

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Name of the Claimant
James L. Rogers

Case Number: 01-02467

Name of the Respondents
American Investment Services, Inc.;
Mark Skertich

Hearing Site: Indianapolis, Indiana

REPRESENTATION OF PARTIES

Claimant James L. Rogers ("Rogers") was represented by Mark E. Maddox, Esq. of the firm of Maddox Koeller Hargett & Caruso, located in Indianapolis, Indiana.

Respondent American Investment Services, Inc. ("AIS") was represented by Jerry W. Kinnan, Esq., of American Investment Services, Inc., located in East Peoria, Illinois.

Respondent Mark Skertich ("Skertich") filed for bankruptcy and did not appear.

CASE INFORMATION

Statement of Claim filed: May 11, 2001.

Claimant signed the Uniform Submission Agreement: May 3, 2001.

Statement of Answer filed by Respondent AIS on or about: July 19, 2001.

Respondent AIS signed the Uniform Submission Agreement: May 25, 2001.

Motion to Strike filed by Respondent AIS on or about: July 19, 2001.

Response to Motion to Strike filed by Claimant on or about: July 31, 2001.

Reply Brief to Motion to Strike filed by Respondent AIS on or about: August 21, 2001.

Dismissal without prejudice of Respondent Skertich filed on or about: September 25, 2001.

CASE SUMMARY

Claimant asserted the following causes of action: churning; overmargining; unauthorized trading; violations under the Indiana Securities Act; breach of contract; common law fraud and misrepresentation; breach of fiduciary duty and constructive fraud; violation of Section 2110 of the Conduct Rules of the NASD; violation of NASD Conduct Rule 2310; violation of NASD Conduct Rule 2120; negligent supervision of Claimant's account and violation of Section 3010 of the NASD Conduct Rules; respondeat superior; negligence and negligent supervision; and

violation of NASD Conduct Rule 2510. The causes of action related to numerous stock transactions conducted by Respondents in Roger's account.

Unless specifically admitted in its Answer, Respondent AIS denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimant's claims should be deemed barred or reduced in proportion to the extent his own fault or negligence contributed to the losses he complains of;
2. Claimant's claims are barred by the doctrines of estoppel, waiver and laches;
3. Claimant's claims are barred by the doctrine of assumption of risk;
4. Claimant's claims are limited by the doctrine of accord and satisfaction;
5. AIS did not "control" Claimant's account-an essential element of his claim for churning;
6. Claimant's claims are barred by the applicable statutes of limitation;
7. Claimant's claims are barred by the doctrines of *in pari delicto*, assumption of risk and unclean hands; and,
8. Claimant's claims are barred to the extent he has failed to mitigate his damages.

RELIEF REQUESTED

Claimant requested:

Compensatory Damages	\$ 125,000.00
Punitive Damages	unspecified
Interest	unspecified
Attorneys' Fees	unspecified
Other Costs	unspecified

Respondent AIS requested that Claimant's claims against AIS be dismissed in their entirety.

OTHER ISSUES CONSIDERED AND DECIDED

On or about August 30, 2001, Respondent Mark Skertich filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court. Pursuant to the Bankruptcy Code, this matter was stayed as to this Respondent. Claimant dismissed without prejudice his claim against Respondent Skertich on September 25, 2001 and proceeded against Respondent AIS.

The panel denied Respondent AIS's Motion to Strike during the Initial Pre-Hearing Conference of December 10, 2001.

At hearing on May 8, 2002, Claimant presented a Motion to Dismiss the Defenses for Respondent AIS's failure to produce documents in discovery as ordered by the panel, pursuant to Rule 10305(b) of the Code of Arbitration Procedure. The panel initially took the motion under advisement. After a break in the hearing, counsel for Respondent AIS left the hearing without asking for a recess or postponement. Claimant reasserted his Motion to Dismiss the Defenses. The panel granted the Motion and continued the hearing pursuant Rule 10318 of the Code of Arbitration Procedure.

