

**N.A.S.D. STIPULATED AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

In the matter of the arbitration between

**Name of Claimant**

Steve L. Greenberg

vs.

NASD # 96-05611

**Name of Respondents**

Tripp & Co., Inc.  
Steven L. Frank  
Donald L. Carman  
Kevin O'Connor

**REPRESENTATION**

For Claimant Steve L. Greenberg ("Claimant"), Daniel J. Brooks, Esq. and Eamonn F. Foley, Esq. of Layton Brooks & Hecht, 745 Fifth Avenue, New York, New York.

For Respondent Tripp & Co., Inc. ("Tripp"), Howard B. Sirota, Esq. and Irwin Weltz, Esq. of Sirota & Sirota LLP, 747 Third Avenue, New York, New York.

For Respondent Steven L. Frank ("Frank"), Martin H. Kaplan, Esq. of Gusrae Kaplan & Bruno, 120 Wall Street, New York, New York.

For Respondent Donald L. Carman ("Carman"), Anthony W. Djinis, Esq. and Paul Bazil, Esq. of Pickard and Djinis, 1990 M. Street, N.W., Washington, D.C.

For Respondent Kevin O'Connor ("O'Connor"), David E. Robbins, Esq. of Kaufmann Feiner Yamin Gildin & Robbins, LLP, 777 Third Avenue, New York, New York.

**CASE INFORMATION**

Statement of Claim was filed on or about December 13, 1996. Statment of Answer was filed by Respondent Tripp on or about February 27, 1997. Statement of Answer was filed by Respondent Frank on or about February 27, 1997. Statement of Answer was filed by Respondent Carman on or about February 27, 1997. Statement of Answer was filed by Respondent O'Connor on or about February 27, 1997.

## HEARING INFORMATION

Hearing dates were scheduled for October 20 - 22, 1997. No hearing dates were utilized, and no pre-hearing conferences were necessary to resolve discovery disputes, as the arbitration proceeding was settled.

## CASE SUMMARY

Claimant alleged that in or about May 1992, Claimant opened an account at Tripp, a registered broker/dealer and member of the NASD. Claimant alleged that Frank was, at that time, a registered representative at Tripp, and Claimant's broker. Claimant alleged that between October 1993 and August 1996 more than eighty checks totaling in excess of \$242,000, which were made payable to Claimant, were drawn on Claimant's Tripp account (the "Account"). Claimant alleged that Frank endorsed those checks with a forgery of Claimant's signature, and Frank deposited those checks in an account at United Jersey Bank, opened under the name of Claimant, all of which was purportedly accomplished without Claimant's permission. Claimant alleged that he received none of the funds that were allegedly taken from his Account and deposited in the United Jersey Bank account by Frank.

Claimant further alleged that since approximately 1986, Claimant kept a number of bearer bonds in a safe deposit box that he maintained at a bank. Claimant alleged that on numerous occasions since the opening of the Account, Claimant clipped coupons on certain of the bonds and delivered them to Frank with the understanding that Frank would deposit them into his Account. Claimant alleged that in excess of \$120,000 in coupons delivered by Claimant to Frank were not deposited into Claimant's Account, but, rather, were converted by Frank.

Moreover, Claimant alleged that on numerous occasions since the opening of his Account, Frank advised Claimant that certain of the bearer bonds that Claimant allegedly kept in the safe deposit box had been called, and instructed Claimant to deliver them to Frank to be deposited into Claimant's Account. Claimant alleged that on other occasions, Frank told Claimant that the bearer bonds he delivered to Frank would be kept in a vault maintained by Tripp. Claimant alleged that in excess of \$485,000 in bearer bonds delivered by Claimant to Frank were actually converted by Frank.

Furthermore, Claimant alleged that in or about February 1994, Frank caused a margin feature to be added to his Account by purportedly forging Claimant's signature on a margin agreement form of Tripp's clearing broker. Claimant alleged that between February 1994 and August 1996, his Account was debited in excess of \$11,000 in margin

interest. Claimant alleged that on a number of occasions, margin calls were issued in his Account. Claimant alleged that when he questioned Frank about them, Frank told Claimant that they had been sent out by mistake and that Claimant should disregard them.

Additionally, Claimant alleged that Frank recommended and solicited numerous trades in his Account that were inconsistent with Claimant's investment objectives, needs and risk tolerance.

Claimant alleged claims against Frank for conversion, fraud, unsuitability and breach of fiduciary duty. Claimant alleged that Tripp, Carman and O'Connor were responsible for Frank's alleged conduct on a theory of Respondent Superior liability and as Controlling Persons under Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78(t). Claimant also alleged a claim against Tripp for breach of contract and breach of fiduciary duty.

Each of the Respondents denied Claimant's allegations and/or denied knowledge and information to form a belief with respect to Claimant's allegations, denied any liability to Claimant and asserted affirmative defenses.

