

**Award**  
**NASD Regulation, Inc.**

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In the Matter of the Arbitration Between:  
Hugh J. O'Donnell, Claimant vs. Fairchild Financial Group, Inc., and Bradley St. Myer, Respondents.

Case Number: 99-00749

Hearing Site: Cincinnati, Ohio

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**REPRESENTATION OF PARTIES**

Claimant, Hugh J. O'Donnell, "O'Donnell", hereinafter referred to as "Claimant", represented himself.

Respondent, Fairchild Financial Group, Inc., "Fairchild", was originally represented by Claudia Oliveri, Esq., of the Law Offices of Ruthann G. Niosi, Esq., P.C., New York, New York. Ms. Oliveri withdrew as counsel prior to the hearing, and was not replaced. No representative for Fairchild was present at the hearing.

Respondent, Bradley St. Myer, "St. Myer", was originally represented by Claudia Oliveri, Esq., of the Law Offices of Ruthann G. Niosi, Esq., P.C., New York, New York. Ms. Oliveri withdrew as counsel prior to the hearing. Thereafter, St. Myer was represented by Marc Dorfman, Esq., and Leo F. Orenstein, Esq., of Freedman, Levy, Kroll & Simonds, Washington DC. However, St. Myer was not present at the hearing, nor did any representatives appear on his behalf.

**CASE INFORMATION**

Statement of Claim filed on or about: February 19, 1999

Claimant signed the Uniform Submission Agreement: February 17, 1999

Joint Statement of Answer filed by Respondents on or about: July 7, 1999

Respondent, Bradley St. Myer, signed the Uniform Submission Agreement:  
October 18, 1999

William B. Erb, Vice President of Respondent, Fairchild Financial Group, Inc.,  
signed the Uniform Submission Agreement: September 10, 1999

### CASE SUMMARY

Claimant asserted the following causes of action: unsuitability; material omissions; misrepresentation; and negligence; and *respondeat superior*. The causes of action relate to transactions involving *Kids Stuff* stock.

Unless specifically admitted in their Joint Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: failure to state a cause of action for which relief can be granted; contributory negligence; waiver; absence of fiduciary duty; failure to mitigate; ratification; and estoppel.

### RELIEF REQUESTED

Claimant requested:

Compensatory Damages	\$19,072.66
Punitive Damages	\$ 8,000.00

Respondent requested that all claims be dismissed with prejudice.

### OTHER ISSUES CONSIDERED AND DECIDED

#### Factual Findings

Over a series of approximately six (6) months, Claimant purchased two (2) separate securities with the aid and assistance of Respondents St. Myer and Fairchild. *Compare Generics* was purchased on April 4, 1997 for Six Thousand Five Hundred Eighty Seven and 50/100 (\$6,587.50) Dollars and sold at a small profit on September 26, 1997.

At arbitration, Claimant testified that Respondent St. Myer also recommended the purchase of warrants in *Kids' Stuff*. Based upon that recommendation, Claimant sold *Compare Generics* and purchased one thousand (1,000) shares of *Kids' Stuff* warrants on July 24, 1997. Subsequently, Claimant purchased another one thousand (1,000) shares of *Kids' Stuff* warrants on July 26, 1997, and one thousand one hundred seventy five (1,175) shares on September 26, 1997, all at Respondent St. Myer's recommendation. Claimant's total investment in the warrants totaled Nineteen Thousand One Hundred Forty Seven and 66/100 (\$19, 147.66) Dollars.

In September, 1997, Claimant contacted Respondent St. Myer and expressed a desire to exercise the *Kids' Stuff* warrants or to sell them. Claimant initiated his desire to sell or exercise with Respondent St. Myer's assistant, also an employee of Respondent Fairchild (formerly known as VTR

Capital). The assistant explained that he/she lacked authority to carry out a "Sell Order" and required that Claimant speak directly with Respondent St. Myer.

In Claimant's conversation with Respondent St. Myer, despite requesting the sale of the **Kids' Stuff** warrants no less than three (3) times, Respondent St. Myer exercised undue influence and pressure upon Claimant, ultimately convincing Claimant to retain such holdings through misrepresentation and promises of stock performance.

Subsequently, Claimant was unable to exercise the warrants and watched the underlying common stock decline in value. On December 26, 1998, Claimant sold six hundred (600) shares of the **Kids' Stuff** warrants for Forty Four and 99/100 (\$44.99) Dollars, and on July 16, 1999, Claimant sold two thousand five hundred seventy five (2,575) shares of the **Kids' Stuff** warrants for Five Hundred Thirty Eight and 72/100 (\$538.72) Dollars.

