

NASD REGULATION, INC. AWARD

In the Matter of the Arbitration Between

Name of Claimant:

HARRY M. FARNHAM, JR. IRA

Name of Respondents:

THOMAS JAMES ASSOCIATES, INC., a New York corporation, H. J. MEYERS & CO., INC. a/k/a/ MEYERS SECURITIES CORPORATION, a California corporation, MARK ALLEN, an individual, and ROBERT SETTEDUCATI, an individual.

Case 96-04376

REPRESENTATION

For Claimant: Harry M. Farnham, Jr. IRA

Dan Brecher, Esquire
Fischer, Badillo, Wagner, Harding
New York, New York

For Respondents: H. J. Meyers & Company, Thomas James Associates, Inc. and Robert Setteducati

James C. Cosby, Esquire
Maloney, Huennkens, Parks, Gecker & Pars
Richmond, Virginia

For Respondent: Mark Allen

John J. Phelan, III, Esquire
John J. Phelan, III, P.C.
New York, New York

CASE INFORMATION

Statement of Claim filed by Harry M. Farnham, Jr. IRA on or about October 1, 1996.

Statement of Answer filed by H. J. Meyers & Co., Inc., Thomas James Associates, Inc. and Robert Setteducati on or about February 25, 1997.

Statement of Answer filed by Mark Allen on or about February 28, 1997.

Submission Agreements signed:

Harry M. Farnham, Jr. IRA- September 16, 1996
H. J. Meyers & Co., Inc. - January 16, 1997
Robert Setteducati - January 17, 1997
Mark Allen - February 25, 1997

HEARING INFORMATION

Pre-Hearing Conference with two Arbitrators held on March 27, 1998 for one (1) session.

Hearing held on: June 15, 1998 for two (2) sessions;
 June 16, 1998 for two (2) sessions; and
 June 17, 1998 for one (1) session.

Hearing Location: Houston, Texas.

CASE SUMMARY

Harry W. Farnham, Jr. IRA ("Farnham") was a client of David Steele ("Steele"), a broker for Thomas James Associates, Inc. ("TJA"). In August of 1993, TJA undertook a private placement of \$2.25 Million dollars consisting of 25 units, each unit consisting of 20,000 shares and one 5 year warrant of Acculyte Corporation ("Acculyte"), a spin off, a spin off start up company located in

Winchester, Virginia.

Acculyte initially was owned 60% by Richard White ("White") and 40% by Joseph A. Stroud ("Stroud"), former managers for a company which owned the Acculyte Technology. TJA and Acculyte entered into a "Best Efforts, minimum, maximum" Placement Agent Agreement to offer the securities under a Private Placement Memorandum and Rule 506 of Reg. D. so that the units would be sold only to "accredited investors" who executed a Subscription Agreement and Purchase Questionnaire. The Offering Period ended on October 1, 1993 unless extended to a date no later than November 1, 1993. The Offering period was extended.

The Escrow Agent was the law firm of Dryer and Taub who received the subscription documents and payment. The Placement Agent TJA would receive an opinion from Acculyte's counsel and an Officers Certificate from Acculyte as to the accuracy of the PPM and at closing the Escrow Agent would pay 90% of the subscription funds to Acculyte and 10% to TJA. The Placement Agreement required Acculyte to advise TJA of adverse Material changes and provide Memorandum Supplements. Also, an Officers Certificate would be supplied by Acculyte to TJA and an opinion of Counsel for Acculyte with respect to the PPM.

Steele recommended the purchase of the Acculyte units to Farnham. Farnham was an accredited investor and decided to purchase \$25,000 interest (a 1/4 unit) on October 7, 1993, (closed by the Escrow Agent August 20), a \$75,000 interest (3/4 unit) on November 18, 1993 (closed by the Escrow Agent on November 17), and a \$125,000 interest (1 1/4 units) on January 3, 1994 (closed by the Escrow Agent on January 19). As alleged, Steele believed the investment to be sound and

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that he had a good record in recommending investments in private placements. Steele had been advised of the investment by Mark Allen. Mark Allen was available to discuss the investment with investors or Steele. Steele also sold an interest in Acculyte to his mother in January 1994. No complaint was filed against Steele.

Mark Allen was the investment Banker for TJA who together with others in TJA prior to the Placement Agreement with Acculyte, evaluated and subsequently accepted Acculyte as a client to market the Private Placement Units of Acculyte under the PPM prepared by Acculyte. While TJA and Acculyte anticipated the offering would be sold out by October, 1993, the full offering was not sold out until March, 1994. It was a common goal of TJA and Acculyte to have an IPO of Acculyte stock after sale of the units under the PPM and obtaining One Million Dollars in financing.

On various dates from October 1993 to March 1994, Mark Allen allegedly received various communications from Acculyte and maintained contact with Acculyte concerning the marketing of the units and the operations of Acculyte. By October 1994, Acculyte and TJA were unable to secure an additional One Million Dollar line of Credit or satisfactory purchaser and Acculyte went into Bankruptcy.

The Placement Memorandum, inter alia, included reference to a \$250,000 note of Acculyte which was contemplated to be paid from the offering proceeds when sold out and reference to the need for an additional One Million Dollar line of credit necessary for the business operations after the Offering.

