

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

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In the Matter of the Arbitration Between

Name of Claimant

James H. Hall, Jr.

Case No. 99-01109

Names of Respondents

Phillip Olin Ernsberger  
James Peter Boudouris  
Robert Williams

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**REPRESENTATION OF PARTIES**

Claimant James H. Hall, Jr., hereinafter referred to as "Claimant", appeared pro se.

Respondent Phillip Olin Ernsberger ("Ernsberger") appeared pro se.

Respondent James Peter Boudouris ("Boudouris") appeared pro se.

Respondent Robert Williams ("Williams") appeared pro se.

**CASE INFORMATION**

Statement of Claim filed on or about: March 6, 1999.

Claimant signed the Uniform Submission Agreement: March 2, 1999.

Statement of Answer filed by Respondent Ernsberger on or about: June 23, 1999.

Respondent Ernsberger signed the Uniform Submission Agreement: June 23, 1999.

Statement of Answer and Motion to Dismiss filed by Respondent Boudouris on or about: June 17, 1999.

Respondent Boudouris signed the Uniform Submission Agreement: June 17, 1999.

Statement of Answer filed by Respondent Williams on or about: June 22, 1999.

Respondent Williams signed the Uniform Submission Agreement: June 22, 1999.

Motion to Dismiss filed by Respondent Williams on or about: January 6, 2000.

Motion to Dismiss filed by Respondent Boudouris on or about: January 6, 2000.

**CASE SUMMARY**

Claimant alleged the following: Respondents are all former employees of H.J. Meyers & Co., Inc. ("H.J. Meyers") which ceased doing business in September 1998; Respondent Ernsberger executed unauthorized trades in Claimant's account; and, Respondents Boudouris

and Williams were aware of the imminent demise of H.J. Meyers and "stalled" or dissuaded Claimant from submitting a formal claim until it was too late to obtain any monetary compensation from the company.

Respondent Ernsberger alleged that he did not execute unauthorized trades in Claimant's account. Further, Respondent Ernsberger asserted that when he left H.J. Meyers, he had no knowledge of any problems with respect to Claimant's account.

Respondent Boudouris alleged that he had no prior knowledge of the sudden demise of H.J. Meyers. Further, Respondent Boudouris asserted that as Compliance Officer of H.J. Meyers, he performed his duties in an ethical manner and in accordance with the rules and regulations of the National Association of Securities Dealers, Inc.

Respondent Williams denied that he had any advance notice of the closing of H.J. Meyers. Respondent Williams further alleged that he met all duties owed to Claimant relating to his employment with H.J. Meyers as branch manager. Further, the unauthorized trading allegation is irrelevant with respect to Respondent Williams as Claimant was not Respondent Williams' client.

#### **RELIEF REQUESTED**

Claimant requested damages in the sum of \$9750.00.

Respondents Boudouris and Williams requested dismissals of all claims asserted against them plus an expungement of all references to this arbitration from their NASD Central Registration Depository ("CRD") records.

Respondent Ernsberger requested a dismissal of all claims asserted against him.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

On or about January 27, 2000, the arbitrator, Kenneth R. Starr, issued an Order which granted the Motion to Dismiss of Respondent Williams.

At the conclusion of the evidentiary hearing on February 10, 2000, Claimant Hall informed the arbitrator that he had dismissed, with prejudice, all claims against Respondent Boudouris.

#### **AWARD**

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

The undisputed facts adduced at the hearing reflect that Claimant and the remaining Respondent, Ernsberger, began doing business in approximately May 1998. The first

transaction on May 27, was the purchase of 4000 shares of a company called Solopoint.<sup>1</sup> The next transaction on June 16, was the purchase of 6000 additional shares of Solopoint.<sup>2</sup> Claimant paid for these purchases and did not complain to anyone at that time about the allegedly unauthorized purchases.<sup>3</sup>

The next three transactions were as follows: July 31, 300 share purchase of a company called TEAM; August 3, 5000 share purchase of a company called BPiE and 3200 share sale of Solopoint (at a loss).<sup>4</sup> Claimant testified that he knew nothing of these trades until receiving confirmations sometime between August 7 through 9.

On or about August 10, Claimant contacted the branch manager, Robert Williams, and complained about the trades. Later that same day, after speaking with Respondent Ernsberger, Claimant again spoke with Respondent Williams. It is unclear exactly what was said during that conversation, but there is no question that Claimant did not want anything done (or undone) on his behalf at that time. At the hearing, Claimant explained that he was motivated to do nothing at that time because Respondent Ernsberger had convinced him, in the telephone conversation earlier that day, the transactions in question were in his best interest.

