

**AWARD  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Name of Claimant

Scott Clemons

v.

Case Number: 01-01722  
Hearing Site: Southfield, Michigan

Names of Respondents

Gaines Berland, Inc. n/k/a  
GBI Capital Partners, Inc. and  
John Michael Rodriguez, Jr.

and

Name of Cross-Claimant

John Michael Rodriguez, Jr.

v.

Name of Cross-Respondent

GBI Capital Partners, Inc.

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**REPRESENTATION OF PARTIES**

Scott Clemons ("Claimant") was represented by Walter L. Baumgardner, Esq., Musilli, Baumgardner & Parnell, St. Clair Shores, Michigan as of on or about February 5, 2002.

Gaines Berland, Inc. n/k/a GBI Capital Partners, Inc. ("GBI") was represented by Mark J. Astarita, Esq., Beam & Astarita, LLC, Bloomfield, New Jersey.

John Michael Rodriguez, Jr. ("Rodriguez") was represented by Peter L. Blodnick, Esq., Williston Park, New York. Respondent Rodriguez did not appear at hearing.

**CASE INFORMATION**

The Statement of Claim was filed on or about April 5, 2001. Clarification of Damages letter was filed on or about April 23, 2001. The Submission Agreement of Claimant, Scott Clemons, was signed on or about April 2, 2001.

Statement of Answer was filed by Respondent Gaines Berland, Inc. n/k/a GBI Capital Partners, Inc. on or about June 15, 2001.

Statement of Answer and Cross-Claim was filed by Respondent John Michael Rodriguez, Jr. on or about June 11, 2001. The Submission Agreement of Respondent John Michael Rodriguez, Jr. was signed on or about June 6, 2001.

### **CASE SUMMARY**

Claimant asserted the causes of action including the following: unauthorized trading, failure to disclose material information, falsification of documents, breach of fiduciary duty, and concealing facts and costs. The causes of action relate to the handling of Claimant's account including margin trading.

Unless specifically admitted in its Answer, Respondent GBI denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: Respondents acted at all times in compliance with the applicable rules and regulations, acted in good faith, and did not induce the alleged act or acts, if any, constituting any alleged violations of law, the damages alleged by the Claimant have no causal relationship with any act committed by or legally attributable to the Respondents, the Claimant failed to mitigate his damages, if any, and is therefore barred from recovery of such damages, and the Statement of Claim fails to plead fraud with the requisite particularity.

Unless specifically admitted in his Answer, Respondent Rodriguez denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: the Statement of Claim fails to state a cause of action against Rodriguez for which relief can be granted. Claimant authorized and directed the execution of all transactions in the account with Rodriguez and/or GBI, Claimant ratified and acquiesced to all transactions in his account with Rodriguez and/or GBI, and Claimant failed to mitigate his damages, if any. Respondent Rodriguez filed a Cross-Claim for indemnification and/or contribution.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$1,722,737.74 in compensatory damages and \$1,040,000.00 in punitive damages, plus attorney fees, costs, interest, commissions, transaction costs, time costs, pain and suffering, and anxiety, and loss of income. At hearing, Claimant requested damages of \$458,736.00, plus interest and commissions.

Respondent GBI requested that the claims asserted against it be dismissed and that Respondent be awarded costs, disbursements and attorneys' fees, and that forum fees be assessed against Claimant in addition to such other and further relief as the Panel deems appropriate.

Respondent Rodriguez requested that the claims asserted against him be dismissed in their entirety with costs and disbursements, including attorney's fees and that they be awarded their costs and attorneys' fees. Respondent Rodriguez requested indemnification and/or contribution in his Cross-Claim.

### **OTHER ISSUES CONSIDERED & DECIDED**

Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrators have determined that Respondent John Michael Rodriguez, Jr. has been properly served with the Statement of Claim pursuant to Rule 10302 and Rule 10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that Respondent Rodriguez had received due notice of

the hearing as required under Rule 10315 of the Code, had filed a Cross-Claim, and that arbitration of the matter would proceed pursuant to Rule 10318 of the Code.

Gaines Berland, Inc. n/k/a GBI Capital Partners, Inc. did not file with the NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, is bound by the determination of the arbitration panel on all issues submitted.

At hearing, Claimant advised the Panel that he had reached a settlement with Respondent GBI. The Panel did not adjudicate any claims against Respondent GBI.

