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NASD REGULATION, INC.  
AWARD

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In the Matter of the Arbitration Between

Name of Claimant

David P. Leib

97-02900

Name of Respondents

David M. Ditosti  
The Harriman Group, Inc.

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REPRESENTATION

Claimant David P. Leib ("Leib") appeared pro se.

For Respondent David M. Ditosti ("Ditosti") appeared Jonathon D. Warner, Esq. of the law firm Warner & Joselson located in New York, New York.

Respondent The Harriman Group, Inc. ("Harriman Group") did not enter an appearance in this matter.

CASE INFORMATION

Leib's Statement of Claim was filed on June 2, 1997.

Leib's Submission Agreement was signed on July 3, 1997.

Ditosti's Statement of Answer was filed on September 4, 1997.

Ditosti's Submission Agreement was signed on September 3, 1997.

Harriman Group did not file a Statement of Answer or a signed Submission Agreement.

HEARING INFORMATION

Pre-Hearing Conference:	January 21, 1998	-	One Session
	February 11, 1998	-	One Session
Hearing Date/Sessions:	April 8, 1998	-	Two Sessions

The hearing was conducted at the offices of NASD Regulation, Inc. located in New York, New York.

### CASE SUMMARY

Leib alleged that he was introduced to Ditosti in September 1996 and, after making a small profit on his first trade, he agreed to invest long-term in two new stocks, Natural Health ("Natural Health") and Surge Components ("Surge"). Leib also alleged that, in October 1996, Ditosti convinced him to invest in an IPO by assuring him that it was risk-free and promised great returns, and by quoting a history of 90% returns on his previous IPOs. In addition, Leib alleged that he made it clear to Ditosti that he would have to take out a bank loan in order to make the trade. Leib further alleged that he agreed to purchase 1,000 common shares of the Community Care IPO ("Community Care") with the understanding that Ditosti would quickly resell the position at a profit, allowing Leib to repay the loan and retain the profits.

Leib contended that, on October 25, 1996, Ditosti purchased 4,500 common shares and 1,000 warrants in Community Care without his authorization. Leib further contended that Ditosti sold his holdings in Surge and Natural Health, without authorization, to pay for part of the purchase of Community Care. Leib also contended that Ditosti knew that the two stocks were purchased for long-term holding, and were not to be sold within three weeks of their purchase or at a loss.

Leib alleged that when he confronted Ditosti about the unauthorized transactions, Ditosti apologized for his negligence in the handling of Leib's account, and for not selling the shares of Community Care when it was showing a profit. Leib also alleged that Ditosti told him to hold Community Care for a year and the price would come back up. Leib asserted that he tried to settle this matter with Ditosti and the Harriman Group to no avail. Leib also asserted that the Harriman Group went out of business shortly after this incident. Leib alleged that as a result of Ditosti's actions he and his family have experienced extreme financial hardship as he had to repay the bank loan.

Ditosti maintained that at all times Leib had discretion over his account, and at no time did he or the Harriman Group have discretionary authority. Ditosti further maintained that Leib's purchases in Surge and Natural Health were of warrants, not shares. Ditosti asserted that he never promised great returns on the IPO, never stated that he had a past history of 90% return on his IPOs, and never stated that the IPO investment was risk free. Ditosti asserted that Leib committed to purchase 1000 Community Care units and 4,500 shares of Community Care and, on October 25, 1996, the transaction was executed for a total investment of \$38,970.00. Ditosti further asserted that the transaction left Leib's account with a deficit balance, and the Harriman Group in order to lessen the balance, sold Leib's warrants in Surge and Natural Health. Ditosti maintained that after the purchases in Community Care, Leib never authorized him to sell any of his holdings in Community Care, and that Leib never placed a limit order to sell any of his holding in Community Care. Ditosti further maintained that he never stated that he was negligent with regard to Leib's account. Ditosti also maintained that he had several conversations with Leib regarding his holdings in Community Care and that Leib never requested that they be sold.

