

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Anthony J. DiFulvio, (Claimant) vs. Jason Alan Birnbaum, Michael Pegalis and Wexford Clearing Services

Case Number: 01-01165

Hearing Site: Buffalo, New York

REPRESENTATION OF PARTIES

Claimant, Anthony DiFulvio, hereinafter referred to as "Claimant": Charles J. Engel, Jr., Esq., Engel & Engel, Syracuse, NY.

Respondent, Jason Alan Birnbaum, hereinafter referred to as "Respondent Birnbaum": Joseph F. Keenan, Esq., McCanliss & Early, LLP, New York, NY.

Respondent, Michael Pegalis, hereinafter referred to as "Respondent Pegalis": Stephen B. Wexler, Esq., Wexler & Burkhardt, PC, Mitchel Field, NY.

Respondent, Wexford Clearing Services Corporation, hereinafter referred to as "Respondent Wexford": Patricia A. Fitzpatrick, Esq., Prudential Securities, Inc., New York, NY. Previously represented by: Joseph Dolcimascolo, First Vice President and Associate General Counsel, Prudential Securities, Inc., New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: March 8, 2001.

Claimant signed the Uniform Submission Agreement: February 15, 2001.

Claimant's Response to Respondent Wexford's Motion to Dismiss filed on or about: June 14, 2001.

Statement of Answer filed by Respondent Birnbaum on or about: June 5, 2001.

Respondent Birnbaum did not sign the Uniform Submission Agreement.

Statement of Answer and Motion to Dismiss filed by Respondent Pegalis on or about: May 24, 2001.

Respondent Pegalis did not sign the Uniform Submission Agreement.

Statement of Answer and Motion to Dismiss filed by Respondent Wexford on or about: May 9, 2001.

Respondent Wexford signed the Uniform Submission Agreement: May 24, 2001.

CASE SUMMARY

Claimant asserted the following causes of action: churning; unauthorized trading; misrepresentation; fraud; unsuitable recommendations; breach of fiduciary duty; failure to supervise; clearing house liability; and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Unless specifically admitted in its Answer, Respondent Birnbaum denied the allegations made in the Statement of Claim and asserted the following defenses: the Claimant authorized and ratified all transactions; waiver; failure to mitigate damages; assumption of the risk; Respondent discharged his duties in good faith and exercised that degree of care, diligence and skill which an ordinary prudent person would exercise in similar circumstances; any losses suffered by Claimant were the result of market conditions; contributory or comparative negligence; and Respondent Birnbaum did not owe a fiduciary duty to Claimant and there was no breach of such duty.

Unless specifically admitted in its Answer, Respondent Pegalis denied the allegations made in the Statement of Claim and asserted the following defenses: Respondent Pegalis did not service or have contact with Claimant on the account, he was only listed on the account as a backup to broker Birnbaum, and the two would share commissions on the accounts; Respondent Pegalis was not a supervisor or control person over Respondent Birnbaum;

Unless specifically admitted in its Answer, Respondent Wexford denied the allegations made in the Statement of Claim and asserted the following defenses: Respondent Wexford responsibilities with respect to Claimant's account were strictly limited, by contract, to the ministerial post-execution tasks of processing, clearing and reporting those trades already placed in Claimant's account by Claimant's brokerage firm, Cambridge Capital; and failure to state a cause of action.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$217,337.33; treble damages pursuant to RICO in the amount of \$652,011.99; plus damages for lost commissions, margin interest, market-adjusted damages, punitive damages and attorneys' fees.

Respondent Birnbaum requested dismissal of Claimant's claims against him; all costs, fees and expenses of these proceedings be assessed against Claimant; and other such relief as the Panel deems appropriate.

Respondent Pegalis requested dismissal of Claimant's claims against him; and that all references to this arbitration be expunged from Respondent Pegalis' CRD records.

Respondent Wexford requested dismissal of Claimant's claims against Respondent Wexford prior to the hearing in this matter, or in the alternative, that these proceedings be stayed as against Respondent Wexford pending the resolution of the Securities Investor Protection Corporation ("SIPC") liquidation of Cambridge Capital.

OTHER ISSUES CONSIDERED AND DECIDED

By letter of April 16, 2001, all matters concerning Cambridge Capital, LLP, were indefinitely stayed upon confirmation that such party had filed for bankruptcy.

Respondent Wexford moved pre-hearing to dismiss Claimant's claims against Respondent Wexford. The Panel reserved decision on the motion until conclusion of Claimant's case. Upon conclusion of Claimant's case, Respondent Wexford renewed its motion to dismiss, and such motion was unanimously granted by the Panel at that time.

Respondent Pegalis moved to dismiss Claimant's claims against him at the close of Claimant's case. The Panel reserved decision until the conclusion of the hearing. At that time, Respondent renewed its motion to dismiss, and a majority of the Panel granted the motion.

Respondents Pegalis and Birnbaum did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure and, having answered the claim and/or appeared and testified at the hearing, are 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.

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. Claimant's claims are hereby dismissed in their entirety.
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Birnbaum, Pegalis, Wexford and Cambridge's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondents must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
3. All other requests for relief are denied.

