

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimants

Alan and Marsha Garfield

96-04375

Name of Respondents

H.J. Meyers & Co., Inc.;
Mark Allen;
Robert Setteducati; and
Thomas James Associates, Inc.

REPRESENTATION

For Claimant: Alan Garfield and Marsha Garfield ("Garfield") were represented by Eric Ross, Esq., of the Law Offices of Dan Brecher, located in New York, New York, and appeared at hearing telephonically.

For Respondents: Respondents did not appear at hearing. Counsel for H.J. Meyers & Co., Inc., formerly known as Thomas James Associates, Inc. and Robert Setteducati withdrew on October 2, 1998. As of November 19, 1998, Mr. Setteducati was represented by James C. Cosby, Esq. of Maloney, Huennekens, Parks, Gecker & Parsons, located in Richmond, Virginia. Respondent Mark Allen was represented by John J. Phelan, III, Esq. of John J. Phelan, III, P.C., located in New York, New York.

CASE INFORMATION

Statement of Claim filed: October 1, 1996.

Claimants' Submission Agreement signed on: September 11, 1996.

Statement of Answer filed by Respondents H.J. Meyers & Co., Inc., formerly known as Thomas James Associates, Inc. ("Meyers"), Thomas James Associates, Inc. ("James") and Robert Setteducati ("Setteducati") on: February 24, 1997.

Respondent Meyers' Submission Agreement signed on: January 16, 1997.

Respondent Setteducati's Submission Agreement signed on: January 17, 1997.

Motion to Dismiss filed by Meyers and Setteducati on: February 24, 1997.

Claimants' Response to the Motion to Dismiss filed on: March 21, 1997.

Reply Brief filed by Respondents Meyers and Setteducati on: April 16, 1997.

Statement of Answer and Motion to Dismiss filed by Respondent Mark Allen ("Allen") on: February 28, 1997.

Respondent Allen's Submission Agreement signed on: February 25, 1997.

Claimants' Response to Allen's Motion to Dismiss filed on: April 3, 1997.

Reply to the Response filed by Allen on: May 27, 1997.

Respondent Setteducati's Motion to Reopen Hearing filed: November 19, 1998.
Claimants' Response to the Motion to Reopen Hearing filed: December 15, 1998.

HEARING INFORMATION

Pre-Hearing Conference: March 10, 1998 before a full panel.
Hearing Date/Sessions: November 16, 1998 for One (1) session.
Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimants alleged that Respondents failed to disclose or misrepresented certain information regarding a private placement offering of Acculyte Corporation. Based upon these misrepresentations, Claimant purchased 5,000 shares of Preferred Stock and Warrants to purchase 5,000 shares of common stock for the sum of \$25,000. On October 21, 1994, Claimant learned of the failure of the company and the total loss of his investment. Based upon these allegations, Claimant alleged violation of 18 U.S.C. §1962 Racketeering Influenced and Corrupt Organizations Act ("RICO") against James and Meyers (Claims One, Two and Three of the Statement of Claim); violation of the Securities Exchange Act of 1934 and Rule 10b-5 against all Respondents (Claim Four); control person liability under §§20(a) and (b) of the Exchange Act against James (Claim Five); breach of fiduciary duty against all Respondents (Claim Six); fraud against all Respondents (Claim Seven); negligence against all Respondents (Claim Eight); negligent misrepresentation against all Respondents (Claim Nine); *respondeat superior* against James (Claim Ten); breach of contract against James (Claim Eleven); and successor liability against Meyers (Claim Twelve).

Respondents Meyers, James and Setteducati denied the material allegations of the Statement of Claim, alleging that prior to this investment, Claimants received a Private Placement Memorandum drafted by Acculyte which contained the material facts regarding the company. In addition, Claimants were experienced investors who represented in the Subscription Documents that they reviewed and relied only on the Memorandum, and had adequate opportunity to review the records of the company. The Garfields were capable of understanding the risk which was fully disclosed prior to them prior to their participation in the offering and also were accredited investors willing to take such risk. These Respondents also asserted several affirmative defenses.

