): Dan Brecher, Esq., of the law firm of Fischbein, Badillo, Wagner & Harding, New York, New York

For Respondents H.J. Meyers & Co. Inc. ("HJM") and Robert Setteducati ("Setteducati"): James C. Cosby, Esq., of the law firm of Maloney, Huennekens, Parks, Gecker, Parsons, Richmond, Virginia

For Respondent Mark Allen ("Allen"): John J. Phelan, III, Attorney at Law, New York, New York

**CASE INFORMATION**

Statement of Claim filed: August 30, 1996

Claimant's Submission Agreement signed on: October 22, 1996

Amended Statement of Claim filed: November 1, 1996

Joint Statement of Answer filed by Respondents HJM and Setteducati (collectively referred to as "Respondents"): February 26, 1997

Respondents Thomas James Associates' and HJM's Submission Agreement executed by Michael Brown, General Counsel for H.J. Meyers & Co. on: January 16, 1997

Respondent Setteducati's Submission Agreement signed:

Statement of Answer filed by Respondent Allen: May 27, 1997

Respondent Allen did not execute a Submission Agreement

**HEARING INFORMATION**

Pre-Hearing Conference:      one session with three arbitrators on January 28, 1998  
   one session with three arbitrators on February 5, 1998  
   one session with single arbitrator on March 10, 1998

Hearing Dates/Sessions:      March 16, 1998 - 2 sessions

Hearing Location:              NASD Regulation, Inc. District Office, New York, NY

### CASE SUMMARY

Claimant alleged, among other things, that Respondents committed violations under the Securities and Exchange Act of 1934, Rule 10b-5 and Section 20(a), breach of fiduciary duties, fraud, negligence, negligent misrepresentation, respondeat superior, breach of contract, and successor liability. Claimant alleged that Respondents fraudulently induced him, based upon information which Respondents knew or should have known was inaccurate and misleading, to invest in a private placement in Acculyte Corporation ("Acculyte"). Acculyte was insolvent at the time Claimant invested in it, and it subsequently filed bankruptcy. Claimant asserted that had he been informed by Respondents of the true financial condition of Acculyte, he would not have invested in it. Claimant further alleged that the private placement was conducted in a manner which violated certain exemptions from registration under the federal securities laws and state blue sky laws.

Respondents HJM and Setteducati maintained that Claimant acknowledged in subscription documents that (i) he reviewed and relied solely on the Private Placement Memorandum ("PPM"), (ii) he had adequate opportunity to review the books and records of the company with his attorney and/or accountant, and (iii) he had reasonable opportunity to ask questions about the Company.

HJM maintained that it served as placement agent for units of convertible preferred stock and warrants of Acculyte, whose principals had been successful in the electronics field in the defense industry. Respondents HJM and Setteducati maintained that the offering was sold through HJM on "best efforts, minimum/maximum" basis. Respondents HJM and Setteducati maintained that Acculyte's law firm reaffirmed the accuracy of the PPM prepared by Acculyte, as did Acculyte's principals. Respondents HJM and Setteducati maintained that after the offering was completed, a promissory note made by Acculyte, adequately disclosed in the PPM, was assigned to another party, defaulted, and was foreclosed upon, causing the sale of all Acculyte's assets, resulting in Acculyte's bankruptcy. Respondents HJM and Setteducati maintained that all risks were adequately disclosed in the PPM and denied liability. Respondents HJM and Setteducati maintained that the Statement of Claim failed to allege a cause of action upon which relief may be granted, and that Claimant assumed all risks. Respondents HJM and Setteducati maintained that such risks resulted in Acculyte's bankruptcy, and that Claimant is entitled to no relief.

Respondent Allen adopted the defenses asserted by Respondents HJM and Setteducati. Allen, among other things, maintained that the Statement of Claim failed to plead with particularity the claims against him or to give him fair notice of what he was charged with having done. Allen denied the material allegations of the Statement of Claim. Allen denied that he was "head of investment banking" at the Respondent member organizations. Allen denied any wrongful or improper conduct and denied the violation of any statute, rule or industry standard in any of the matters in the claim. Allen maintained that he acted at all times professionally and in complete accord with all such statutes, regulations, rules and standards. Allen maintained that he acted solely as an employee of Respondent organizations and was not a controlling person. Allen maintained that he did not know the Claimant and had no role in managing his funds. Allen asserted a Statute of Limitations defense to the Federal Securities Law claim.