ARBITRATOR'S REPORT

Upon conclusion of the hearing, the Panel deliberated and made the following findings of fact:

1. Respondents, including Respondent Birnbaum, did not commit any fraud or misrepresentation in their dealings with Claimant;
2. Claimant was not an unsophisticated investor;
3. Claimant was consulted with and did consent to each transaction through Respondent Birnbaum;
4. Claimant did control his account at all times pertinent;
5. Claimant chose to invest with Respondent Birnbaum and Respondents throughout his relationship with them, having an objective of quick growth, which involved heavy trading activity;

6. Claimant was aware that his investment activity afforded the possibility of both reward and risk of loss of his investment during his relationship with Respondent Birnbaum and Respondents;
7. Claimant never expressed any dissatisfaction to anyone with regard to his trading activity with Respondent Birnbaum and Respondents;
8. Claimant never suggested or otherwise complained during any of the account activity period that Birnbaum was making unauthorized trades or placing him in unsuitable transactions. Indeed, Claimant, upon closing his account with Cambridge, transferred his account to Whitehall Investments when Respondent Birnbaum himself decided to leave Cambridge and join Whitehall Investments;
9. The Panel finds that the claims brought by Claimant are not supported by the evidence adduced during the course of the hearing. As such, all claims brought by Claimant and against all Respondents are hereby dismissed.
10. The Panel further recommends that any and all complaints filed by Claimant against Respondents Birnbaum, Pegalis, Wexford and Cambridge be removed from the Central Registration Depository (See Award above).

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	= \$ 375.00
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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, Wexford Clearing Services, Corp. is a party.

Member surcharge	= \$ 2,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 3,500.00

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:

Three (3) Pre-hearing sessions with Panel x \$1,200.00 = \$ 3,600.00

Pre-hearing conferences:	January 25, 2002	1 session
	February 25, 2002	1 session
	April 12, 2002	1 session

Four (4) Hearing sessions x \$1,200.00 = \$ 4,800.00

Hearing Dates:	June 17, 2002	2 sessions
	June 18, 2002	2 sessions

Total Forum Fees = \$ 8,400.00

1. The Panel has assessed \$1,680.00 of the forum fees against Claimant.
2. The Panel has assessed \$1,680.00 of the forum fees against Respondent Birnbaum.
3. The Panel has assessed \$1,680.00 of the forum fees against Respondent Pegalis.
4. The Panel has assessed \$3,360.00 of the forum fees against Respondent Wexford.

Fee Summary

1. Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 375.00
<u>Forum Fees</u>	<u>= \$ 1,680.00</u>
Total Fees	= \$ 2,055.00
<u>Less payments</u>	<u>= \$ 1,575.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 480.00

2. Respondent Birnbaum be and hereby is solely liable for:

<u>Forum Fees</u>	<u>= \$ 1,680.00</u>
Total Fees	= \$ 1,680.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 1,680.00

3. Respondent Pegalis be and hereby is solely liable for:

<u>Forum Fees</u>	<u>= \$ 1,680.00</u>
Total Fees	= \$ 1,680.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 1,680.00

4. Respondent Wexford be and hereby is solely liable for:

Member Fees	= \$ 6,100.00
<u>Forum Fees</u>	<u>= \$ 3,360.00</u>
Total Fees	= \$ 9,460.00
<u>Less payments</u>	<u>= \$ 6,100.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 3,360.00

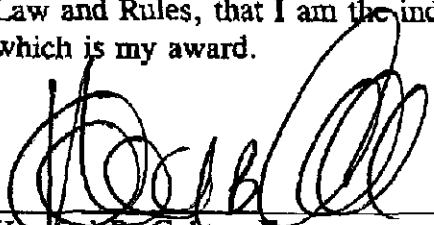
All balances are due and payable to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Howard B. Cohen, Esq.	-	Public Arbitrator, Presiding Chair
Christopher C. Willett, Esq.	-	Public Arbitrator
Anthony D. McCaffrey, CFP	-	Industry Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, 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.



Howard B. Cohen, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Christopher C. Willett, Esq.
Public Arbitrator

Signature Date

Anthony D. McCaffrey, CFP
Industry Arbitrator

Signature Date

July 22, 2002

Date of Service (For NASD office use only)

ARBITRATION PANEL

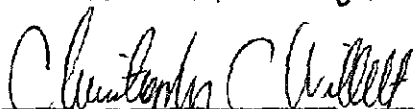
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Anthony D. McCaffrey, CFP
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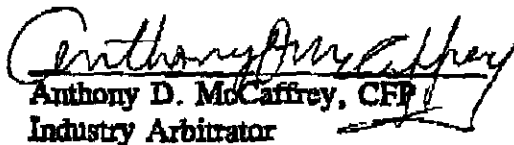
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Howard B. Cohen, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Christopher C. Willett, Esq.
Public Arbitrator

Signature Date



Anthony D. McCaffrey, CFP
Industry Arbitrator

7/10/02

Signature Date

July 22, 2002

Date of Service (For NASD office use only)