**RELIEF REQUESTED**

Claimant requested judgment against Respondents for no less than \$1,047,000 in compensatory damages, \$1,000,000 in punitive damages, reasonable attorneys' fees and the costs and disbursements of this proceeding. Respondents requested that the Statement of Claim be dismissed in its entirety.

**SETTLEMENT**

In June 1997, the parties reached an agreement to settle this proceeding for the sum of \$408,000. In August 1997, a Settlement Agreement was finalized and executed by all the parties hereto. Tripp and Frank have fully paid to Claimant the entire settlement sum of \$408,000. Respondents Carman and O'Connor did not contribute any sums of money towards the settlement, nor did they pay to Claimant any sums of money to dismiss this proceeding against them. A Notice of Dismissal dismissing this proceeding with prejudice against all parties was signed by all of the parties and filed with the NASD on or about September 23, 1997.

## OTHER ISSUES CONSIDERED & DECIDED

### 1. Expungement of Proceeding.

By Stipulation, dated August 7, 1997, each of the parties to this proceeding agreed and consented to the expungement of all references to this arbitration proceeding from the Central Registration Depository records of Respondents Carman and O'Connor. A copy of the Stipulation, the original of which has been previously filed with the NASD, is annexed hereto as Exhibit A. Additionally, the Answers of Carman and O'Connor, setting forth their positions with respect to Claimant's allegations, are annexed hereto as Exhibits B and C, respectively.

## AWARD


The parties have on their own accord reached a settlement in this proceeding, and all sums required to be paid thereunder have been paid. The sole issue remaining for this Panel is the request made by Respondents Carman and O'Connor for expungement of this proceeding on their Central Registration Depository records. All of the parties to this proceeding have agreed and consented to such request of Respondents Carman and O'Connor. After considering the pleadings, the nature of the allegations regarding Carman and O'Connor, the settlement, that Carman and O'Connor did not make any payment to Claimant in settlement of this matter; and that the parties to this proceeding have provided their consent to such action, the undersigned arbitrators have decided, as follows:

1. Pursuant to Rule 10305 of the Code of Arbitration Procedure, the Central Registration Depository shall expunge all references to the above captioned arbitration proceeding on the CRD of Donald L. Carman (CRD #818688).

2. Pursuant to Rule 10305 of the Code of Arbitration Procedure, the Central Registration Depository shall expunge all references to the above captioned arbitration proceeding on the CRD of Kevin O'Connor (CRD #1096255).

ARBITRATION PANEL

Sidney N. Weiss, Esq. - Public Chairperson  
Harry Weiss - Public Panelist  
Robert E. Holley - Industry Panelist

  
\_\_\_\_\_  
Sidney N. Weiss, Esq.

Dated: New York, New York  
March 25, 1998

\_\_\_\_\_  
Harry Weiss

Dated: New York, New York

\_\_\_\_\_  
Robert E. Holley

Dated: New York, New York

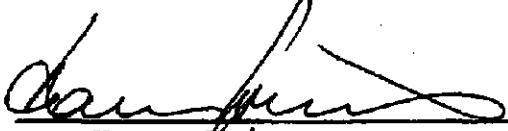
Central Registration Depository records reflect that the Central Arbitration Panel of this proceeding have agreed and consented to such use of this proceeding by the respondents Carman and O'Connor. After considering the testimony of Carman and O'Connor, one of the allegations regarding Carman and O'Connor is that they have agreed to a settlement of this matter; and that the Central Arbitration Panel of this proceeding have provided their consent to such use of this proceeding by the respondents Carman and O'Connor.

ARBITRATION PANEL

Sidney N. Weiss, Esq. - Public Chairperson  
Harry Weiss - Public Panelist  
Robert E. Holley - Industry Panelist

Sidney N. Weiss, Esq.

Dated: New York, New York

  
Harry Weiss

Dated: New York, New York  
March 25, 1998

Robert E. Holley

Dated: New York, New York

ARBITRATION PANEL

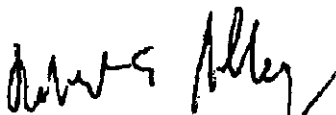
Sidney N. Weiss, Esq. - Public Chairperson  
Harry Weiss - Public Panelist  
Robert E. Holley - Industry Panelist

Sidney N. Weiss, Esq.

Dated: New York, New York

Harry Weiss

Dated: New York, New York



Robert E. Holley

Dated: New York, New York  
March 25, 1998

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ORDERED, that pursuant to Rule 10305 of the Code of Arbitration Procedure, the Central Registration Depository shall expunge all references to the above captioned arbitration proceeding on the CRD's of Donald Carman (CRD #818688) and Kevin O'Connor (CRD #1096256).