### Applicable Rules of Law

For Claimant to prevail on a claim of unsuitability, Claimant must prove:

1. The securities were unsuited to Claimant's needs;
2. Respondents knew the securities were unsuitable;
3. Respondent(s) recommended the purchase and Claimant relied upon Respondent(s)' recommendations and representations to his detriment.

Pursuant to the principal of *respondeat superior*, an employer may be held responsible and liable for the wrongful conduct of its employee. Claimant has a duty to mitigate his damages.

Prior to being contacted through a "cold call" by Respondent St. Myer, Claimant had very little, if any, investment experience. The amount of money that Claimant invested through Respondents was significant not only with respect to Claimant's overall net worth, but also with respect to Claimant's investment sophistication, and lack thereof. Respondent St. Myer knew of Claimant's history and net worth. He also knew the securities he suggested were not appropriate for Claimant's experience or investment objectives. The representations made by Respondent St. Myer during the conversations with respect to the projected performance of **Kids' Stuff** warrants were inappropriate and untrue, but Claimant relied to his detriment upon such statements. Respondent St. Myer's refusal to execute Claimant's request that the warrants be exercised and/or sold resulted in a loss to Claimant of Eighteen Thousand Five Hundred Sixty Three

and 95/100 (\$18,563.95) Dollars. The actions of Respondent St. Myer occurred during and in the course of his employment. Respondent Fairchild was negligent in its supervision of Respondent St. Myer. It permitted Respondent St. Myer to carry on transactions in the account without proper account documentation, without sufficient experience in marketing this type of security and without information regarding the securities Respondent St. Myer represented to Claimant.

Claimant had a duty to mitigate his damages which he attempted to do by requesting the sale of the securities. Respondent would not comply.

### **Post Hearing Submissions**

Due to the uncertainty of a final settlement with Respondent St. Myer, the Arbitrator permitted Claimant to submit a post hearing communication within thirty (30) days as to the status of the settlement, if any. Claimant submitted a letter to the NASD indicating no settlement with Respondent St. Myer was reached due to his check(s) being returned "NSF."

### **Failure to Appear**

Respondents did not appear at the hearing but are required to submit to arbitration pursuant to the Code and, having answered the claim, signed the Uniform Submission Agreement, and having received due notice of the hearing to the satisfaction of the Panel, is bound by the determination of the Panel on all issues submitted.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

This Award shall be joint and several against Respondent Fairchild and Respondent St. Myer. Respondents shall pay to Claimant the sum of Fifteen Thousand and 00/100 (\$15,000.00) Dollars. No punitive damages shall be awarded. Claimant shall be entitled to interest on this Award in accordance with the applicable law and this Award may be enforced in any court having jurisdiction thereof.

All relief not specifically granted herein is hereby denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$120

#### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is Fairchild Financial Group.

Member surcharge = \$ 600

Pre-hearing process fee = \$ 600

Hearing process fee = \$1,000

#### Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator, including a pre-hearing conference with the arbitrator, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions x \$300 = \$ 600

Pre-hearing conference: September 10, 1999 1 session

October 12, 1999 1 session

One (1) Hearing sessions x \$300 = \$ 300

Hearing Date: May 22, 2000 1 session

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Total Forum Fees = \$ 900

The Panel has assessed \$300 of the forum fees to Claimant, and \$600 of the forum fees to Respondents, jointly and severally.

**Fee Summary**

1. Claimant, Hugh J. O'Donnell, be and hereby is solely liable for:

Initial Filing Fee	= \$ 120
Forum Fees	= \$ 300
Total Fees	= \$ 420
Less payments	= \$ 420
Balance Due NASD Regulation, Inc.	= \$ 0

2. Respondent, Fairchild Financial Group, be and hereby is solely liable for:

Member Fees	= \$ 600
Pre-Hearing Process Fees	= \$ 600
Hearing Process Fees	= \$1,000
Total Fees	= \$2,200
Less payments	= \$ 600
Balance Due NASD Regulation, Inc.	= \$1,600

3. Respondents, Bradley St. Myer and Fairchild Financial Group, be and hereby are jointly and severally liable for:

Forum Fees	= \$ 600
Total Fees	= \$ 600
Less Payments	= \$ 0
Balance Due NASD Regulation, Inc.	= \$ 600

All balances are due to NASD Regulation, Inc.

**Arbitrator's Signature**

  
Tracy L. Allen, Esq.  
Sole Arbitrator

7/25/00  
Signature Date

Date of Service (For NASD office use only)