

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

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In the Matter of the Arbitration Between:

Zhengzhou Pan-China Arts & Crafts Co., Ltd., (Claimant) vs. Malario Corp. d/b/a Shamrock Financial Services, Edward Cohan, John Huang, Dennis Maloney, and Michael Wu, (Respondents)

Case Number: 01-02773

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Zhengzhou Pan-China Arts & Crafts Co., Ltd., hereinafter referred to as "Claimant": Saul Roffe, Esq., Sirota & Sirota, New York, NY.

Respondents, Malario Corp. d/b/a Shamrock Financial Services ("Malario"), Edward Cohan ("Cohan"), John Huang ("Huang"), and Dennis Maloney ("Maloney"): Philip A. DeCaro, Esq., DeCaro & DeCaro, P.C., Purchase, NY.

Respondent, Michael Wu ("Wu"), appeared *pro se*. Previously represented by: David M. Sobel, Esq., The Goldstein Law Group, P.C., New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: May 24, 2001.

Claimant signed the Uniform Submission Agreement: May 20, 2001.

Joint Statement of Answer and Cross-claim filed by Malario, Cohan, Huang, and Maloney on or about: August 22, 2001.

Malario did not sign a Uniform Submission Agreement.

Cohan signed the Uniform Submission Agreement: August 21, 2001.

Huang signed the Uniform Submission Agreement: August 1, 2001.

Maloney signed the Uniform Submission Agreement: August 21, 2001.

Statement of Answer filed by Wu on or about: March 8, 2002.

Amended Statement of Answer filed by Wu on or about: April 12, 2002.

Wu did not sign a Uniform Submission Agreement.

### **CASE SUMMARY**

Claimant asserted the following causes of action: churning; unauthorized trading; violation of the Know Your Customer Rule; failure to supervise; and failure to comply with the agreement between Claimant and Wu. Claimant's claim involved unspecified financial products.

Unless specifically admitted in their Answer, Malario, Cohan, Huang, and Maloney denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant has failed to state a cause of action for fraud; Claimant has failed to allege the three elements of the churning claim, namely that the broker exercised control over the account at issue, that the trading in the account was excessive in light of Claimant's investment objectives, and that the broker acted with scienter or with the intent to defraud; Claimant ratified each and every trade in its account; and the alleged guarantee between Claimant and Wu, and/or the other Respondents, is an inappropriate and illegal agreement that cannot be entered into by any member of the investment community that is licensed by the NASD and has no force and/or effect.

In their Cross-claim, Malario, Cohan, Huang, and Maloney asserted the following cause of action: indemnification.

Unless specifically admitted in his Answers, Wu denied the allegations made in the Statement of Claim and asserted the following defenses: the doctrine of impossibility in contracts states that a contract based on or requiring an illegal act is unenforceable and void at its inception; the contract intended to be used as a basis for this claim is against public policy; the equitable defense of unclean hands acts to bar Claimant from receiving judgement on this claim; Claimant is guilty of fraudulent inducement which acts to void the agreement; Cohan and Malario are responsible for Wu's actions under the doctrine of respondeat superior; the Statement of Claim fails to state a basis or claim upon which relief may be granted; at all times material herein, Claimant was advised of and assumed the risks of market fluctuation; and to the extent that any losses or diminution in value of Claimant's securities may have occurred, such losses were the result of unforeseen market fluctuations and were within the risks assumed.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$160,500.00, plus interest from at least May 31, 2000.

In their Answer, Malario, Cohan, Huang, and Maloney requested that the Statement of Claim be dismissed in its entirety and that they be awarded the costs and disbursements of this proceeding.

In their Cross-claim, Malario, Cohan, Huang, and Maloney requested full indemnification for any costs, judgment, settlement, and/or legal fees associated with this claim from Wu.

Wu requested an Award:

- a. Denying all claims in the Statement of Claim;
- b. Assessing all costs and expenses of this proceeding against Claimants; and
- c. Granting all such other and further relief as the Panel deems just and necessary.

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

During the hearings in this matter, the Panel allowed Claimant to verbally amend the Statement of Claim to add a claim for suitability.