## **RELIEF REQUESTED**

Leib requested damages in the amount of \$59,880.00.

Ditosti requested that the Statement of Claim be dismissed in its entirety.

## **OTHER ISSUES CONSIDERED & DECIDED**

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. In either case, the parties have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

The panel denied Ditosti's Motion for Summary Judgement.

At the hearing, Leib reduced his claim for damages to the sum of \$41,221.37.

At the hearing, Leib requested travel expenses, which the panel denied.

The panel made the following determinations concerning the Harriman Group, who did not file a Statement of Answer or a Submission Agreement and did not appear at the hearing in this matter:

1. Pursuant to Rule 10101 of the Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that the Harriman Group was a member of the NASD at the time this controversy arose. Accordingly, the panel found personal jurisdiction over the Harriman Group pursuant to Rule 10301 of the Code.
3. The panel found that the Harriman Group was required to file a Statement of Answer and a Submission Agreement with NASD Regulation, Inc. pursuant to Rule 10314(b) of the Code. In this regard, the panel found that the Statement of Claim was properly served upon the Harriman Group, pursuant to Rule 10314(a) of the Code.
4. In addition, in accordance with Rules 10310, 10315, and 10318 of the Code, the panel found that NASD Regulation, Inc. provided the Harriman Group with "due notice" of the hearings conducted in this matter by regular and certified mail. The panel further determined to proceed with the hearing without the Harriman Group, whose absence was unexcused.

## **AWARD**

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

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1. Ditosti and the Harriman Group are jointly and severally liable for and shall pay to Leib compensatory damages in the amount of \$10,499.00, plus interest at 10% per annum, accruing from January 1, 1997 until the date the award is satisfied.
2. Ditosti is liable for and shall pay to Claimant the sum of \$500.00 as reimbursement of the hearing session deposit.
3. All other requests for relief are hereby denied.

**FORUM FEES**

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$150.00 non-refundable filing fee previously submitted by Claimant, and have assessed the following forum fees:

1 Pre-hearing conferences x \$300.00	=	\$ 300.00
1 Pre-hearing conference (with full panel)	=	\$ 500.00
2 Hearing sessions x \$500.00	=	<u>\$1,000.00</u>
 Total Forum Fees	 =	 \$1,800.00
 Hearing Session Deposit	 =	 <u>(\$ 500.00)</u>
 Balance Due NASD Regulation, Inc.	 =	 \$1,300.00

1. Ditosti is liable for and shall pay to NASD Regulation, Inc. the sum of \$1,300.00, representing the remaining balance on the total forum fees assessed.
2. Ditosti be and hereby is liable and shall pay to Leib the sum of \$500.00 as reimbursement of the hearing session deposit.
3. The Harriman Group be and hereby is liable and shall pay to NASD Regulation, Inc. the sum of \$300.00, representing the member surcharge assessed.

**Fees are payable to NASD Regulation, Inc.**

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**ARBITRATORS' SIGNATURES**



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Richard W. Vallario, Esq.  
Chairperson - Public Arbitrator

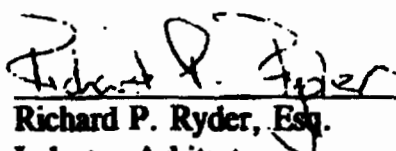
Date of decision: May 5, 1998

I, Richard W. Vallario, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



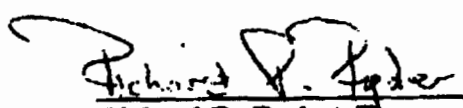
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Richard W. Vallario, Esq.

**ARBITRATORS' SIGNATURES**

  
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Richard P. Ryder, Esq.  
Industry Arbitrator

Date of decision: May 5, 1998


I, Richard P. Ryder, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
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Richard P. Ryder, Esq.

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**ARBITRATORS' SIGNATURES**

  
Margaret McQueeney  
Public Arbitrator

Date of decision: May 5, 1998

I, Margaret McQueeney, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
Margaret McQueeney