

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Craig Birkelbach

Case No. 99-00813

Names of Respondents

The Boston Group, L.P.

Robert A. Diminico

Kye Hellmers

Name of Third-Party Respondent

Clifford Mastricola

REPRESENTATION OF PARTIES

For Craig Birkelbach ("Birkelbach"), hereinafter referred to as "Claimant": Dan A. Druz, Esq., Manasquan, New Jersey.

For Respondents The Boston Group, L.P., ("The Boston Group"), Robert DiMinico ("DiMinico") and Kye Hellmers ("Hellmers"), hereinafter collectively referred to as "Respondents": Eric S. Hutner, Esq. of the Law Offices of Eric S. Hutner & Associates, New York, New York until his withdrawal as counsel for Respondents The Boston Group and DiMinico on or about October 4, 2000. Thereafter, Respondent DiMinico appeared pro se and as the representative for Respondent The Boston Group.

Third-Party Respondent Clifford Mastricola ("Mastricola") appeared pro se.

CASE INFORMATION

Statement of Claim filed on or about: February 20, 1999.

Letter dated November 24, 1999 from Dan A. Druz, Esq. to NASD Dispute Resolution, Inc. filed.

Amended Statement of Claim filed on or about: January 28, 2000.

Second Amended Statement of Claim filed on or about: July 7, 2000.

Claimant signed the Uniform Submission Agreement: January 28, 1999.

Motion to Dismiss, or Alternatively, for a More Definite Statement and Response to Statement of Claim and Third-Party Claim Versus Clifford Mastricola (Claimant's Broker) filed on or about: June 3, 1999.

Respondents' Reply to Opposition to Motions filed on or about: December 14, 1999.
Renewed Motions and Response to Amended Statement of Claim filed on or about: February 10, 2000.
Response to Second Amended Statement of Claim and Second Renewal of Motion to Dismiss filed on or about: July 25, 2000.
Respondent Hellmers signed the Uniform Submission Agreement: June 3, 1999.
Respondent DiMinico signed the Uniform Submission Agreement: April 20, 1999.
Respondent The Boston Group signed the Uniform Submission Agreement: April 20, 1999.
Letter dated August 17, 2000 from Respondent Masticola to NASD Dispute Resolution, Inc. filed.
Third-Party Respondent Masticola did not file an executed Uniform Submission Agreement.

CASE SUMMARY

Claimant asserted the following: The claims alleged in the arbitration arise out of the egregious, intentional misconduct by Respondent The Boston Group, particularly its supervisors and control persons, in connection with the accounts of Claimant. The allegations against Respondents include unauthorized purchases and sales of securities; failure to follow its client's explicit instructions to sell securities; violation of Section 10b of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder; market manipulation; fraud; breach of fiduciary duty; failure to supervise; negligence; breach of contract; failure to use due diligence; and, conversion. Further, certain Respondents are liable to Claimant as control persons under Section 20 of the Exchange Act.

The securities that Respondents failed to either buy or sell without authorization include, but are not limited to the following: Cinemastar Luxury Theaters; American Cinemastores; Chicago Pizza & Brewery; Diedrich Coffee, Inc.; Sound Source Interactive; Apparel Technologies; Tramford Intl; Imagematrix Corp.; Craig Consumer Electronics; Jerry's Famous Deli; Logic Works; U.S. Long Distance Corp.; Medimmune, Inc.; and, Network Express.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following: Claimant has failed to shed light on the factual issues that support his claims; Claimant, in commencing this arbitration, is involved in a wrongful effort to recoup his investment loss; the brokerage firm is not a guarantor of success in the stock market which Claimant well understood; Claimant is a knowledgeable, seasoned investor who deliberately made aggressive investments with full knowledge of the risks and potential rewards that his investment decisions entailed; and, Respondents did not breach any duty owed to Claimant or engage in any wrongful conduct.

Respondent The Boston Group asserted a third-party claim against Third-Party Respondent Masticola which alleged the following: Third-Party Respondent Masticola was Claimant's principal broker at The Boston Group. As such, he had principal responsibility for making recommendations, effecting transactions, and otherwise speaking with Claimant and servicing

his account. Therefore, Third-Party Respondent Mastriola should be liable, pursuant to the principles of indemnity and contribution, for all or part of any damages assessed against Respondents.

Third-Party Respondent Mastriola asserted the following: At no time did he engage in any wrongdoing with respect to his relationship with Claimant; all information provided to Claimant was received by Third-Party Respondent Mastriola from his employer; Third-Party Respondent Mastriola learned that the information provided was inaccurate after he left the employ of Respondent The Boston Group; and, Third-Party Respondent Mastriola suffered irreparable financial and emotional damage as a result of the false information provided to him to pass on to his clients.