Dated: New York, New York  
August 2, 1997

LAYTON BROOKS & RECHT

By: Eamonn F. Foley  
Eamonn F. Foley

Attorneys for Claimant  
Steve Greenberg

SIROTA & SIROTA LLP

By: Irwin Weltz  
Irwin Weltz

Attorneys for Respondent  
Tripp & Co., Inc.

PICKARD AND DJINIS

By: Paul Bazil  
Paul Bazil

Attorneys for Respondent  
~~Kevin O'Connor~~  
DONALD CARMAN

KAUFMAN, FEINER, YAMIN  
GILDIN & ROBBINS

By: David E. Robbins  
David E. Robbins

Attorneys for Respondent  
Donald Carman

GUSEAE, KAPLAN & BRUNO

By: John E. Bersin  
John E. Bersin

Attorneys for Respondent  
Steve L. Frank

Ordered, as of this \_\_\_\_\_ day of \_\_\_\_\_ 1997.

\_\_\_\_\_  
Name:  
Chairman of the  
Arbitration Panel

ORDERED, that pursuant to Rule 10305 of the Code of Arbitration Procedure, the Central Registration Depository shall expunge all references to the above captioned arbitration proceeding on the CRD's of Donald Carman (CRD #818688) and Kevin O'Connor (CRD #1096256).

Dated: New York, New York  
August 7, 1997

LAYTON BROOKS & HECHT

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Eamonn F. Foley

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Steve Greenberg

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Donald Carman

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By: Cirino M. Bruno  
Cirino M. Bruno

Attorneys for Respondent  
Steve L. Frank

Ordered, as of this \_\_\_\_\_ day of \_\_\_\_\_ 1997.

\_\_\_\_\_  
Name:  
Chairman of the  
Arbitration Panel

Dated: New York, New York  
August 2, 1997

LAYTON BROOKS & RECHT

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Donald Corman

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Donald Corman  
Kevin O'Connor

GUSRAE, KAPLAN & BRUNO

By: John E. Bersin  
John E. Bersin

Attorneys for Respondent  
Steve L. Frank

Ordered, as of this \_\_\_\_\_ day of \_\_\_\_\_ 1997.

\_\_\_\_\_  
Name:  
Chairman of the  
Arbitration Panel

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Dated: New York, New York  
August 7, 1997

LAYTON BROOKS & RECHT

By: Eamonn F. Foley  
Eamonn F. Foley

Attorneys for Claimant  
Steve Greenberg

SIROTA & SIROTA LLP

By: Irwin Weltz  
Irwin Weltz

Attorneys for Respondent  
Tripp & Co., Inc.

PICKARD AND DJINIS

By: Paul Bazil  
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Attorneys for Respondent  
Kevin O'Connor

KAUFMAN, PEINER, YAMIN  
GILDIN & ROBBINS

By: David E. Robbins  
David E. Robbins

Attorneys for Respondent  
Donald Carman Kevin O'Connor

GUSRAE, KAPLAN & BRUNO

By: John E. Bersin  
John E. Bersin

Attorneys for Respondent  
Steve L. Frank

Ordered, as of this \_\_\_\_\_ day of \_\_\_\_\_ 1997.

\_\_\_\_\_  
Name:  
Chairman of the  
Arbitration Panel

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ARBITRATION BEFORE THE NATIONAL ASSOCIATION OF  
SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Steven L. Greenberg,

Claimant,

vs.

NASD Case Number  
96-05611

Tripp and Company, Inc., et. al.

Respondents.

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**RESPONDENT DONALD CARMAN'S**  
**ANSWER TO THE STATEMENT OF CLAIM**

**PRELIMINARY STATEMENT**

This answer is submitted on behalf of Respondent Donald Carman to the  
Statement of Claim filed in the above-referenced NASD Arbitration proceeding.

At all times relevant to this matter, Donald Carman has served as Chairman and  
Chief Executive Officer of Tripp & Co., Inc. ("Tripp"), a NASD member firm for over  
fifty years. In his thirty-eight years in the securities industry, including fifteen years as a  
general securities principal, Mr. Carman has maintained an absolutely pristine  
disciplinary history. Mr. Carman has never been the subject of any SEC, self-regulatory  
organization or state securities commission disciplinary action and has never been  
sanctioned in any fashion by any regulatory agency whatsoever.

Claimant's allegations in this case concern the activities of Steven L. Frank, a

former registered representative of Tripp. Mr. Frank served as Claimant's registered representative during the period May 1992 through August 1996 with respect to two securities accounts that Claimant maintained at Tripp. At no time during the entire period that Mr. Frank served as Claimant's broker did the Claimant ever complain to Tripp's management about the allegations of Frank's wrongdoing set forth in the Statement of Claim.

At no time during the period that Mr. Frank worked at Tripp did Claimant ever meet with Mr. Carman or have any written communications with him. Moreover, Mr. Carman did not have anything to do with the transactions that took place in the Claimant's accounts and did not serve as Mr. Frank's supervisor. In short, during the entire period that Mr. Frank served as Claimant's broker, Claimant never discussed with Mr. Carman any of the allegations contained in the Statement of Claim. Indeed, Claimant provided no notice whatsoever to Mr. Carman of any wrongdoing by Mr. Frank or problems with Claimant's accounts.