Claimant alleged several "misrepresentations" and "omissions" which principally go to

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alleged material information concerning Acculyte not provided to the investor by TJA, and alleged material changes occurred which were not reported to the client. The claims were basically directed to actions taken or not taken by TJA in advising investors of Acculyte's financial condition, business practices and proposed plans for further financing. Claimant alleged a 10b-5 violation, RICO claims, control person liability, breach of fiduciary duties, fraud, negligence, negligent representation, Respondent Superior, breach of contract, failure to supervise, failure to properly monitor and failure to deal fairly with Claimant.

The Claimant alleged that a number of statements in the PPM were in variance to actual facts known to TJA. In the fall of 1993 Acculyte complained to TJA that the escrow agent was delaying payments which was causing problems. Despite the problems, Acculyte also made some positive reports to TJA.

As alleged, the Counsel for Acculyte, at each closing, issued a detailed opinion letter to investors. The Placement Agent also received prior to closing an Officers Certificate relative to the accuracy of the PPM. In March 1994, Acculyte did issue a recision letter to prospective investors before a closing.

In October 1994 the Company ceased operations after the Note Holder called the \$250,000 Note. The Note was called for failure to obtain additional One Million Dollars of financing in August 1994.

TJA denied the Claimant's allegations and responded that it performed due diligence in agreeing to market the security interests as the Placement Agent under the PPM. Respondents states

that the PPM, prepared by Acculyte, fully disclosed the risks and that TJA provided Claimant with all the material facts necessary for an informed decision by an accredited investor. Farnham as an accredited investor understood the risks set out in the PPM and understood there was reasonable opportunity to ask questions of the Company. Respondents stated the purpose of the PPM was to obtain start up funding for a spin-off Company and the PPM stated the representations of Acculyte. Respondents stated Farnham was advised directly from Acculyte and attorneys for Acculyte at closing that the projects in the PPM were still accurate. Respondents denied any fraud, negligent misrepresentation, or 10(b) fraud. Respondents pled many affirmative defenses including waiver, estopped ratification and laches.

RELIEF REQUESTED

Claimant requested \$500,000.00 in compensatory damages and an unspecified amount in punitive damages as well as attorneys' fees and costs.

Respondents Thomas James and Associates and Setteducati requested dismissal of the claims and an affirmative award of costs and fees.

Respondent Mark Allen requested dismissal of the claims, attorneys fees, costs and fees.

OTHER ISSUES

At or before the hearing, Claimant withdrew his RICO claims.

The Claims against Allen and Setteducati were withdrawn by Claimant on or about May 4,

1998 and prior to the hearing.

At the hearing, the Parties present stipulated that suitability was not an issue in the case. The Parties also agreed to substitute the "Harry M. Farnham, Jr. IRA account" for the individual Harry M. Farnham, Jr. as the proper party in this arbitration.

The Respondent Thomas James and Associates, Inc. was, by change of name, now known as "H. J. Meyers & Co., Inc." and the responsible successor Thomas James and Associates, Inc.

ARBITRATOR COMMENTS

We, the undersigned Arbitrators, find the testimony of Harry Farnham, Jr. to be credible.

We find that the funds and subscriptions of Harry Farnham on October 7, 1993, November 18, 1993, and January 3, 1994 were placed with the Escrow Agent for closing.

We find that if there were any material changes with respect to the PPM which were sufficient for a rescission offer, that the Counsel for Acculyte, Acculyte, and possibly the Escrow Agent would have a responsibility with respect to advising investors and would be principal parties with respect to such action or inaction. We do not see a responsibility of TJA to pass on to investors any dialogue between Acculyte and TJA prior to January 3 as Acculyte and Counsel for Acculyte would have the responsibility for advising investors of material changes or factors relative to the PPM prior to a closing.

We do not find sufficient testimony and evidence on the facts presented to hold TJA liable under any Claim of Claimant.

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 Claimant Harry M. Farnham, Jr. IRA take nothing and that the claim against the Respondent Thomas James & Associates, Inc. be dismissed; and
2. That other than forum fees addressed below, all other claims and requests for relief not specifically awarded are hereby denied in their entirety and dismissed.

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session. There were six (6) sessions x \$750.00 = \$4,500.00 in forum fees. Pursuant to Section 10332(b) of the NASD 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 Section 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant Harry M. Farnham, Jr. IRA. Respondent Thomas James & Associates, Inc. is liable for and shall pay the amount of \$950.00 to Claimant, Harry M. Farnham, Jr. IRA as reimbursement of the claim filing fee and the hearing

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session deposit. Respondent Thomas James & Associates, Inc. is also liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$3,750.00 for forum fees. Pursuant to Rule 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$350.00 member surcharge previously paid by Respondent Thomas James & Associates, Inc.

Arbitrators' Signatures:

Donald H. Fidler, Esquire Date July 23, 1998
Donald H. Fidler, Esquire
Public Arbitrator
Chairman

Frank M. Romano Date July 24, 1998
Frank M. Romano
Public Arbitrator

Richard P. Cancelmo Date July 23, 1998
Richard P. Cancelmo, Jr.
Industry Arbitrator

For NASD use only:
Date served: July 24, 1998
