

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

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In the Matter of the Arbitration Between

**Names of Claimants**

Joseph Lopresto, individually and  
as Trustee for the Lopresto Family  
Trust UAD 11/26/91

Case No. 99-01289

**Names of Respondents**

Baxter Banks & Smith, Ltd.  
Kevin J. Ruggiero  
Francis Martin McDermott

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**REPRESENTATION OF PARTIES**

For Claimants: David A. Weintraub, Esq. of David A. Weintraub, P.A., Ft. Lauderdale, FL.

For Respondents Baxter, Banks & Smith, Ltd. ("BBS") and Francis Martin McDermott ("McDermott"): Jeffrey Mark Sherman, Esq. of the Law Offices of Jeffrey Mark Sherman, St. Petersburg, FL.

Respondent Kevin J. Ruggiero ("Ruggiero") did not appear.

**CASE INFORMATION**

Statement of Claim filed on or about March 17, 1999.

Amended Statement of Claim filed on or about August 17, 1999.

Claimant signed the Uniform Submission Agreement April 27, 1999.

Statement of Answer filed by Respondent BBS on or about June 14, 1999.

Statement of Answer filed by Respondent McDermott on or about October 21, 1999.

Statement of Answer to Amended Statement of Claim filed by Respondent McDermott on or about December 24, 1999.

Respondent Ruggiero did not file a Statement of Answer. (See "Other Issues").

Respondents BBS, Ruggiero, and McDermott did not file executed Uniform Submission Agreements. (See "Other Issues").

**CASE SUMMARY**

Claimants alleged the following: During the summer of 1998, Joseph Lopresto ("Lopresto") received a 'cold call' from Ruggiero, a stockbroker employed by BBS. Lopresto agreed to transfer the majority of his life savings to Ruggiero. Between July 1998 and November 1998, Ruggiero, acting within the scope of his employment, under McDermott's supervision,

and without Lopresto's authorization, sold each and every security that Lopresto had transferred to BBS. McDermott was, and remains today, BBS's Chief Executive Officer. Ruggiero used the sale proceeds to purchase three stocks: Maid Aide, Inc., CFE Enterprises, Inc., and Persona Records. Ruggiero failed to do any due diligence in connection with his purchases of these stocks. The purchases of CFE Enterprises, Inc. and Persona Records were unauthorized. McDermott had actual knowledge no later than August 7, 1998 that Ruggiero had failed to conduct any due diligence. Notwithstanding this actual knowledge, McDermott failed to prohibit Ruggiero from purchasing more shares of CFE Enterprises, Inc. and Persona Records for Lopresto's account. McDermott failed to employ any compliance policies or procedures designed to prevent registered representatives from purchasing 'bulletin board' or 'pink sheet' stocks for which no due diligence had been conducted. McDermott also failed to employ any compliance policies or procedures designed to prevent registered representatives from purchasing or recommending stocks in companies not registered in a customer's resident state or for which financial statements were not publicly available. Respondents' purchases of the referenced securities were also unsuitable for Claimants. Claimants suffered damages as a result of Respondents' activities.

Unless specifically admitted in its Answer, Respondent BBS denied the allegations made in the Statement of Claim and asserted the following defenses: BBS supervised its employees and exercised good faith in its dealings with Claimants; Respondents never guaranteed the performance of any of the securities that Claimants invested in; Claimants failed to exercise due diligence in making their investment decisions; and, Claimants were aware of their investment choices and elected to continue with the investments and their attendant risks.

Unless specifically admitted in his Answer, Respondent McDermott denied the allegations made in the Statement of Claim and asserted the following defenses: McDermott acted in good faith; McDermott did not directly or indirectly induce any of the acts alleged in the Statement of Claim; McDermott never conducted any securities transactions for Claimants' account; Lopresto advised McDermott that he was satisfied with the management of his account; and, Claimants failed to establish that McDermott participated in any of the acts committed by Ruggiero.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages in excess of \$190,000.00 plus interest, punitive damages, and such other relief as the Panel deemed appropriate.

Respondent BBS requested a dismissal of the Statement of Claim.

Respondent McDermott requested a dismissal of the Statement of Claim and an award of attorneys' fees.

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

On July 19, 1999, Claimants filed a Motion for Default and to Preclude Kevin J. Ruggiero

from Presenting any Facts or Defenses. No response to the motion was received from any party. On or about October 25, 1999, the Panel issued an order which granted the Motion.

On or about January 11, 2000, Claimants filed a Motion to Strike Respondents BBS and McDermott's pleadings. On or about December 31, 1999, Respondents BBS and McDermott filed a joint response to the Motion. On January 3, 2000, the Panel issued an order granting the Motion as to BBS and denying the Motion as to McDermott.