In fact, on one prior occasion, Claimant telephoned the trading desk at Tripp, seeking to enter an open order to buy an over-the-counter equity security. When Tripp's trading desk informed Claimant that Tripp specialized in the purchase and sale of municipal securities and other fixed income investments and was therefore not equipped to handle open orders on OTC equity securities, Claimant became abusive and demanded to speak with the trading desk's superior. When Mr. Carman politely reiterated to Claimant that Tripp was unable to accommodate such an order, Claimant again became abusive and profane. This conversation is noteworthy because Claimant

made no mention of any of the purported events which are the subject of his Statement of Claim.

In August 1996, Tripp terminated Respondent Frank for excessive absenteeism. Several days later, Claimant called Mr. Frank to discuss why a margin call had taken place in connection with his accountand, since no registered representative had yet been assigned to replace Mr. Frank in servicing Claimant's accounts, Mr. Carman spoke with Claimant. Mr. Carman and Claimant then met for the first time after which time, the possibility of a theft of funds and securities from Claimant's accounts by Mr. Frank was first raised. During this conversation, Claimant admitted that he had closely monitored his account statements and could not answer why, at any time in the past four years while Mr. Frank was employed at Tripp, he had failed to ever notify anyone at Tripp that funds or securities might have been converted by Mr. Frank.

With the exception of the conversations described above, Mr. Carman has never had any involvement whatsoever with the activities in Claimant's account at Tripp. Not only has Claimant not alleged a single wrongful action by Mr. Carman that purportedly contributed to his losses, Claimant has not alleged that Mr. Carman failed to exercise any supervisory duty in connection with Claimant's account. At no time during the period in question did Mr. Carman serve as the supervisor over any registered representative servicing Claimant's account. In fact, the individual who was delegated by Tripp with direct oversight responsibility over Mr. Frank from 1992 through 1995, Charles Granito, Jr., is no longer associated with Tripp and has not even been named as a respondent in this action.

Claimant does not allege that any violative acts were directly committed by Mr. Carman or resulted from any failure by Mr. Carman to reasonably supervise. Rather, Claimant seeks to impose liability upon Mr. Carman derivatively, for the conduct of one of Tripp's former employee based solely as a "controlling person". Section 20(a) of the Exchange Act describes "controlling person" liability as follows:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 USC §78t(a).[emphasis added] As the Second Circuit has held, Congress' intent in enacting this provision was "obviously to impose liability only on those directors who fall within its definition of control and who are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons." Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. 1973). Claimant has not alleged a single fact from which Mr. Carman's "culpable participation" in any purportedly wrongful acts by Respondent Frank could possibly be inferred.<sup>1</sup>

The inclusion of Mr. Carman as a respondent in this action is unwarranted and improper. This action against Mr. Carman should be dismissed immediately.

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<sup>1</sup> In fact, the Statement of Claim does not even allege that Mr. Carman is a "control person" of Respondent Frank, instead attempting to impose tertiary liability as a control person of Tripp, which itself is alleged to be derivatively liable, upon a theory of respondeat superior, for the purported wrongful acts of Respondent Frank.

### **AFFIRMATIVE DEFENSES**

1. Claimant has failed to state a cause of action against Mr. Carman upon which relief may be granted.
2. Claimant is not entitled to punitive damages, attorneys fees or costs under the law and/or the facts of this case.
2. Claimant had knowledge of and assumed the risks inherent in trading securities.
3. To the extent that Claimant has been damaged, if at all, such damages resulted wholly or partially from his own negligence, recklessness or fraud. The Claimant's right of recovery, if any, should therefore be reduced by that amount which the negligence, recklessness and fault of Claimant contributed to any such damages.
4. To the extent that Claimant has been damaged, if at all, he failed to discharge his duty to mitigate damages.
5. Mr. Carman at all times acted in good faith, without knowledge or wrongdoing and did not directly or indirectly induce any act or acts constituting any purported violation or purported claim alleged in the Statement Of Claim. Donald Carman is not accountable for the purported misconduct of Respondent Steven L. Frank under Section 20(a) of the Securities Exchange Act of 1934.
6. Claimant had or should have had at all relevant times, full knowledge of all material facts concerning his account maintained at Tripp, including the positions maintained and the transactions made therein. Accordingly, Claimant should be estopped from bringing this arbitration proceeding or from obtaining any recovery

herein.

