

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

James W. Herrick, (Claimant) vs. Gaines Berland, Inc. and Bryan Brush, (Respondents)

Case Number: 99-05178

Hearing Site: Boston, Massachusetts

REPRESENTATION OF PARTIES

Claimant, James W. Herrick, hereinafter referred to as "Claimant": Timothy T. Tucker, Esq., a sole practitioner, Medford, MA. Previously represented by: Paul J. Sevvfert, Esq., a sole practitioner, Wilmington, MA.

Respondent, Gaines Berland, Inc. ("Gaines"), did not appear at the hearing in this matter. Previously represented by: Joseph C. Pickard, Esq., Vice President, Gaines Berland, Inc., Bethpage, NY.

Respondent, Bryan Brush ("Brush"), did not appear at the hearing in this matter. Previously represented by: M. David Sayid, Esq., Sayid and Associates, LLP, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: November 12, 1999.

Claimant signed the Uniform Submission Agreement: November 5, 1999.

Statement of Answer filed by Gaines on or about: March 22, 2000.

Gaines signed the Uniform Submission Agreement: March 22, 2000.

Statement of Answer filed by Brush on or about: March 24, 2000.

Brush did not sign a Uniform Submission Agreement.

CASE SUMMARY

Claimant asserted the following causes of action: unauthorized trades; fraudulent actions; violations of consumer rights; and high pressure sales tactics. Claimant's claim involved the stocks of Bellwether Exploration Corp. and Mallon Resources Corp.

Unless specifically admitted in his Answer, Brush denied the allegations made in the Statement of Claim and asserted the following defenses: Brush violated no written contract, no statute, no law, no rule, and no regulation in connection with the allegations set forth in the Statement of Claim; Claimant assumed the risk of his transactions, and authorized the purchase and sale of all said transactions maintained with Respondents; Claimant had or should have had full knowledge of all material facts concerning his securities accounts maintained with Respondents; the Statement of Claim fails to state a cause of action upon which relief can be granted; Claimant waived any and all claims for relief they may otherwise have had against Respondents; Claimant is estopped from asserting the claims set forth in the Statement of Claim; Claimant ratified and approved each and every transaction on which his claims purport to be based; the claims are barred by Claimant's contributory fault, comparative fault, recklessness, and failure to exercise due diligence; Claimant cannot reasonably have relied upon any alleged representations set forth in the Statement of Claim; Claimant has failed to mitigate his damages; Claimant had full knowledge of and assumed the risks of each of the investments on which his Statement of Claim is based; and any and all relief sought by Claimant is barred by the doctrine of unclean hands.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$12,334.38, plus treble damages, attorneys' fees, costs, and interest.

Brush requested that the Statement of Claim be denied in its entirety, that he be awarded the costs, fees, expenses, and reasonable attorneys' fees incurred in defending this claim totaling approximately \$15,000.00, and that the Panel grant him such other and further relief as justice and equity require.

OTHER ISSUES CONSIDERED AND DECIDED

Upon review of the file and the representations made on behalf of the Claimant, the undersigned arbitrators (the "Panel") determined that Brush 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 Brush present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

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

Prior to the hearing in this matter, Claimant entered into a settlement agreement with Respondent Gaines.

During the hearing in this matter, Claimant made a motion for summary judgement based on Brush's failure to appear. The Panel allowed Claimant's motion.

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.

AWARD

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

1. Brush be and hereby is liable for and shall pay to Claimant the sum of \$12,334.38 as compensatory damages, plus interest for the period of April 4, 1997 through August 28, 2001 totaling \$6,414.00.
2. Brush be and hereby is liable for and shall pay to Claimant the sum of \$6,435.00 as attorneys' fees.
3. Brush be and hereby is liable for and shall pay to Claimant the sum of \$750.00 as costs.
4. Claimant's request for treble damages is hereby denied.
5. Brush be and hereby is liable for and shall pay to Claimant the sum of \$175.00, to reimburse Claimant for the filing fee previously paid to NASD Dispute Resolution, Inc.
6. All other requests for relief are hereby denied.

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

= \$ 175.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, Gaines Berland, Inc. is a party.

Member surcharge	= \$ 800.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$1,000.00

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

One (1) Pre-hearing session with Panel x \$600.00	= \$ 600.00
Pre-hearing conference: April 5, 2001 1 session	
One (1) Hearing session x \$600.00	= \$ 600.00
Hearing Date: August 28, 2001 1 session	
Total Forum Fees	= \$1,200.00

The Panel has assessed all of the forum fees against Brush.

Fee Summary

1. Claimant be and hereby is solely liable for:

<u>Initial Filing Fee</u>	= \$ 175.00
Total Fees	= \$ 175.00
<u>Less payments</u>	= \$ 775.00
Refund Due Claimant	= \$ 600.00

As stated in the "Award" section above, Brush is liable and shall reimburse Claimant for the \$175.00 filing fee.

2. Gaines be and hereby is solely liable for:

<u>Member Fees</u>	= \$2,400.00
Total Fees	= \$2,400.00
<u>Less payments</u>	= \$1,800.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 600.00

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3. Brush he and hereby is solely liable for:

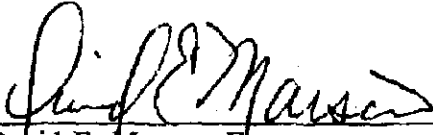
<u>Forum Fees</u>	= \$1,200.00
<u>Total Fees</u>	= \$1,200.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution, Inc.</u>	= \$1,200.00

All balances are due and payable to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

David E. Marsan, Esq.	-	Public Arbitrator, Presiding Chair
Richard D. Jordan	-	Public Arbitrator
James E. Fox	-	Industry Arbitrator

Concurring Arbitrators' Signatures



David E. Marsan, Esq.
Public Arbitrator, Presiding Chair

9-28-01

Signature Date David E. Marsan, Esq.
Public Arbitrator, Presiding Chair

Richard D. Jordan
Public Arbitrator

Signature Date Richard D. Jordan
Public Arbitrator

James E. Fox
Industry Arbitrator

Signature Date

October 10, 2001
Date of Service (For NASD office use only)

ARBITRATION PANEL

David E. Marsan, Esq.	-	Public Arbitrator, Presiding Chair
Richard D. Jordan	-	Public Arbitrator
James E. Fox	-	Industry Arbitrator

Concurring Arbitrators' Signatures

Signature of David E. Marsan, Esq.
Public Arbitrator, Presiding Chair

Signature of Richard D. Jordan
Public Arbitrator

James E. Fox
Industry Arbitrator

October 10, 2001
Date of Service (For NASD office use only)

Signature Date David E. Marsan, Esq.
Public Arbitrator, Presiding Chair

10/01/01
Signature Date Richard D. Jordan

Signature Date

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Richard D. Jordan	-	Public Arbitrator
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Public Arbitrator, Presiding Chair

Signature Date David E. Marsan, Esq.
Public Arbitrator, Presiding Chair

Richard D. Jordan
Public Arbitrator

Signature Date Richard D. Jordan
Public Arbitrator



James E. Fox
Industry Arbitrator

9/27/01

Signature Date

October 10, 2001
Date of Service (For NASD office use only)