

**Stipulated Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Catherine Dwyer,

Claimant,

Case Number: - 03-03175

v.

Birkelbach Investment Securities, Inc.,  
Peregrine Financials & Securities, Inc.  
William J. Murphy, Thomas E. Pearson,  
James F. Kelly and Michael J. Rukujzo,  
Respondents.

Hearing Site: Chicago, Illinois

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Thomas E. Pearson and James F. Kelly,  
Respondents/Cross-Claimants,

v.

Patrick S. Jage,

Cross-Respondent.

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**NATURE OF THE DISPUTE**

Customer vs. Member Firms and Associated Persons

**REPRESENTATION OF PARTIES**

Catherine Dwyer ("Dwyer"), hereinafter referred to as "Claimant": Bruce Lewitas, Esq., of Lewitas & Associates, P.C. (formerly Lewitas & May), located in Chicago, Illinois.

Respondents Birkelbach Investment Securities, Inc. ("Birkelbach Investment"), William J. Murphy ("Murphy") and Carl M. Birkelbach ("Birkelbach"): Dexter B. Johnson, Esq. of the law firm Mallon & Johnson, P.C., located in Chicago, Illinois.

Respondents Peregrine Financials & Securities, Inc. ("Peregrine"), Thomas E. Pearson ("Pearson") and James F. Kelly ("Kelly"): Rebecca Wing, Esq. of Peregrine located in Chicago, Illinois, along with co-counsel Christopher L. Gallinari, Esq. of the law firm Bellows & Bellows, P.C., located in Chicago, Illinois.

Respondent Michael J. Rukujzo ("Rukujzo"): Delmer C. Gowing, III, Esq. of Delray Beach, Florida.

Patrick S. Jage appeared *pro se*.

**CASE INFORMATION**

Statement of Claim filed on or about: April 30, 2003

Dwyer signed the Uniform Submission Agreement: April 28, 2003

Statement of Answer filed by Respondents Peregrine on or about: June 25, 2003

Peregrine signed the Uniform Submission Agreement on: June 25, 2003

Statement of Answer and Motion to Dismiss filed by Respondents Birkelbach and Murphy on or about: July 10, 2003

Birkelbach and Murphy jointly signed the Uniform Submission Agreement: June 9, 2003

First Amended Statement of Claim filed by Claimant: July 10, 2003

Answer to First Amended Statement of Claim filed by Respondents Peregrine: July 21, 2003

Answer to First Amended Statement of Claim filed by Respondents Birkelbach and Murphy: July 25, 2003

Second Amended Statement of Claim filed by Claimant: September 16, 2003

Respondent Pearson filed a Motion to Dismiss: October 16, 2003

Claimant's Response to Pearson's Motion to Dismiss: November 14, 2003

Third Amended Statement of Claim filed by Claimant: January 27, 2004

Claimant's Motion to Amend Statement of Claim and Fourth Amended Statement of Claim: February 27, 2004

Panel's Order granting Claimant's Motion and Fourth Amended Statement of Claim: May 18, 2004

Respondents Pearson and Kelly jointly filed an Answer to Claimant's Fourth Amended Statement of Claim and Cross-claim against Respondent Patrick Jage: June 14, 2004

### **CASE SUMMARY**

Claimants asserted the following causes of action: unsuitability, churning, unauthorized trading, common law and statutory fraud, breach of fiduciary duty, negligence failure to supervise, Respondeat Superior and control person liability. The causes of action related to various stocks, including Alpha Pro Tec, Manugistics Group, Inc., ESS Technology, Astar, Davita, Aquila, CMS Energy and others, which Claimant asserted were unsuitable to her investment needs and objectives.

Respondent Peregrine denied the operative allegations in the Statement of Claim and asserted the following defenses:

1. Claimant's alleged damages after the April 25, 2001 transfer to Birkelbach Investment Securities, Inc. cannot apply to Peregrine;
2. Claimant failed to mitigate any damages;
3. Loss in Claimant's account was devaluation;
4. Patrick Jage was adequately supervised at all times;
5. Claimant's account was at Peregrine; and
6. All actions taken and not taken conformed with Claimant's investment objectives; estoppel and ratification.