### **RESPONSE TO CLAIMS**

Respondent Donald Carman, by and through his undersigned attorneys, answers the Statement Of Claim in this matter as follows:

1. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraph 1.
2. Carman admits the allegations of paragraphs 2, 3 and 4 of the Statement of Claim.
3. Carman denies the allegations of paragraphs 5 and 6 of the Statement of Claim.
4. Carman denies the allegation that he knew that Frank had been arrested for operating a motor vehicle without a license. Carman admits the remaining allegations of paragraph 7 of the Statement of Claim.
5. Carman admits that Frank was hired in March 1992 and dismissed in August 1996 and denies the remaining allegations of paragraph 8 of the Statement of Claim.
6. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 9 and 10.
7. Carman admits the allegations of paragraph 11.
8. Carman denies the allegations of paragraphs 12 and 13 to the extent they differ from the description of Claimant's account activity contained in the periodic account statements.

9. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraph 14.

10. Carman denies the allegations of paragraph 15 to the extent they differ from the description of Claimant's account activity contained in the periodic account statements. Carman lacks sufficient information to form a belief and therefore denies the allegations in paragraph 15 pertaining to the deposit of these checks into a bank account.

11. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 16 through 25.

12. Carman admits that Pershing was Tripp's clearing broker. Carman lacks sufficient information to form a belief and therefore denies the remaining allegations in paragraph 26.

13. Carman denies the allegations of paragraph 27 to the extent they differ from the description of Claimant's account activity contained in the periodic account statements.

14. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 28 through 30.

15. Carman denies the allegations in paragraphs 31 and 32.

16. Carman repeats and realleges the answers set forth in paragraphs 1 through 32 as set forth fully herein.

17. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 34 through 36.

18. Carman denies the allegations in paragraphs 37 and 38.

19. Carman repeats and realleges the answers set forth in paragraphs 1 through 38 as set forth fully herein.

20. Carman denies the allegations in paragraph 40.

21. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 41 through 44.

22. Carman denies the allegations in paragraphs 45 through 47.

23. Carman repeats and realleges the answers set forth in paragraphs 1 through 47 as set forth fully herein.

24. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 49 through 53.

25. Carman denies the allegations in paragraphs 54 through 56.

26. Carman repeats and realleges the answers set forth in paragraphs 1 through 56 as set forth fully herein.

27. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 58 through 62.

28. Carman denies the allegations in paragraphs 63 through 65.

29. Carman repeats and realleges the answers set forth in paragraphs 1 through 65 as set forth fully herein.

30. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 67 through 68.

31. Carman denies the allegations in paragraph 69.

32. Carman repeats and realleges the answers set forth in paragraphs 1 through 69 as set forth fully herein.

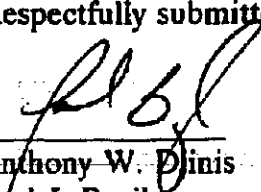
33. Carman lacks sufficient information to form a belief and therefore denies all allegations in paragraphs 71 through 73.

34. Carman denies the allegations in paragraph 74.

35. Carman denies any other allegations in Claimants' Statement Of Claim, to the extent not otherwise admitted herein.

36. Carman denies any liability to Claimant.

Respectfully submitted,



Anthony W. Djinis

Paul J. Bazil

PICKARD & DJINIS

1990 M Street, N.W.

Washington, D.C. 20036

202/223-4418

Attorneys for Respondent Donald Carman

**List Of Parties Served**

I hereby certify that on February 27, 1997, a copy of Respondent Donald Carman's Answer in the arbitration before the National Association of Securities Dealers, Inc. (96-05611) was sent via United States Mail to:

Daniel J. Brooks, Esq.  
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Irwin Weltz, Esq.  
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EDWARD E. COLTON, P.C.  
OF COUNSEL

VIA FEDERAL EXPRESS

February 27, 1997

Christine Holder  
Senior Legal Assistant  
NASD Arbitration and Mediation  
33 Whitehall Street - 8th Floor  
New York, New York 10004

Re: NASD Arbitration #96-05611  
Steve L. Greenberg v. Tripp & Co., Inc., Steven L. Frank,  
Donald L. Carman and Kevin O'Connor

Dear Ms. Holder:

On behalf of Respondent Kevin O'Connor, we herewith file his **Answer** to the Statement of Claim of Steve L. Greenberg.

**INTRODUCTION**

The Statement of Claim reads like an indictment - hiring a broker with a history of drug and alcohol abuse; conversion by that broker of over \$200,000 in checks made payable to the customer; theft of bearer bond coupons worth over \$100,000; conversion by that broker of almost \$500,000 worth of bearer bonds; forgery of the customer's margin agreement; and, to add insult to injury, recommending unsuitable securities transactions. It remains to be seen whether any of these allegations are true because with every allegation there are serious questions of credibility.