Sometime later, on or about August 24, Claimant spoke with the branch compliance manager, James Boudouris, and reiterated his complaints of the unauthorized trading referenced above. Respondent Boudouris investigated the complaints over the next two to three weeks.

Claimant's total investment during the relevant time frame was \$6,360.94. The shares of Solopoint, sold on August 3, netted \$3613.87. Sometime after that sale, Solopoint went to "as high as \$9.00 - \$10.00 per share." The 300 shares of TEAM were sold sometime after August 24, "in the \$6.00 - \$8.00 range." Claimant still owns 2500 shares of BPiE and 50 shares of Solopoint.

Respondent Ernsberger testified at the hearing that he never executed any trade on behalf of Claimant that was unauthorized. He suggested there may have been some misunderstanding at various times, but he never disregarded specific directions nor took any action without

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<sup>1</sup> Claimant testified that he only authorized the purchase of 3000 shares at that time.

<sup>2</sup> Claimant testified that he only authorized the purchase of 4000 shares at that time.

<sup>3</sup> Solopoint subsequently did a 1 for 4 split.

<sup>4</sup> Claimant testified that none of these transactions was authorized.

first speaking to Claimant.<sup>5</sup> At the hearing, Claimant adamantly insisted there was no misunderstanding. In fact, with regard to the purchase of TEAM, Claimant alleged he specifically told Respondent Ernsberger not to buy the stock during their only telephone conversation on the matter. Respondent Ernsberger contradicted this by stating Claimant did, in fact, authorize him to sell Solopoint and buy TEAM in either one or two telephone conversations prior to the transactions. The Arbitrator finds this diametrically opposed testimony irreconcilable.

Respondent Ernsberger further testified that he had been in the securities industry for 10 years. He stated he is an ambitious and aggressive salesman, but he is not dishonest. He further stated that his share of the commission for the TEAM purchase was approximately \$12.00. The apparent "misunderstanding" on the initial purchase of Solopoint arose from a directive from Claimant to purchase an indefinite number of shares for a specific dollar investment (approximately \$1,100.00). He admitted that Claimant did not wish to invest more money at that time. At the time of that conversation, the price of Solopoint would have supported the purchase of 4000 shares. The share price had increased by the time the buy order was entered and the 4000 shares resulted in an additional investment of approximately \$380.00. Respondent further testified that if Claimant had demanded the rescission of unauthorized trades in his account, H.J. Meyers would have reversed the transactions immediately.

Claimant offered the testimony of Christian Cherniak, an experienced broker, with whom Claimant had been doing business since June 1998. Cherniak testified that he was contacted by Claimant contemporaneously with the transactions involving TEAM and Solopoint and was asked "if that could be done legally". Mr. Cherniak responded by telling Claimant that the actions described to him amounted to unauthorized trading and that he should immediately "freeze" the account and subsequently move the account to another broker.

Before he was voluntarily dismissed, Respondent Boudouris testified that, after investigating Claimant's complaints, he reached the conclusion that they were valid. He advised Claimant that he was waiting for additional information and that H.J. Meyers was going to settle the claim.<sup>6</sup>

Respondent Boudouris' conclusion about the validity of the Claimant's assertions was based upon telephone logs he had access to at the time, similar complaints received from other clients at approximately the same time and the fact that Respondent Ernsberger "took poor contemporaneous notes."

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<sup>5</sup> Before his summary dismissal, Respondent Williams stated in pleadings filed with the NASD that Claimant informed him on or about August 10, 1998 "there had been a misunderstanding between [Claimant] and Ernsberger.

<sup>6</sup> Before the claim could be settled, H.J. Meyers ceased doing business.