### RELIEF REQUESTED

Claimant requested an award for damages in the amount of not less than \$50,000 plus punitive damages together with pre-award interest from January 25, 1994; all costs of arbitration, including attorneys' fees.

disbursements, expenses and post award interest on all such sums as allowed by law.

Respondents HJM, Setteducati and Allen requested that the Statement of Claim be denied in its entirety and that Respondents be awarded their costs and fees.

#### OTHER ISSUES CONSIDERED & DECIDED

At the beginning of the hearing, Claimant dismissed his claim as to only Respondent Setteducati.

Pursuant to the bylaws of the NASD, Allen was required to submit to this arbitration, notwithstanding, his failure to execute a submission agreement. The Panel, therefore, exercised its jurisdiction over Allen and he is bound by the Panel's rulings and determinations set forth herein.

At the hearing, Allen made a motion to dismiss that was granted by the Panel.

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.

#### 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. Claimant's claim for compensatory damages against Respondent H.J. Meyers (formerly known as Thomas James Associates, Inc.) is denied in its entirety.
2. Claimant's claim for punitive damages against Respondent H.J. Meyers (formerly known as Thomas James Associates, Inc.) is denied in its entirety *ly*
3. That the parties shall bear their respective costs including attorneys' fees except as forum fees are addressed herein.
4. That any and all relief not specifically addressed herein is denied in its entirety.

#### FORUM FEES

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

2 pre-hearing conferences (with 3 arbitrators) x \$400 =	\$ 800.00
1 pre-hearing conference with one arbitrator x \$300 =	\$ 300.00
2 sessions x \$400 =	\$ 800.00
Total Forum Fees	\$ 1,900.00

Forum Fees assessed against: 50% to Claimant and 50% to Respondent H.J. Meyers. Claimant is

assessed forum fees in the amount of \$950. Claimant is entitled to offset this amount with his hearing deposit of \$400 so that the amount due from Claimant is \$550. Forum Fees in the amount of \$950 are assessed against Respondent H.J. Meyers.

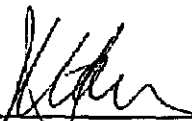
H.J. Meyers & Co. paid its Member Surcharge fee of \$200.00.

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

DATE AWARD SIGNED:

Concurring Arbitrators' Signatures

4/14/98

  
\_\_\_\_\_  
Ira M. Starr - Chairperson  
Public Arbitrator

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Hilary B. Miller - Panelist  
Public Arbitrator

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James Baxter - Panelist  
Industry Arbitrator

Date Decision Served on NASD:

April 22, 1998

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H.J. Meyers & Co. paid its Member Surcharge fee of \$200.00.

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

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Concurring Arbitrators' Signatures

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Public Arbitrator

4/14/98

  
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Hilary B. Miller - Panelist  
Public Arbitrator

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James Baxter - Panelist  
Industry Arbitrator

Date Decision Served on NASD: April 22, 1998

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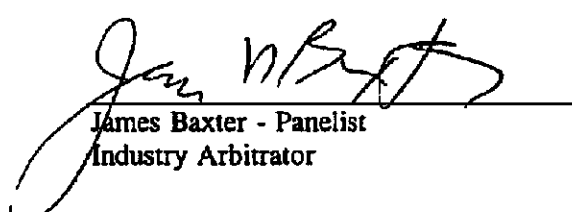
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Ira M. Starr - Chairperson  
Public Arbitrator

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Hilary B. Miller - Panelist  
Public Arbitrator

April 14, 1998


  
James Baxter - Panelist  
Industry Arbitrator

Date Decision Served on NASD:

April 22, 1998

**ARBITRATOR'S SIGNATURE**

I, Ira M. Starr, 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 Arbitrator

DATE OF DECISION: April 22, 1998

**ARBITRATOR'S SIGNATURE**

I, Hilary B. Miller, 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.

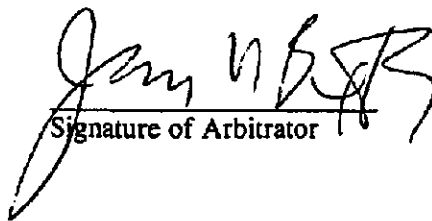
  
\_\_\_\_\_  
Signature of Arbitrator

DATE OF DECISION: 4/14/98



**ARBITRATOR'S SIGNATURE**

I, James Baxter, 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 Arbitrator

DATE OF DECISION: March 16, 1998