By Claimant's own acknowledgement, he has known the broker, Steven Frank, for sixteen years, since 1981. He knew of Mr. Frank's run-ins with the law (as did the NASD and Tripp & Co.). As noted in the claim, he and his family stayed with Frank as he moved from firm to firm, nine in all, from 1981 through 1996. During those years, Claimant and Frank developed a friendship and a working relationship. When Frank became employed by Tripp in March 1992, he had known the Claimant and been Claimant's family's broker for nine years. That month, Claimant opened a joint account at Tripp with his mother. Two months later, he opened an individual account that is the subject of the claim.

Christine Holder  
February 27, 1997  
Page 2

In March 1992, Respondent Kevin O'Connor was President of Tripp. He remained in that position until August of that year, at which time another individual became president. Mr. O'Connor became Tripp's Sales Manager. Three years later, in May 1995, Mr. O'Connor became president again and still holds that position. He has never been a respondent in an arbitration claim, a defendant in a litigation or the subject of any customer complaint.

In his capacity as President, Sales Manager, and later President again, Mr. O'Connor had no involvement with respect to overseeing or supervising the receipt of bearer bonds, coupons, margin calls or the suitability of trading in customer accounts. It is in these areas that Claimant seeks to hold Mr. O'Connor secondarily liable for the alleged misconduct of Steven Frank without saying why Mr. O'Connor should be held liable. Since Mr. O'Connor had no oversight responsibility for the underlying conduct of Frank - for which Claimant seeks to hold Mr. O'Connor secondarily liable - Mr. O'Connor requests the panel dismiss those claims against him.

However, in his defense of Tripp & Co., Mr. O'Connor will present evidence on the following subjects:

1. A system that was in place at Tripp to monitor check disbursements;
2. Claimant admitted to reviewing his monthly statements on a regular basis;
3. The "converted" checks were each time recorded on those monthly statements;
4. The "missing" bonds and coupons were never reported on those statements;
5. Claimant called Mr. O'Connor and others at Tripp when he had questions about his statements;
6. Claimant never raised the issues of the checks, the bonds or the "unsuitable" trades with Mr. O'Connor or any other officer of Tripp before Frank was fired in August 1996 due to excessive absence;
7. Claimant often came to Tripp's office in downtown Manhattan to pick up checks;
8. Claimant frequently thanked representatives of Tripp for effectuating the disbursement of checks from Tripp's clearing firm, Pershing;
9. Signed receipts were received by Tripp for the disbursed checks;

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- and, most tellingly
10. It was Respondent Donald L. Carman, CEO of Tripp, who first raised the issue of the checks with Claimant - in the summer of 1996 - more than four years after the account was opened.

If there was wrongdoing by Frank, Claimant would have been the first to know it. Checks started to be deposited in the New Jersey bank account in 1993. Two that year, 17 in 1994, 34 in 1995 and 28 through August 1996. During that same period, checks and bonds were personally delivered to Tripp by Claimant, and checks were picked up by him.

#### PRIMARY QUESTIONS

There is much still to be learned in this case, many questions to ask. The primary question is this - How could Claimant not have known what was going on in his accounts, month after month, year after year? Logic and reason dictate that Claimant was aware; it will be his burden to prove otherwise.

Other questions that are prompted by the Claim are: What involvement did Claimant have with the New Jersey bank account? What proof is there that the "missing" bearer bonds and coupons were ever delivered to Frank by Claimant, especially when the supposed origin of those bonds - the Estate of Claimant's father - did not reflect them in the probate proceeding? If certain purchases in the account were unsuitable, why is it only now that the allegation is being made? Which trades were unsuitable, since the Claim is silent on that issue?

#### THE CLAIMS AGAINST KEVIN O'CONNOR

Kevin O'Connor is charged, in this arbitration, with secondary liability for the fraudulent conduct of Frank related to bonds, margin calls and unsuitable trades - not for the alleged conversion of the checks, the bonds and the coupons. It is claimed that Mr. O'Connor is liable for the misconduct of Frank under Section 20(a) of the Securities Exchange Act of 1934 and must be ordered to pay Claimant:

1. At least \$618,000 for Frank's violation of Section 10(b) of the 1934 Act in that Frank allegedly made numerous misrepresentations

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concerning the bearer bonds and margin calls. [Second Claim]

2. At least **\$1,618,000** for common law fraud - the same alleged misrepresentations as in the Second Claim. Of those damages, Claimant seeks at least \$1 million in punitive damages. [Third Claim]
3. At least **\$200,000** for Frank's recommending unsuitable securities transactions. Not a single transaction is specified in the Claim, leaving one to wonder whether this claim is a mere afterthought. [Fourth Claim]

Kevin O'Connor denies any liability with reference to these three claims against him and respectfully requests that the panel dismiss those claims, award him his attorneys' fees incurred in the defense of them, assess all NASD arbitration fees against Claimant and under the Central Registration Depository (CRD) to expunge and remove all reference to this claim on Mr. O'Connor's CRD record.

