

**NASD REGULATION, INC. AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.  
OFFICE OF DISPUTE RESOLUTION

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In the Matter of the Arbitration Between

Name of Claimant

Thomas W. Bibb

and

Case Number 96-04369

Names of Respondents

H.J. Meyers & Co., Inc.,  
Mark Allen, and  
Robert Seteducatti

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**REPRESENTATION OF PARTIES**

Claimant, Thomas W. Bibb was represented by Dan Brecher, Esquire of Fischbein, Badillo, Wagner & Harding located in New York, New York.

Respondent, H. J. Meyers & Co., Inc. was represented by George McDonald, Esquire of H.J. Meyers & Co., Inc. located in Rochester, New York.

Respondent, Mark Allen was represented by John J. Phelan, III. Esquire of John J. Phelan, III, P.C. located in New York, New York.

**CASE INFORMATION**

The Statement of Claim of Claimant, Thomas W. Bibb was filed on or about September 26, 1996.

The Submission Agreement of Claimant, Thomas W. Bibb was signed on September 10, 1996.

The Statement of Answer of Respondent, H.J. Meyers & Co., Inc. was filed on about March 4, 1997.

The Submission Agreement of Respondent, H.J. Meyers & Co., Inc. was signed on January 16, 1997

The Statement of Answer of Respondent, Mark Allen was filed on or about March 5, 1997.

The Submission Agreement of Respondent, Mark Allen was signed on February 25, 1997.

### **HEARING INFORMATION**

A pre-hearing conference was held on March 10, 1998 for one (1) pre-hearing session.

The hearing was held on: September 16, 1997 for two(2) hearing sessions; and  
March 23, 1998 for three (3) hearing sessions.

The hearing was held in Houston, Texas.

### **CASE SUMMARY**

Thomas W. Bibb ("Claimant") alleged that from approximately August 1993 through April 1994, H.J. Meyers & Co., Inc. by and through Mark Allen and Robert Setteducati ("Respondents") induced him to invest in a private placement in Acculyte Corporation by making untrue statements which Respondents knew or should have known were inaccurate and misleading, and by the failure to disclose negative information about Acculyte which Respondents knew or should have known. Claimant alleged that Respondents 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 successor liability. Acculyte Corporation was allegedly insolvent at the time Claimant invested in it, and it subsequently filed bankruptcy. Claimant contended that had he been informed by Respondents of the true financial condition of Acculyte, he would not have invested in the Acculyte Corporation.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that Claimant as an experienced investor with substantial experience in speculative securities, was fully capable of understanding the risk of the investment which was fully disclosed and clearly presented to him in the private placement memorandum prior to his participation in the Acculyte Offering. Respondents asserted the following affirmative defenses: The Acculyte Offering was a private placement; Claimant failed to allege fraud; Claimant knew or assumed all the risks; Claimant was barred by the legal principles of waiver, estoppel and ratification and the equitable principle of laches.

### **RELIEF REQUESTED**

Claimant requested: an award for damages in an amount of not less than \$50,000.00 in actual damages plus punitive 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, breach of contract, and successor liability; together with pre-award interest from January 24, 1994; punitive damages in the amount the panel deemed 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.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded costs and attorneys' fees.

#### OTHER ISSUES CONSIDERED & DECIDED

On or about February 28, 1997, Respondents, H.J. Meyers & Co., Inc., Mark Allen and Robert Setteducati filed motions to dismiss. After review of the motions and all related submissions, the undersigned Arbitrators denied the motions on or about June 19, 1997.

At the hearing on September 16, 1997, Respondents collectively requested Arbitrator William J. Hawkins, Esq. to recuse himself since they had just discovered that Mr. Hawkins had recently served on another arbitration case in which H.J. Meyers & Co., Inc. was a party. After hearing the Respondents' request and the Claimant's objection as well as following his review of Canon IIE of Appendix A of the Arbitrators' Manual entitled Code of Ethics for Arbitrators in Commercial Disputes, Mr. Hawkins denied the Respondents' request to recuse. Respondents, H.J. Meyers & Co., Inc., Mark Allen and Robert Setteducati and their counsel then voluntarily left the hearing. In accordance with §10318 of the Code of Arbitration Procedure (the "Code"), the undersigned Arbitrators decided to proceed with the arbitration. Claimant presented his direct case on September 16, 1997.

Prior to the Arbitrators' rendering a final decision in the matter, Claimant and all Respondents submitted a joint motion to stay the arbitration on or about October 7, 1997. Arbitrator William J. Hawkins, Esq. withdrew from the panel on or about October 15, 1997. In accordance with §10312 of the Code, Respondents objected to the vacancy on the panel and requested a replacement arbitrator. Arbitrator John Greer was appointed as the replacement arbitrator on or about October 22, 1997.

On or about October 16, 1997 and October 17, 1997, Respondents, H.J. Meyers & Co., Inc., Mark Allen and Robert Setteducati moved to reopen the hearing pursuant to §10329 of the Code. Following their review of all related submissions, the undersigned Arbitrators granted the Respondents' motions to reopen the hearing. The panel further ordered that the Respondents would be able to present a defense in the matter and call the Claimant as a witness yet Claimant would not be required to repeat his presentation of his case in chief.

In a letter dated March 19, 1998 and at the hearing on March 23, 1998, Claimant, Thomas W. Bibb stated that all of his claims against Respondent, Robert Setteducati were withdrawn with prejudice.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD Regulation, Inc. Office of Dispute Resolution..

### 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. Respondent, H.J. Meyers & Co., Inc. is liable for and shall pay to Claimant, Thomas W. Bibb the sum of \$50,000.00 in actual damages;
2. Respondent, H.J. Meyers & Co., Inc. is liable for and shall pay to Claimant, Thomas W. Bibb the sum of \$19,000.00 for pre-judgement interest.;
3. Respondent, H.J. Meyers & Co., Inc. is liable for and shall pay to Claimant, Thomas W. Bibb post-judgementsimple interest in the above amounts at the rate of 12% per annum beginning to accrue on the date of receipt of this award until paid.
4. All claims and relief requests against Respondent, Mark Allen are denied in their entirety and dismissed with prejudice;
5. The parties shall bear their own attorneys' fees; and
6. Other than forum fees addressed below, all claims and relief requests not specifically awarded are denied in their entirety and dismissed with prejudice.

### FORUM FEES

Forum fees are calculated at the rate of \$400.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There was one (1) pre-hearing session x \$300.00 plus there were five (5) hearing sessions x \$400.00 = \$2,300.00 in forum fees. Pursuant to §10332(b) of the Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$120.00 and shall retain as forum fees the

hearing session deposit in the amount of \$400.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to §10332(c) of the Code, Respondent, H.J. Meyers & Co., Inc. is liable for and shall pay to Claimant, Thomas W. Bibb the sum of \$520.00 as reimbursement of the claim filing fee and hearing sessions deposit. Respondent, H.J. Meyers & Co., Inc is also liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,900.00 in additional forum fees.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$200.00 member surcharge previously paid by Respondent, H.J. Meyers & Co., Inc.

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

Arbitrators' Signatures:

Dated:

Charles D. Powell, Esquire  
Charles D. Powell, Esquire  
Public Arbitrator, Presiding Chair

May 18, 1998

Woody W. Wilson  
Woody W. Wilson  
Public Arbitrator, Panelist

May 8, 1998

John M. Greer  
John M. Greer  
Industry Arbitrator, Panelist

May 11, 1998

For NASD use only:  
Date served: May 18, 1998