Respondent Ruggiero did not appear in this matter. Upon review of the file and the representations made by/on behalf of the Claimants, the Panel determined that Respondent Ruggiero has been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without said Respondent present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

Respondent Ruggiero did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and is bound by the determination of the Panel on all issues submitted.

Respondents BBS and McDermott did not file with the NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

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

### **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:

Respondents are liable, jointly and severally, and shall pay compensatory damages to the Lopresto Family Trust in the sum of \$150,553.30 plus pre-award interest at the rate of ten percent (10%) in the sum of \$38,368.68 for a total due to Claimant Lopresto Family Trust of \$188,921.98. Post-judgment interest shall accrue in accordance with Rule 10330(h) of the Code.

Respondents are liable, jointly and severally, and shall pay compensatory damages to Joseph Lopresto, individually, in the sum of \$32,389.54 plus pre-award interest at the rate of ten percent (10%) in the sum of \$5,716.64 for a total due to Claimant Joseph Lopresto of \$38,106.18. Post-judgment interest shall accrue in accordance with Rule 10330(h) of the Code.

Respondents BBS and Ruggiero are liable, jointly and severally, and shall pay punitive damages to Claimants in the sum of \$50,000.00 pursuant to Mastrobuono v. Shearson, Lehman, Hutton, Inc., 115 S.Ct. 1212 (1995).

Respondents BBS and Ruggiero are liable, jointly and severally, and shall pay to Claimants the sum of \$200.00 representing reimbursement of the claim filing fee previously paid by Claimants to NASD Regulation, Inc.

### **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 = \$ 200.00

#### **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 member firm, BBS, is a party.

Member surcharge	= \$1500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2500.00

#### **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:

Three (3) Pre-hearing sessions with Panel x \$750.00 = \$2250.00

Pre-hearing conferences:	October 5, 1999	1 session
	October 25, 1999	1 session
	December 30, 1999	1 session

Three (3) Hearing sessions x \$750.00 = \$2250.00

Hearing Dates:	January 10, 2000	2 sessions
	<u>January 11, 2000</u>	<u>1 session</u>

Total Forum Fees = \$4500.00

The Panel has assessed the total forum fees of \$4500.00 jointly and severally to Respondents.

### **Fee Summary**

Claimants be and hereby are solely liable for:

<u>Initial Filing Fee</u>	= <u>\$ 200.00</u>
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Total Fees	= \$ 200.00
<u>Less payments</u>	= \$ 200.00
Balance Due NASD Regulation, Inc.	= \$ 0.00

Respondent BBS be and hereby is solely liable for:

<u>Member Fees</u>	= \$4600.00
Total Fees	= \$4600.00
<u>Less payments</u>	= \$1500.00
Balance Due NASD Regulation, Inc.	= \$3100.00

Respondents be and hereby are jointly and severally liable for:

Forum Fees	= \$4500.00
Total Fees	= \$4500.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$4500.00

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

**Concurring Arbitrators' Signatures**

/s/

\_\_\_\_\_  
Allen M. Lerner, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

/s/

\_\_\_\_\_  
Robert A. Sauerberg  
Public Arbitrator

\_\_\_\_\_  
Signature Date

/s/

\_\_\_\_\_  
Bernard A. Taub  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

March 13, 2000

Date of Service (For NASD office use only)

Total Fees	= \$ 200.00
<u>Less payments</u>	<u>= \$ 200.00</u>
Balance Due NASD Regulation, Inc.	= \$ 0.00

Respondent BBS be and hereby is solely liable for:

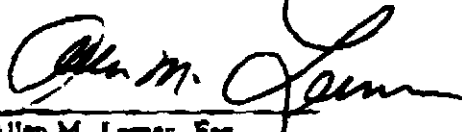
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Public Arbitrator, Presiding Chair

3/12/2000  
Signature Date

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Robert A. Sauerberg  
Public Arbitrator

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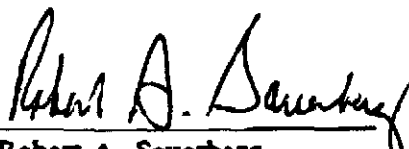
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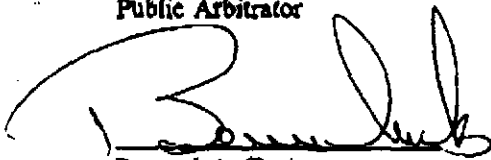
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Signature Date

  
Bernard A. Taub  
Industry Arbitrator

3/13/00  
Signature Date

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