#### **BACKGROUND OF KEVIN O'CONNOR**

Kevin O'Connor is the 44 year old President of Tripp & Co. He joined the firm in January 1982 as a registered representative and in December 1987 became Sales Manager and Vice President. From May 1991 to August 1992, he was President. He then left that post to return to the position of Sales Manager. When Claimant's accounts were opened at Tripp in March and May 1992, Mr. O'Connor had no involvement in supervising the accounts' activity. Nor, for that matter, did he have supervisory responsibilities with respect to account activity when he was Sales Manager, from August 1992 to May 1995 (at which time he returned as President).

When Frank was hired in March 1992, Mr. O'Connor was apprised of Frank's prior arrest record and was also advised that the NASD placed no restriction, suspension or bar on his registration. (In August 1996, Claimant admitted to representatives of Tripp that he and Frank were long time friends, that he knew of Frank's prior arrests, that he knew Frank's family well and that at one time Frank handled a brokerage account of his with a balance of \$2-1/2 million.)

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### OPENING OF CLAIMANT'S ACCOUNTS

Claimant opened two accounts at Tripp; the Claim only mentions the second one. The first was a joint account opened by Claimant and his mother in March 1992, the same month Frank became employed at Tripp.

The "risk factors" checked off on the New Account Form for the Joint Account included investment grade, good quality and speculative. The "investment objectives" checked off were long term capital gains and income. All confirmations and monthly statements were to be mailed to Claimant's business address in New York City. That business, No-Mo Products, was costume jewelry. The "financial profile" section of the form stated that the approximate annual income of Claimant was \$100,000 and that the approximate net worth was \$500,000.

Three months later, in May 1992, Claimant opened an Individual Account (which is the subject of this claim). This time, the "risk factors" checked off were investment grade, good quality, speculative and high risk. The "investment objectives" checked off were long term capital gain, short term capital gain and income. Approximately two years later, in February 1994, Tripp received what purported to be the signed margin agreement for Claimant's individual account.

### CHECKS AND BONDS

From the Spring of 1992 through the Summer of 1996, many transactions took place in Claimant's individual and joint accounts. During this same period, many checks were received by Tripp from Claimant and even more were, according to the monthly statements, disbursed to him. In addition, the monthly statements reflected the receipt of numerous bonds into the account. What follows is a summary of the delivery in and disbursement out of checks and bonds:

#### Checks Withdrawn

1992	8	\$ 49,500.00
1993	25	\$179,850.23
1994	25	\$143,850.00
1995	46	\$102,790.78

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1996	41	<u>\$105,812.50</u>
		\$581,803.51

### Checks Received from Claimant

1992	1	\$100,000.00
1993	2	\$ 53,412.50
1994	5	\$ 90,732.98
1995	7	\$ 56,355.00
1996	1	<u>\$ 812.50</u>

\$301,312.98

### Bonds Received from Claimant

Date	Face Amount	Description	Yield	Maturity
07/15/92	95000	NYS Atomic and Space Develop	8.000%	6/1/04
12/17/92	25000	NYS Housing	5.200%	11/1/01
12/17/92	15000	NYS Housing	5.200%	11/1/09
12/17/92	25000	Puerto Rico	5.900%	1/1/07
12/17/92	15000	Puerto Rico	7.750%	7/1/08
12/17/92	25000	Puerto Rico	7.750%	1/1/99
01/28/93	55000	NYS Housing	6.500%	11/1/00
02/25/93	20000	NY City	3.500%	1/15/02
05/11/93	10000	NYS Mtg Sing Fam	9.000%	1/1/02
09/13/93	10000	NY City	3.500%	5/1/14
11/8/93	5000	NYS Urban Development Corp	6.600%	1/1/11
11/20/95	15000	NY City	10.250%	7/1/08
4/17/96	20000	NY City	6.000%	8/15/08
5/22/96	25000	NY State	6.100%	11/1/03
8/29/96	40000	NY State	6.600%	1/1/11

Whenever checks were received or withdrawn, there was a record of that transaction on Claimant's monthly account statement. The entries clearly showed the amounts deposited, the amounts withdrawn and the actual check number for the withdrawals.

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### CONVERSATIONS WITH CLAIMANT

While Claimant maintained his accounts at Tripp, Mr. O'Connor had no involvement in the supervision of trading activity therein. However, on at least two occasions that Mr. O'Connor recalls, he received a phone call from Claimant to discuss his accounts' activity. Both of the conversations were as a result of Frank's absence from the office.

Claimant's focus during both conversations was on the equity side of his individual account. He complained about missed opportunities in market rumor situations and IPO allocations. These were attributed, in his opinion, to either Frank's lack of attentiveness or lack of recognition by syndicate offering groups.

During both conversations, Mr. O'Connor questioned Claimant about using an institutional bond representative for this type of equity trading. Mr. O'Connor recommended that if Claimant was unhappy with the performance of that portion of his account, Claimant should use another broker or firm for equities. In addition, and most importantly, Mr. O'Connor told Claimant that any future complaints should be made in writing and mailed to his attention. There were none.

