

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

H.C. Wainwright & Co., Inc., (Claimant) vs. Oppenheimer & Co., Inc., Richard B. Trull, Thomas Valeo, and Sidney N. Towle, Jr., (Respondents)

Case Number: 01-02306

Hearing Site: Boston, Massachusetts

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**REPRESENTATION OF PARTIES**

Claimant, H.C. Wainwright & Co., Inc., hereinafter referred to as "Claimant": Christopher P. Litterio, Esq., Ruberto, Israel & Weiner, P.C. (formerly Shapiro, Israel & Weiner, P.C.), Boston, MA.

Respondents, Oppenheimer & Co., Inc. ("Oppenheimer"), Richard B. Trull ("Trull"), Thomas Valeo ("Valeo"), and Sidney N. Towle, Jr. ("Towle"), hereinafter collectively referred to as "Respondents": Joseph E. Gehring, Jr., Esq., Kasowitz, Benson, Torres & Friedman LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: April 30, 2001.

Response to Counterclaim filed by Claimant on or about: August 10, 2001.

Claimant signed the Uniform Submission Agreement: April 30, 2001.

Joint Statement of Answer and Counterclaim filed by Respondents on or about: July 6, 2001.

Oppenheimer did not sign a Uniform Submission Agreement.

Trull did not sign a Uniform Submission Agreement.

Valeo did not sign a Uniform Submission Agreement.

Towle did not sign a Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty; tortious interference with business relationship; and violation of Consumer Protection Act, G.L. c.93A.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant's claim under Consumer Protection Act, G.L. c.93A is meritless because that statute does not apply to employment disputes; the individual Respondents were at-will employees with no restrictive covenants and no duty to remain in Claimant's employ; Claimant does not allege a single act of wrongdoing on the part of Oppenheimer in support of its claims against that entity; the Statement of Claim fails to allege facts sufficient to state a cause of action against Respondents; and Claimant's claims are barred, in whole or in part, by Claimant's failure to mitigate its damages, if any.

In their Counterclaim, Respondents asserted the following causes of action: defamation and tortious interference with advantageous business relations.

Unless specifically admitted in its Response, Claimant denied the allegations made in the Counterclaim and asserted the following defenses: the Counterclaim fails to state a claim upon which relief may be granted; the alleged defamatory statements were non-actionable statements of opinion; and the alleged defamatory statements were true.

### **RELIEF REQUESTED**

Claimant requested:

- a. That all Respondents and any persons acting on behalf or in concert with them, be enjoined from soliciting or accepting business from any of Claimant's customers, clients, customer leads, or prospects who the individual Respondents serviced or became aware of while in the employ of Claimant or through their wrongful appropriation of Claimant's confidential information;
- b. An Order that all Respondents and any persons acting on behalf of or in concert with them, are restrained and enjoined from copying, disclosing, transmitting, reviewing, using, distributing, discussing, transferring, commenting, or relying on or referring to any documents, or parts thereof, or any information contained in the records of Claimant, including but not limited to, any customer lists (or other documents identifying the name, address, telephone number, financial information, trading activities, net worth, income investment, or history of Claimant's customers), gross commission reports, prospecting lists, holding pages, cross-reference pages, profit and loss statements, budgets, account transfer forms, new account forms or any other documents, materials, or information that discuss, reference, summarize, identify, or relate, directly or indirectly, to the records of Claimant, and directing that computer software, computerized data, original records, and all copies thereof be returned to Claimant immediately;

- c. An Order that all Respondents pay Claimant all damages sustained as a result of the individual Respondents' actions described in the Statement of Claim, together with the costs of this proceeding including, but not limited to, reasonable attorneys' fees and interest; and
- d. All other relief that the Panel deems just.

In their Answer and Counterclaim, Respondents requested that:

- a. The Statement of Claim be dismissed in its entirety;
- b. The Respondents be awarded the fees and costs of this proceeding;
- c. The Respondents' Counterclaims be granted;
- d. Damages be awarded to Respondents on their Counterclaims in an amount to be determined at arbitration and fixed by the Panel; and
- e. Punitive damages be awarded for the shocking and outrageous conduct of Claimant as set forth in the Counterclaim in an amount to be determined at arbitration and fixed by the Panel.

In its Response, Claimant requested that the Counterclaim be dismissed in its entirety.

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

Respondents filed a Pre-hearing Brief and Motion to Dismiss on August 23, 2002. Claimant's filed a Pre-hearing Brief and Opposition to the Motion to Dismiss on September 5, 2002. During the hearings in this matter, Respondents renewed their Motion to Dismiss. After due consideration, the Panel granted the Motion to Dismiss. Respondents withdrew their Counterclaim upon the Panel's decision on their Motion to Dismiss.

