

NASD AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

Herman Glaser
Lenard Thylan

96-03974

Name of Respondent

H.J. Meyers & Co., Inc.

REPRESENTATION

Claimants Herman Glaser ("Glaser") and Lenard Thylan ("Thylan") were represented by Dan Brecher, Esq. and Eric Ross, Esq., Fischbein Badillo Wagner Harding, New York, NY.

Respondent H.J. Meyers & Co. (f.k.a. Thomas James & Associates "Respondent") was represented by James C. Cosby, Esq., Maloney, Huennekens, Parks, Gecker & Parsons, Richmond, VA.

CASE INFORMATION

The Statement of Claim of Glaser and Thylan (collectively "Claimants") was filed September 5, 1996.
Thylan's Uniform Submission Agreement was signed August 30, 1996.
Glaser's Uniform Submission Agreement was signed September 3, 1996.

Respondent's Statement of Answer was filed February 26, 1997.
Respondent's Uniform Submission Agreement was signed January 16, 1997.

HEARING INFORMATION

Prehearing Conference Date/Sessions: January 23, 1998/one session

Hearing Dates/Sessions: April 29, 1998/two sessions
April 30, 1998/one session
May 1, 1998/two sessions
May 5, 1998/one session

Hearing Location: NASD Regulation Office of Dispute Resolution
New York, NY

CASE SUMMARY

Claimants alleged that Respondent induced them to invest in a private placement in Acculyte Corporation ("Acculyte") by untrue statements which Respondent knew or should have known were inaccurate and misleading, and by the failure to disclose negative information about Acculyte which Respondent knew or should have known. Claimants alleged that Respondent committed violations under the Securities 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 has successor liability. Additionally, Claimants alleged Acculyte's operations and finances deteriorated between August 9, 1993, the date of the Acculyte Offering Memorandum, and the October 1997 dates on which Claimants' investments closed in the private placement in Acculyte. Claimants further asserted that Respondents knew of, but failed to disclose any of this material information to Claimants. Claimants contended that Acculyte was insolvent at the time of Claimants' investments, and it subsequently filed for bankruptcy. Claimants alleged that had Claimants been informed by Respondent of the true operational and financial condition of Acculyte at or prior to the October 1993 closing of their investments, they would not have invested in the Acculyte private placement.

Respondent denied all allegations of wrong-doing as asserted in the Statement of Claim. Respondent maintained that each Claimant acknowledged and confirmed in subscription documents that (i) he reviewed and relied solely on the Private Placement Memorandum ("PPM"), (ii) that he had adequate opportunity to review the books and records of Acculyte with his attorney and/or accountant, and (iii) he had reasonable opportunity to ask questions about Acculyte. Further, Respondent contended that each Claimant certified that he was an "accredited investor" as defined in Rule 501 of Regulation D and also certified that he was an experienced investor, who was capable of making his own decision.

Respondent 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. Respondent asserted that Acculyte sought to obtain working capital to enable it to proceed to develop and market electronic fluorescent ballasts for the lighting industry, which would allow it to be viable, and to proceed ultimately to offer its stock to the public. Respondent maintained that it sold the offering on a "best efforts, minimum/maximum" basis and that adequate due diligence was performed at all times, and later, Acculyte's law firm reaffirmed the accuracy of the PPM prepared by Acculyte as did Acculyte's principals. Respondent further maintained that after the offering was completed, Acculyte continued to operate up through 1994, but later failed due to the realization of risks that were of the type disclosed to each investor in the PPM. Respondent contended that ultimately 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. Respondent maintained that all risks were adequately disclosed in the PPM and denied any liability.

Respondent maintained that the Statement of Claim failed to allege a cause of action upon which relief may be granted, and that Claimants assumed all risks and that such risks resulted in Acculyte's bankruptcy, and that Claimants are entitled to no relief. Respondent maintained that there was no actionable misrepresentation or omission, that Claimants could not demonstrate reasonable reliance, nor that the fact(s) allegedly misrepresented or omitted were the cause of the investments loss, all as required by law.