With respect to the receipt of bonds and checks and the disbursements of checks, it will be Mr. O'Connor's testimony that the majority of such transactions were handled in person with Claimant. Interest checks and principal withdrawals were routinely delivered by Pershing to Tripp and picked up by Claimant or - with Claimant's permission - given to Frank to give to Claimant. Receipts were prepared in all cases. Claimant personally delivered the securities into the account that are listed above. On several occasions, Claimant contacted the head of operations for Tripp, Charles Granito, to thank him for the personal attention he was getting with respect to the check disbursements.

In August 1996, Claimant met with representatives of Tripp. During that meeting, Claimant maintained several times that he reviewed his monthly statements regularly. He also maintained that he had built and run a successful costume jewelry business which he then sold. He said that he was fully aware of Frank's disciplinary history and Frank's personal habits outside the office.

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### CHECK DISBURSEMENTS

With respect to check disbursements, Claimant initially requested that if he could not come to the office to pick them up himself, he wanted Tripp to give them to Frank, who, in turn, would give them to Claimant. Thus, the procedure of giving checks to Frank for Claimant was initially at the request of Claimant. While many times Claimant would personally pick up the checks, on other occasions they would be given to Frank for Claimant. However, in all instances, Tripp received signed receipts for those disbursements.

### FRANK'S TERMINATION

On August 5, 1996, Tripp fired Frank for excessive absenteeism. Thereafter, Claimant called the office to inquire about a transaction and, since a broker had not been re-assigned to his account, he spoke with Don Carman, Tripp's CEO. As a result of that conversation, an investigation was undertaken with respect to the receipt and disbursement of checks and securities into and out of Claimant's accounts. Thereafter, representatives of Tripp, including Mr. O'Connor and Mr. Carman, met with Claimant at Tripp. Until that time, Claimant never complained to anyone at Tripp about the check disbursements reported on his monthly statements. Had he done so the first time he noticed the disbursement of an unreceived check, Tripp would have done an investigation at that time.

### SECTION 20(a)

The basis of Claimant's claims against Mr. O'Connor come from Section 20(a) of the 1934 Act. That section provides for liability of a person who exercised control over a person who, in turn, violated the 1934 Act and whose conduct caused damage to the plaintiff. Section 20(a) provides that:

1. Every person who, directly or indirectly,
2. Controls any person liable under the 1934 Act or any rule or regulation thereunder,
3. Shall also be liable jointly and severally with and to the same extent as such controlled person;
4. To any person to whom such controlled person is liable;

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5. Unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

While Mr. O'Connor was President of Tripp when the accounts were opened, he was the Sales Manager for most of the time the accounts were maintained. However, even if Mr. O'Connor is deemed to be a "controlling person" of Frank, the evidence will show in this case that Mr. O'Connor acted in good faith and did not directly or indirectly induce Frank in his alleged violative conduct. The fact is, as will be shown, Mr. O'Connor had no involvement with the receipt of bearer bonds and bearer bond coupons into Claimant's account. He had no involvement with margin trading activity in the account. Nor, the evidence will show, did he have any involvement in determining the suitability or unsuitability of securities transactions in Claimant's account.

Therefore, while Mr. O'Connor may have held positions of authority at Tripp during the four years that Claimant had his accounts at the firm, his responsibilities did not include the supervision of the activity complained about in the three claims against him (Second, Third and Fourth).

### CONCLUSION

Therefore, Respondent Kevin O'Connor respectfully requests that the three claims against him be dismissed in their entirety, that he be awarded his attorneys' fees, that all NASD arbitration fees be assessed against Claimant and that the arbitrators order the Central Registration Depository to expunge all reference to this case on this record.

Respectfully submitted,

KAUFMANN, FEINER, YAMIN,  
GILDIN & ROBBINS LLP

  
BY: DAVID E. ROBBINS

DER/mf

cc: Howard B. Sirota, Esq.  
Daniel J. Brooks, Esq.  
Mr. Kevin O'Connor  
Anthony J. Dijinis, Esq.  
Marty Kaplan, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was mailed to the above-named addressee this 27th day of February, 1997, to **Christine Holder**, Senior Legal Assistant, 33 Whitehall Street - 8th Floor, New York, New York 10004 and a copy mailed to **Howard B. Sirota, Esq.**, Sirota & Sirota, 747 Third Avenue, New York, New York 10017; **Daniel J. Brooks, Esq.**, Layton, Brooks, Hecht, 745 Fifth Avenue, 29th Floor, New York, New York 10151; **Anthony J. Dijinis, Esq.**, Pickard & Dijinis, 1990 M Street, NW, Washington, DC 20036; and, **Marty Kaplan, Esq.**, Gusrae, Kaplan & Bruno, 120 Wall Street, New York, New York 10005.

By: Maureen Ferranti  
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