RELIEF REQUESTED

Claimant requested approximately \$450,000.00 in compensatory damages; additional damages pursuant to statute; punitive damages in an amount not less than treble the amount of his compensatory damages; and, such other and further relief deemed just and proper.

Respondents requested that all claims be dismissed with prejudice; that Respondents be awarded their costs and disbursements of this action, including attorneys' fees; and, that the arbitration panel award such other relief as it deemed just and proper. Further, Respondent The Boston Group requested that to the extent any claim asserted by Claimant is granted in whole or in part, The Boston Group's claim for contribution and/or indemnity against Third-Party Respondent Mastriola should be granted in its entirety.

Third-Party Respondent Mastriola requested an award of full indemnification from Respondents should he be found liable.

OTHER ISSUES CONSIDERED AND DECIDED

Third-Party Respondent Mastriola did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but is required to submit to arbitration pursuant to the NASD-DR Code of Arbitration Procedure (the "Code") and, having appeared, is bound by the determination of the Panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

On December 9, 1999, in response to Respondents' Motion to Dismiss, or Alternatively, for a More Definite Statement, the arbitration panel issued an Order which denied Respondents' Motion to Dismiss and provided that Claimant may file an amended complaint not later than December 30, 1999. Thereafter, on January 13, 2000, in response to Respondents' Reply to Opposition to Motions, the arbitration panel issued an Order which reiterated the denial of Respondents' motion to dismiss and provided that Claimant may file an amended complaint not later than January 25, 2000. The Amended Statement of Claim was filed on or about

January 28, 2000. Respondents' Renewed Motions and Response to Amended Statement of Claim were filed on or about February 10, 2000. On or about June 18, 2000, the arbitration panel issued an Order which granted, without prejudice, Respondents' motion to dismiss and provided Claimant until July 7, 2000 to file a Second Amended Statement of Claim which described, with sufficient specificity, the parties not named; the securities Respondents failed to buy or sell without authorization; the securities that were unsuitable; the broker or brokers who handled Claimant's account; the elements of fraud; and, details of Respondents' breach of the alleged fiduciary duty. Claimant's Second Amended Statement of Claim was filed on or about July 7, 2000. Respondents' Response to Second Amended Statement of Claim and Second Renewal of Motion to Dismiss was filed on or about July 25, 2000. On or about August 29, 2000, the arbitration panel issued an Order pursuant to Rule 10305(a) of the Code which dismissed, without prejudice, the entire proceeding and referred the parties to their judicial remedies.

On or about October 13, 2000, Claimant served Gabe Kaplan with copies of the Statement of Claim, Amended Statement of Claim, Second Amended Statement of Claim and Third Amended Statement of Claim. The Panel did not consent to the filing of the Third Amended Statement of Claim as no application was made to the Panel pursuant to Rule 10328 of the Code. Further, copies of the Third Amended Statement of Claim were not provided to NASD Dispute Resolution, Inc. in accordance with said Rule. As such, the Third Amended Statement of Claim is not deemed filed with NASD Dispute Resolution, Inc.

AWARD

After considering the pleadings, all prior Orders of the Panel and all motions and responses, *the Panel has decided in full and final resolution of the issues submitted for determination as follows:*

Pursuant to Rule 10305(a) of the Code, the Panel hereby dismisses, without prejudice, all claims by Claimant against all Respondents, Respondent The Boston Group's third party claim against Third-Party Respondent Masticola, Third-Party Masticola's counterclaim against Respondents and any and all claims, cross-claims, counterclaims and third-party claims asserted in these proceedings, and refers the parties to their judicial remedies.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$250.00
Third-party claim filing fee	= \$500.00
Counterclaim filing fee	= \$500.00

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 Boston Group was no longer a member firm at the time of the filing of the Statement of Claim.

Adjournment Fees

Adjournments requested during these proceedings:

February 1, 2, 3, and 4, 2000, adjournment by Respondents	\$1,000.00 waived by the arbitration panel
June 5, 6, 7 8 and 9, 2000, adjournment by Claimant	\$1,000.00 waived by the arbitration panel

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(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One Pre-hearing session with Panel x \$1,000.00	= \$1,000.00
Pre-hearing conference: August 26, 1999	1 session
Total Forum Fees	= \$1,000.00

The Panel has assessed \$333.33 of the forum fees to Claimant.

The Panel has assessed \$333.34 of the forum fees to Respondents The Boston Group, DiMinico and Hellmers, jointly and severally.

The Panel has assessed \$333.33 of the forum fees to Third-Party Respondent Masticola.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred during these proceedings.