At hearing, the Claimant further requested sanctions for Respondent AIS's failure to produce documents in discovery as ordered by the panel. The panel finds that Respondent AIS harmed the Claimant, and the NASD arbitration process itself, by its failure to comply with the panel ordering discovery in a pre-hearing conference held December 10, 2001. In addition to granting the Motion to Dismiss the Defenses, Respondent AIS is assessed an additional sanction for attorneys' fees of \$7,500.00 to the Claimant for the additional time expended by Claimant's counsel in his attempts to obtain discovery material. Pursuant to the discovery order, the panel assesses additional sanctions of \$500.00 per day for the 130-day period beginning December 30, 2001 through the date of hearing, May 8, 2002, for a total of \$65,000.00.

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. Respondent American Investment Services, Inc. is liable for and shall pay to Claimant James L. Rogers the sum of \$47,117.00, plus statutory interest of eight percent (8%) per annum under Indiana law in the amount of \$27,302.00, for a total of \$74,420.00;
2. In addition, Respondent American Investment Services, Inc. is liable for and shall pay to Claimant James L. Rogers the sum of \$37,210.00 in attorneys' fees. In deciding to award attorneys' fees, the panel considered the pleadings filed on behalf of the parties, as well as the arguments of counsel, and determined that authority existed for an award of attorneys' fees to the Claimant, James L. Rogers;
3. Furthermore, as sanctions for failure to comply with the panel's order for discovery entered in a pre-hearing conference held December 10, 2001, Respondent American Investment Services, Inc. is liable for and shall pay to Claimant James L. Rogers the sum of \$72,500.00;
4. Also, Respondent American Investment Services, Inc. is liable for and shall pay to Claimant James L. Rogers the sum of \$300.00 as reimbursement of the non-refundable claim filing fee;
5. The parties shall bear their own costs of arbitration, including any additional attorneys' fees, except for those sums specifically enumerated herein; and,
6. Any and all relief not specifically addressed herein, including punitive damages, is 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

= \$300.00

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. Accordingly, Respondent American Investment Services, Inc. is a party and assessed the following member fees:

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00
Total Member Fees	= \$4,600.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed: None.

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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 a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: January 25, 2002 1 session	

One (1) Pre-hearing session with Panel @ \$1,125.00	= \$1,125.00
Pre-hearing conference: December 10, 2001 1 session	

Two (2) Hearing sessions @ \$1,125.00	= \$2,250.00
Hearing Date: May 8, 2002 2 sessions	

Total Forum Fees	= \$3,825.00
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The Panel has assessed \$3,825.00 of the forum fees to Respondent American Investment Services, Inc.

FEE SUMMARY

Claimant James L. Rogers is solely liable for:

Initial Filing Fee	= \$ 300.00
Less payments	= \$1,425.00
Balance Refunded by NASD Dispute Resolution, Inc.	= \$1,125.00

Respondent American Investment Services, Inc. is solely liable for:

Member Fees	= \$4,600.00
Forum Fees	= \$3,825.00
Total Fees	= \$8,425.00
Less payments	= \$4,600.00
Balance Due NASD Dispute Resolution, Inc.	= \$3,825.00

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

ARBITRATION PANEL

Donald G. Fletcher - Public Arbitrator, Presiding Chairperson
Bruce Jones, PhD - Public Arbitrator
Thomas J. McAllister - Non-Public Arbitrator

Concurring Arbitrators' Signatures



Donald G. Fletcher
Public Arbitrator, Presiding Chairperson

5/14/02

Signature Date

Bruce Jones, PhD
Public Arbitrator

Signature Date

Thomas J. McAllister
Non-Public Arbitrator

Signature Date

5/24/02 
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution, Inc.

Arbitration No. 01-02467

Award Page 5

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Bruce Jones, PhD - Public Arbitrator

Thomas J. McAllister - Non-Public Arbitrator

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Donald G. Fletcher

Public Arbitrator, Presiding Chairperson

Signature Date

Bruce Jones, PhD
Public Arbitrator

5-13-2002

Signature Date

Thomas J. McAllister

Non-Public Arbitrator

Signature Date

5/24/02 Mgm

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Signature Date

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Signature Date



Thomas J. McAllister
Non-Public Arbitrator

5/13/02

Signature Date

5/24/02 

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