The Panel, at the conclusion of the hearing, announced that it would award reasonable attorneys' fees and costs to Respondents. After additional deliberation, notwithstanding its earlier announcement, the Panel has decided that each party will bear its own attorneys' fees and costs.

Oppenheimer, Trull, Valeo, and Towle did not file with NASD Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure 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 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. All other requests for relief are hereby denied.

### **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  |
| Counterclaim filing fee  | = \$ 500.00  |
| Injunctive Relief Fee    | = \$2,500.00 |

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. In this matter, H.C. Wainwright & Co., Inc. and Oppenheimer & Co., Inc. are parties.

#### **H.C. Wainwright & Co., Inc.**

|                         |              |
|-------------------------|--------------|
| Member surcharge        | = \$1,200.00 |
| Pre-hearing process fee | = \$ 600.00  |
| Hearing process fee     | = \$2,000.00 |

#### **Oppenheimer & Co., Inc.**

|                         |              |
|-------------------------|--------------|
| Member surcharge        | = \$1,200.00 |
| Pre-hearing process fee | = \$ 600.00  |
| Hearing process fee     | = \$2,000.00 |

### **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 a single arbitrator x \$450.00 | = \$ 450.00  |
| Pre-hearing conference: April 25, 2002 1 session                |              |
| One (1) Pre-hearing session with Panel x \$1,000.00             | = \$1,000.00 |
| Pre-hearing conference: January 24, 2002 1 session              |              |
| Four (4) Hearing sessions x \$1,000.00                          | = \$4,000.00 |
| Hearing Dates: September 11, 2002 2 sessions                    |              |
| September 12, 2002 2 sessions                                   |              |
| Total Forum Fees  | = \$5,450.00 |

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

### **Fee Summary**

1. Claimant is solely liable for:

|                                     |                      |
|-------------------------------------|----------------------|
| Initial Filing Fee                  | = \$ 500.00          |
| Member Fees                         | = \$ 3,800.00        |
| Injunctive Relief Fee               | = \$ 2,500.00        |
| <u>Forum Fees</u>                   | <u>= \$ 5,450.00</u> |
| Total Fees                          | = \$12,250.00        |
| <u>Less payments</u>                | <u>= \$ 7,800.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 4,450.00        |

2. Oppenheimer is solely liable for:

|                        |                      |
|------------------------|----------------------|
| <u>Member Fees</u>     | <u>= \$ 3,800.00</u> |
| Total Fees             | = \$ 3,800.00        |
| <u>Less payments</u>   | <u>= \$ 6,600.00</u> |
| Refund Due Oppenheimer | = \$ 2,800.00        |

3. Respondents are jointly and severally liable for:

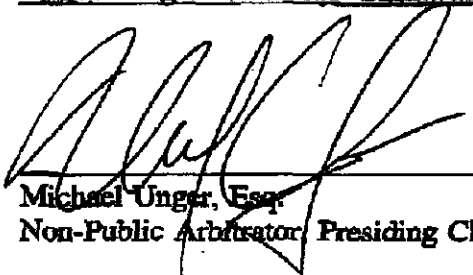
|  |      |        |
|--|------|--------|
| <u>Counterclaim Filing Fee</u>             | = \$ | 500.00 |
| <u>Total Fees</u>                          | = \$ | 500.00 |
| <u>Less payments</u>                       | = \$ | 500.00 |
| <u>Balance Due NASD Dispute Resolution</u> | = \$ | 0.00   |

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

**ARBITRATION PANEL**

|                      |   |  |
|----------------------|---|--|
| Michael Unger, Esq.  | - | Non-Public Arbitrator, Presiding Chair |
| Winthrop G. Dow, Jr. | - | Public Arbitrator                      |
| B.J. Krintzman, Esq. | - | Public Arbitrator                      |

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Michael Unger, Esq.  
Non-Public Arbitrator, Presiding Chair

9/25/02  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Winthrop G. Dow, Jr.  
Public Arbitrator

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

\_\_\_\_\_  
B.J. Krintzman, Esq.  
Public Arbitrator

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

October 1, 2002  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

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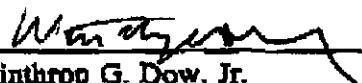
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Michael Unger, Esq.  
Non-Public Arbitrator, Presiding Chair

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Signature Date

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Winthrop G. Dow, Jr.  
Public Arbitrator

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*Sept. 26, 2007*  
Signature Date

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B.J. Krintzman, Esq.  
Public Arbitrator

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Signature Date

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October 1, 2002  
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Non-Public Arbitrator, Presiding Chair

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Signature Date

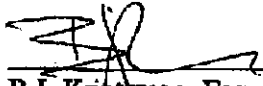
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Winthrop G. Dow, Jr.  
Public Arbitrator

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Signature Date

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B.J. Krintzman, Esq.  
Public Arbitrator

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9/25/02  
Signature Date

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