RELIEF REQUESTED

Claimant Glaser requested an award for damages in an amount of not less than \$100,000 plus treble damages for claims for violations under the Securities Exchange Act of 1934, Rule 10b-5 and Section 20(a), breach of fiduciary duties, fraud, negligence, negligent misrepresentation, respondeat superior and breach of contract; together with pre-award interest from October 27, 1993, the date of closing on his investment; punitive damages in the amount the panel deems just and equitable; all costs of arbitration, including attorneys' fees, disbursements, expenses, and post-award interest on all such sums as allowed by law; and such other relief as the panel deems just and proper.

Claimant Thylan requested an award for damages in an amount of not less than \$25,000 plus treble damages for claims for violations under the Securities Exchange Act of 1934, Rule 10b-5 and Section 20(a), breach of fiduciary duties, fraud, negligence, negligent misrepresentation, respondeat superior and breach of contract; together with pre-award interest from October 7, 1993, the date of closing on his investment; punitive damages in the amount the panel deems just and equitable; all costs of arbitration, including attorneys' fees, disbursements, expenses, and post-award interest on all such sums as allowed by law; and such other relief as the panel deems just and proper.

Respondent requested that the Statement of Claim be dismissed in its entirety.

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.

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. That the Statement of Claim is denied in its entirety; and
2. That the claims for treble and/or punitive damages is denied; and
3. That each party shall bear its own costs and disbursements, including attorney's fees, with the exception of the Forum Fees as specified below; and
4. That any and all relief not specifically addressed herein is denied.

OTHER COSTS

Pursuant to Rule 10333, Respondent is assessed a member surcharge of \$350.00.

FORUM FEES

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

1 Prehearing Session (full panel) x \$750.00 =	\$ 750.00
6 Hearing Sessions x \$750.00 =	<u>\$4,500.00</u>
Total Forum Fees	\$5,250.00

Forum Fees are assessed at \$2,625.00 to Claimants, jointly and severally, and at \$2,625.00 to Respondent.

Claimants shall receive credit for the \$950.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net Forum Fees assessment due from Claimants of \$1,675.00.

Respondent has a net Forum Fees assessment due of \$2,625.00.

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

DATE

5/18/98

CONCURRING ARBITRATORS' SIGNATURES


Diane Ciccone, Presiding
Public Arbitrator

Leo Cooperman
Public Arbitrator

James E. Howard
Industry Arbitrator

Date Decision Served by NASD Regulation:

May 28, 1998

FORUM FEES

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

1 Prehearing Session (full panel) x \$750.00 =	\$ 750.00
6 Hearing Sessions x \$750.00 =	<u>\$4,500.00</u>
Total Forum Fees	\$5,250.00

Forum Fees are assessed at \$2,625.00 to Claimants, jointly and severally, and at \$2,625.00 to Respondent.

Claimants shall receive credit for the \$950.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net Forum Fees assessment due from Claimants of \$1,675.00.

Respondent has a net Forum Fees assessment due of \$2,625.00.

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

DATE

CONCURRING ARBITRATORS' SIGNATURES

Diane Ciccone, Presiding
Public Arbitrator

5/18/98

Leo Cooperman
Leo Cooperman
Public Arbitrator

James E. Howard
Industry Arbitrator

Date Decision Served by NASD Regulation:

May 28, 1998

FORUM FEES

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

1 Prehearing Session (full panel) x \$750.00 = \$ 750.00
6 Hearing Sessions x \$750.00 = \$4,500.00
Total Forum Fees **\$5,250.00**

Forum Fees are assessed at \$2,625.00 to Claimants, jointly and severally, and at \$2,625.00 to Respondent.

Claimants shall receive credit for the \$950.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net Forum Fees assessment due from Claimants of \$1,675.00.

Respondent has a net Forum Fees assessment due of \$2,625.00.

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

DATE

CONCURRING ARBITRATORS' SIGNATURES

Diane Ciccone, Presiding
Public Arbitrator

Leo Cooperman
Public Arbitrator

5/15/98

James E. Howard
James E. Howard
Industry Arbitrator

Date Decision Served by NASD Regulation:

May 28, 1998