Claimant filed a post-hearing submission on or about February 28, 2003.

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(s) remain on file with the NASD Dispute Resolution (the "NASD").

#### **AWARD**

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

- 1.) Respondent, John Michael Rodriguez, Jr., is liable for compensatory damages to Claimant, Scott Clemons, in the amount of \$418,736, less a set-off of \$80,000.00. Respondent, John Michael Rodriguez, Jr., shall pay to Claimant, Scott Clemons, the sum of \$338,736.00 in compensatory damages;
- 2.) The Cross-Claim of Respondent John Michael Rodriguez, Jr. is denied and dismissed with prejudice;
- 3.) Respondent John Michael Rodriguez, Jr. shall pay Claimant, Scott Clemons, \$500.00 in filing fees retained by NASD;
- 4.) That other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 5.) That any relief not specifically enumerated, including punitive damages and attorney fees, is hereby denied with prejudice.

#### **FEES**

Pursuant to the Code, the following fees are assessed:

##### **Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 500.00
Cross-Claim	= \$ 500.00

### **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, the member firm is Gaines Berland, Inc. n/k/a GBI Capital Partners, Inc.

Member surcharge	= \$ 2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 4,500.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

April 15-18, 2002, adjournment by Scott Clemons	= \$ 1,200.00
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### **Forum Fees and Assessments**

The Arbitration 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:

One (1) Pre-hearing session with Panel x \$1,200.00	= \$ 1,200.00
Pre-hearing conference: October 29, 2001 1 session	
One (1) Hearing session x \$1,200.00	= \$ 1,200.00
Hearing Date: February 24, 2002 1 session	
Total Forum Fees	= \$ 2,400.00

The Arbitration Panel has assessed \$1,200.00 of the forum fees to Scott Clemons.

The Arbitration Panel has assessed \$1,200.00 of the forum fees to John Michael Rodriguez, Jr.

### **Fee Summary**

Claimant, Scott Clemons, is liable for:

Initial Filing Fee	= \$ 500.00
Adjournment Fee	= \$ 1,200.00
Forum Fees	= \$ 1,200.00
Total Fees	= \$ 2,900.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution	= \$ 1,200.00

Respondent, Gaines Berland, Inc. n/k/a GBI Capital Partners, Inc., is liable for:

<u>Member Fees</u>	= \$ 7,600.00
<u>Total Fees</u>	= \$ 7,600.00
<u>Less payments</u>	= \$ 9,100.00
Balance refunded by NASD Dispute Resolution	= \$ 1,500.00

Respondent John Michael Rodriguez, Jr. is liable for:

<u>Cross-Claim Filing Fee</u>	= \$ 500.00
<u>Forum Fees</u>	= \$ 1,200.00
<u>Total Fees</u>	= \$ 1,700.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 1,700.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

David L. Haron, JD - Public Arbitrator, Presiding Chair  
Leonard G. Hendricks - Public Arbitrator  
Robert A. Vogler - Non-Public Arbitrator

Concurring Arbitrators:

/s/ David L. Haron, JD  
David L. Haron, JD  
Public Arbitrator, Presiding Chair

03/10/03  
Signature Date

/s/ Leonard G. Hendricks  
Leonard G. Hendricks  
Public Arbitrator

03/10/03  
Signature Date

/s/ Robert A. Vogler  
Robert A. Vogler  
Non-Public Arbitrator

03/07/03  
Signature Date

03/13/03  
Date of Service (For NASD office use only)

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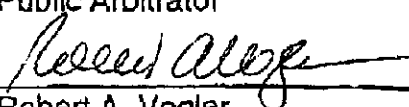
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Public Arbitrator, Presiding Chair

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

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Leonard G. Hendricks  
Public Arbitrator

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

  
\_\_\_\_\_  
Robert A. Vogler  
Non-Public Arbitrator

3-7-03  
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Signature Date

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Date of Service (For NASD office use only)

NASD Dispute Resolution, Inc.  
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Concurring Arbitrators:

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David L. Haron, JD  
Public Arbitrator, Presiding Chair

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

Leonard G. Hendricks  
Leonard G. Hendricks  
Public Arbitrator

MARCH 10, 2003  
Signature Date

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Robert A. Vogler  
Non-Public Arbitrator

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Signature Date

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Date of Service (For NASD office use only)