Respondent Boudouris referred to two pages of hand-written notes documenting his investigation and additional hand-written notes reflecting the other complaints. According to his recollection and his notes, the telephone logs did not reflect outgoing calls to Claimant on certain dates. The absence of calls on those dates would have been consistent with the claim that Respondent Ernsberger executed unauthorized trades. Respondent Boudouris did not recall the specific dates in question. He also testified that the logs only reflected outgoing calls. An exhibit admitted into evidence at the hearing also contained a note about an order ticket on the TEAM purchase which purportedly reflected a telephone contact between Respondent Ernsberger and Claimant on August 3, 1998.<sup>7</sup> According to Respondent Boudouris, the note on the order ticket was in Respondent Ernsberger's handwriting. Respondent Ernsberger stated unequivocally that, if the transaction took place on July 31, the note on the ticket order would have been dated on or before July 31. The actual order ticket was unavailable to be placed into evidence. Respondent Boudouris further testified that he discussed Claimant's complaint with Respondent Ernsberger, via telephone, and believed that Ernsberger agreed to have approximately \$4,000.00 deducted from his final paycheck to settle this claim.<sup>8</sup> Respondent Ernsberger denied any such telephone conversation took place. Respondent Boudouris did not recall if he discussed any of the other client complaints with Respondent Ernsberger, notwithstanding the fact that one of said complaints involved a \$118,000.00 IRA rollover. Other than his hand-written notes, Respondent Boudouris did not have any additional documentation to support his conclusion. As noted above, Respondent Boudouris was voluntarily dismissed after supplying his testimony.

The credibility of the witnesses was critical in determining the facts in this case. Without deciding whether the disputed transactions were unauthorized, the Arbitrator finds from the credible evidence presented that Claimant became aware of the disputed transactions no later than August 10. Notwithstanding the fact he spoke with the branch manager on that date, he independently decided he did not want anything done on his behalf. It was not until approximately two weeks later, on or about August 24, that Claimant decided to complain to the branch compliance officer about the transactions that had occurred in late July and early August.

A principal will not be legally bound by the unauthorized acts of an agent or acts in excess of the agent's authority. However, in order not to be bound, the principal must disavow the unauthorized acts within a reasonable time after learning of them. A principal is not permitted to wait until he determines whether he stands to profit from an agent's unauthorized acts and not disavow them until it becomes apparent that no such profit is forthcoming.

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<sup>7</sup> The TEAM buy order was executed on July 31, 1998.

<sup>8</sup> Respondent Ernsberger left H.J. Meyers in late August, before Boudouris completed his investigation.

In the present case, Claimant voluntarily paid for the first two stock purchases which allegedly were in excess of his authorization. The Arbitrator finds that, by his actions, Claimant ratified those purchases, regardless of whether they were initially executed in excess of the given authority. The Arbitrator further finds that, by informing the branch manager on August 10, he did not want anything done to disturb the transactions of July 31 and August 3, and thereafter allowing two weeks to pass with the attendant price fluctuations, Claimant ratified those transactions, regardless of whether they were initially executed without any authority.

Accordingly, the claim against the remaining Respondent Phillip Ernsberger is hereby dismissed.

Each party shall bear their respective costs.

The arbitrator recommends the expungement of all references to the above-captioned arbitration from Respondents Williams' and Boudouris' registration records maintained by CRD, with the understanding that pursuant to NASD Notice to Members 99-09, Respondents Williams and Boudouris must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directives.

### **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 = \$75.00

#### **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, there is no member firm.

#### **Adjournment Fees**

No adjournments were requested during these proceedings.

#### **Forum Fees and Assessments**

The Arbitrator 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 the arbitrator x \$200.00 = \$200.00  
Pre-hearing conference: October 19, 1999 1 session

Two Hearing sessions x \$200.00 = \$400.00

Hearing Date: February 10, 2000 2 sessions  
Total Forum Fees = \$600.00

The Arbitrator has assessed the total forum fees of \$600.00 to Claimant.

**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.

No administrative costs were incurred in this proceeding.

**Fee Summary**

Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$75.00
Forum Fees	= \$600.00
Total Fees	= \$675.00
<u>Less payments</u>	<u>= \$275.00</u>
Balance Due NASD Regulation, Inc.	= \$400.00

All balances are due and payable to NASD Regulation, Inc.

**Arbitrator's Signature**

/S/

March 13, 2000

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Kenneth R. Starr  
Public Arbitrator Presiding Chair

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Signature Date

March 17, 2000

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Date of Service (For NASD office use only)

Hearing Date: February 10, 2000 2 sessions

Total Forum Fees = \$600.00

The Arbitrator has assessed the total forum fees of \$600.00 to Claimant.

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No administrative costs were incurred in this proceeding.

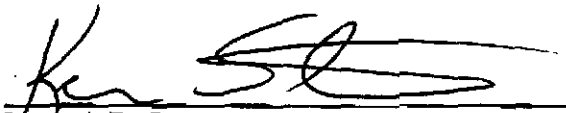
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**Arbitrator's Signature**

  
Kenneth R. Starr  
Public Arbitrator Presiding Chair

3/13/00  
Signature Date

Date of Service (For NASD office use only)