Fee Summary

Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$250.00
Forum Fees	= \$333.33
Total Fees	= \$583.33
<u>Less payments</u>	<u>= \$583.33</u>

Balance Due NASD Dispute Resolution, Inc. = \$0.00

Respondent The Boston Group be and hereby is solely liable for:

Third-Party Claim Filing Fee	= \$500.00
Total Fees	= \$500.00
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$500.00

Respondents The Boston Group, DiMinico and Hellmers be and hereby are jointly and severally liable for:

Forum Fees	= \$333.34
Total Fees	= \$333.34
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$333.34

Third-Party Respondent Masticola be and hereby is solely liable for:

Counterclaim Filing Fee	= \$500.00
Forum Fees	= \$333.33
Total Fees	= \$833.33
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$833.33

All balances are due and payable to NASD Dispute Resolution, Inc. within 30 days of the date of service of the Award.

Concurring Arbitrators' Signatures

/s/
James L. Berfield, J.D.
Public Arbitrator, Presiding Chair

Signature Date

/s/
Thomas R. Grady, Esq.
Public Arbitrator

Signature Date

/s/
Nicholas John Taldone, Esq.
Industry Arbitrator

Signature Date

November 16, 2000

Date of Service (For NASD-DR office use only)

Balance Due NASD Dispute Resolution, Inc. = \$0.00

Respondent The Boston Group be and hereby is solely liable for:

Third-Party Claim Filing Fee = \$500.00

Total Fees = \$500.00

Less payments = \$0.00

Balance Due NASD Dispute Resolution, Inc. = \$500.00

Respondents The Boston Group, DiMinico and Hellmers be and hereby are jointly and severally liable for:

Forum Fees = \$333.34

Total Fees = \$333.34

Less payments = \$0.00

Balance Due NASD Dispute Resolution, Inc. = \$333.34

Third-Party Respondent Masticola be and hereby is solely liable for:

Counterclaim Filing Fee = \$500.00

Forum Fees = \$333.33

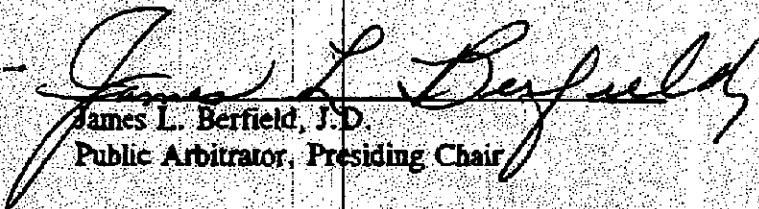
Total Fees = \$833.33

Less payments = \$0.00

Balance Due NASD Dispute Resolution, Inc. = \$833.33

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Concurring Arbitrators' Signatures


 James L. Bertfield, J.D.
 Public Arbitrator, Presiding Chair

11/6/00
 Signature Date

 Thomas R. Grady, Esq.
 Public Arbitrator

 Signature Date

 Nicholas John Taldone, Esq.
 Industry Arbitrator

 Signature Date

 Date of Service (For NASD-DR office use only)

Balance Due NASD Dispute Resolution, Inc. = \$0.00

Respondent The Boston Group be and hereby is solely liable for:

Third-Party Claim Filing Fee	= \$500.00
Total Fees	= \$500.00
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$500.00

Respondents The Boston Group, DiMinico and Hellmers be and hereby are jointly and severally liable for:

Forum Fees	= \$333.34
Total Fees	= \$333.34
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$333.34

Third-Party Respondent Masticola be and hereby is solely liable for:

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Public Arbitrator

11/1/00
Signature Date

Nicholas John Taldone, Esq.
Industry Arbitrator

Signature Date

Date of Service (For NASD-DR office use only)

Balance Due NASD Dispute Resolution, Inc. = \$0.00

Respondent The Boston Group be and hereby is solely liable for:

Third-Party Claim Filing Fee = \$500.00

Total Fees = \$500.00

Less payments = \$0.00

Balance Due NASD Dispute Resolution, Inc. = \$500.00

Respondents The Boston Group, DiMinico and Hellmers be and hereby are jointly and severally liable for:

Forum Fees = \$333.34

Total Fees = \$333.34

Less payments = \$0.00

Balance Due NASD Dispute Resolution, Inc. = \$333.34

Third-Party Respondent Masticola be and hereby is solely liable for:

Counterclaim Filing Fee = \$500.00

Forum Fees = \$333.33

Total Fees = \$833.33

Less payments = \$0.00

Balance Due NASD Dispute Resolution, Inc. = \$833.33

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Signature Date

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Public Arbitrator

Signature Date

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