All Respondents made a Motion to Dismiss at the close of Claimant's case. The Panel reserved decision on the Motion. After due consideration, the Panel has denied Respondents' Motion to Dismiss.

Malario and Wu 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. Malario is solely liable for and shall pay to Claimant the sum of \$3,000.00 as compensatory damages, plus simple interest at the rate of 9% accruing from May 31, 2000 until the date of payment of Award.

2. Claimant's claims against Cohan, Huang, Maloney, and Wu are hereby dismissed.
3. The Cross-claim filed by Malario, Cohan, Huang, and Maloney is hereby dismissed.
4. 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	= \$ 300.00
Cross-claim filing fee	= \$ 1,000.00

#### **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, Malario Corp. d/b/a Shamrock Financial Services is a party.

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

#### **Adjournment Fees**

Adjournments requested during these proceedings:

Apr. 22 & 23, 2002, adjournment by Malario/Cohan/Huang/Maloney	= WAIVED
June 14, 2002, adjournment by Wu	= \$ 1,125.00

#### **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 Panel x \$1,125.00	= \$ 1,125.00
Pre-hearing conference: February 15, 2002	1 session

Twelve (12) Hearing sessions x \$1,125.00 = \$13,500.00

Hearing Dates:	June 10, 2002	1 session
	August 6, 2002	2 sessions
	August 8, 2002	2 sessions
	August 9, 2002	2 sessions
	October 28, 2002	2 sessions
	October 29, 2002	2 sessions
	October 30, 2002	1 session

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Total Forum Fees = \$14,625.00

1. The Panel has assessed \$7,312.50 of the forum fees against Claimant.
2. The Panel has assessed \$7,312.50 of the forum fees against Malario.

#### Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 7,312.50
Total Fees	= \$ 7,612.50
Less payments	= \$ 1,425.00
Balance Due NASD Dispute Resolution	= \$ 6,187.50

2. Malario is solely liable for:

Member Fees	= \$ 4,600.00
Forum Fees	= \$ 7,312.50
Total Fees	= \$11,912.50
Less payments	= \$ 5,800.00
Balance Due NASD Dispute Resolution	= \$ 6,112.50

3. Malario, Cohan, Huang, and Maloney are jointly and severally liable for:

Cross-claim Filing Fee	= \$ 1,000.00
Total Fees	= \$ 1,000.00
Less payments	= \$ 1,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

4. Wu is solely liable for:

<u>Adjournment Fee</u>	= \$ 1,125.00
Total Fees	= \$ 1,125.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 1,125.00

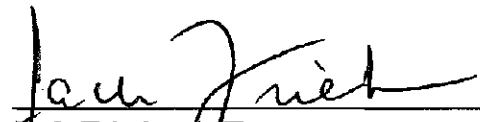
All balances are payable to NASD Dispute Resolution, and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Jack Friedman, Esq.	-	Public Arbitrator, Presiding Chair
Terrence H. Fraser, J.D.	-	Public Arbitrator
Karen M. Cullen, Esq.	-	Non-Public 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.

  
\_\_\_\_\_  
Jack Friedman, Esq.  
Public Arbitrator, Presiding Chair

November 10, 2002  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Terrence H. Fraser, J.D.  
Public Arbitrator

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

\_\_\_\_\_  
Karen M. Cullen, Esq.  
Non-Public Arbitrator

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

November 26, 2002  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

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**Concurring Arbitrators' Signatures**

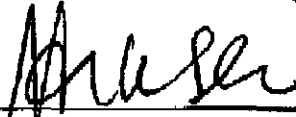
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Jack Friedman, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date



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Terrence H. Fraser, J.D.  
Public Arbitrator

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Signature Date

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Karen M. Cullen, Esq.  
Non-Public Arbitrator

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Signature Date

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Jack Friedman, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date


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Terrence H. Fraser, J.D.  
Public Arbitrator

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Signature Date

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Karen M. Cullen, Esq.  
Non-Public Arbitrator

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11-18-02  
Signature Date

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November 26, 2002  
Date of Service (For NASD Dispute Resolution use only)