Respondent Allen denied the material allegations of the Statement of Claim and incorporated the allegations of the answer filed by the remaining Respondents. In addition, Allen alleged he was out sick during much of the time of the transactions alleged in the Claim and he was not head of investment banking as alleged in the Claim, but was an employee who reported to others. Furthermore, the Statement of Claim itself contains virtually no allegations directly concerning Allen.

RELIEF REQUESTED

Claimants requested entry of an award on their first, second and third claims for relief damages as authorized by 18 U.S.C. §1964[c] and reason attorneys' fees; on the fourth claim, damages in an amount of not less than \$50,000, and punitive damages in an amount sufficient to punish Respondents; on the fifth claim, damages in an amount totaling not less than \$50,000; on the sixth and seventh claims, damages in an amount totaling not less than \$50,000 plus punitive damages in an amount sufficient to punish Respondents; on the eighth and ninth claims, damages in an amount totaling not less than \$50,000; on the tenth and eleventh claims, damages in an amount totaling not less than \$50,000.00; on the twelfth claim, damages as authorized by law; and on all claims, damages as authorized by law, the costs and disbursements incurred, reason attorneys' fees and such other relief as the panel deemed appropriate.

Respondents Meyers, James and Setteducati requested that the claim be dismissed in the entirety and that they receive all their costs and fees.

Respondent Allen requested that the claim be dismissed and that the panel grant all filing fees, forum fees and attorneys' fees in his favor and against Claimant.

OTHER ISSUES CONSIDERED & DECIDED

On July 11, 1997, the panel's decision in regard to the Respondents' Motions to Dismiss was sent to the parties. The panel determined that:

1. Respondents' motion to dismiss the claim in its entirety was denied;
2. Respondent's motion to dismiss Claimant's First, Second and Third Claims for relief was granted and these claims were dismissed with prejudice;
3. The last sentence of paragraph 28 of the Claim was stricken and all claims alleging secondary liability for violation of Section 10(b) of the Securities Exchange Act of 1934 were dismissed with prejudice; and
4. The claims against Respondent Mark Allen were dismissed with leave to Claimants to file and serve within 10 days of receipt of the notice an amended Statement of Claim against Allen setting forth specific and particularized allegations of wrongdoing.

Upon review of the file and the representations made on behalf of the Claimant, the undersigned arbitrators determined that Respondent Setteducati received due notice of the hearing as required under Rule 10315 of the Code and that arbitration of the matter would proceed pursuant to Rule 10318 of the Code.

At hearing, Arbitrator Stephen E. Smith was not immediately present due to a scheduling conflict. The parties present agreed that Mr. Smith would be permitted to review the tape recorded testimony and make his decision with the panel. The hearing proceeded in his absence.

The parties in attendance 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 in attendance agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

The arbitrators reviewed the Motion to Reopen Hearing filed by Respondent Setteducati and the response filed by Claimants in this matter. Based upon the panel's decision on the merits, the panel determined that Respondent Setteducati's Motion was denied.

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. The claims against Respondents H.J. Meyers & Co., Inc., formerly known as Thomas James Associates, Inc., Thomas James Associates, Inc. and Robert Setteducati are dismissed on their merits and denied in the entirety;
2. The claims against Respondent Mark Allen are dismissed with prejudice pursuant to the panel's decision of July 11, 1997;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
4. Any relief not specifically awarded is hereby denied.

OTHER COSTS

Pursuant to Rule 10333 of the Code, Respondent H.J. Meyers & Co., Inc. has paid to NASD Regulation Inc. the \$200.00 member surcharge previously invoiced.

FORUM FEES

Pursuant to Rule 10332[c] of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) pre-hearing before full panel x \$400.00 = \$400.00; One (1) hearing session x \$400.00 = \$400.00; Total forum fees = \$800.00.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$120.00 claim filing fee and, as forum fees, the \$400.00 hearing session deposit paid by the Claimants. Claimants Alan Garfield and Marsha Garfield are liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$400.00 for the remaining forum fees due.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ James L. Schwartz, Esq.
James L. Schwartz, Esq.
Public Arbitrator
Chairperson

March 4, 1999

/s/ Stephen E. Smith
Stephen E. Smith, Esq.
Public Arbitrator

March 4, 1999

/s/ Frank R. Niederman
Frank R. Niederman
Industry Arbitrator

March 3, 1999

For ODR Use Only/Date of Decision: March 5, 1999