Respondents Birkelbach and Murphy denied the operative allegations in the Statement of Claim and asserted the following defenses:

1. Claimant's investments were not unsuitable given her preferences, net worth, investment experience and income;
2. There was no breach of fiduciary duty;

3. Claimant failed to mitigate her damages;
4. Any damages were proximately caused by Claimant's own conduct and events beyond Birkelbach investment's control;
5. Claimant ratified the transactions at issue; and
6. The degree of trading in Claimant's account was consistent with her expressed desires.

In her First Amended Statement of Claim, Claimant sought (in addition to compensatory and punitive damages, pre-judgment interest and attorney's fees and costs) recessionary damages pursuant to Section 13.A of the Illinois Securities Act of 1953. In its Answer to the First Amended Statement of Claim, Peregrine asserted the affirmative defense that Claimant's claims for recessionary damages were barred the applicable statute of limitations. In their Answer to the First Amended Statement of Claim, Respondents Murphy and Birkelbach Investment denied Claimant's entitlement to recessionary damages under the Illinois Securities Act of 1953.

In her Second Amended Statement of Claim, Claimant named Thomas E. Pearson and Carl M. Birkelbach as Individual Respondents, as the supervisors with responsibility over Patrick S. Jage at Peregrine and Birkelbach Investments, respectively. Pearson moved to dismiss, to which Claimant responded. Subsequently, Pearson was voluntarily dismissed and Claimant filed a Third Amended Statement of Claim naming Michael J. Rukujzo as an Individual Respondent, based on information provided by Peregrine in response to Claimant's discovery request, that he was a supervisor of Jage while Claimant's account was at Peregrine. Claimant then moved to amend the Statement of Claim a fourth time, which was opposed, but granted by the Panel on May 18, 2004. In the Fourth Amended Statement of Claim, Claimant named James F. Kelly as an Individual Respondent, as another of Jage's supervisors while at Peregrine.

Claimant dismissed, with prejudice, Peregrine, Pearson, Kelly and Rukujzo on July 1, 2004. Claimant settled her claims against Birkelbach Investments, Birkelbach and Murphy on July 25, 2004. Claimant agreed to dismiss these Respondents following fulfillment of the parties' settlement agreement.

#### **RELIEF REQUESTED**

Claimants requested \$485,000 in compensatory damages; punitive damages; net-out-of-pocket losses; pre-judgment interest; attorney's fees and costs; and recessionary damages.

All Respondents requested dismissal of Claimant's claim. In furtherance of the parties' agreements concerning the resolution of this matter, Claimant and Respondent Michael J. Rukujzo seeks an Order recommending expungement of the CRD registration records of Respondent Michael J. Rukujzo of all reference to these proceedings.

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

During the Initial Pre-Hearing Conference on January 20, 2004, Claimant voluntarily dismissed all claims against Respondent Thomas E. Pearson with prejudice.

In a letter dated July 1, 2004, Claimant dismissed all claims against Respondents Peregrine Financials & Securities, Michael Rukujzo, Thomas E. Pearson and James F. Kelly with prejudice.

On July 25, 2004, Claimant settled all claims against Respondents Birkelbach Investment Securities, Inc., Carl M. Birkelbach and William J. Murphy.

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 parties' submissions and representations, but without making any findings of fact or conclusions of law, the undersigned arbitrators order as follows:

- 1.) Claimant dismissed with prejudice all claims against Peregrine Financials & Securities, Inc., Thomas E. Pearson, James F. Kelly and Michael J. Rukujzo.
- 2.) Respondent Rukujzo has proposed and Claimant supports an Order by the Panel expunging Claimant's complaint and the arbitration from the Central Registration Depository ("CRD") of Michael J. Rukujzo.
- 3.) Michael J. Rukujzo was not involved in the alleged investment-related sales practice violations, therefore, expungement of reference to these proceedings from the registration records of Respondent Rukujzo maintained by the NASD Central Registration Depository ("CRD") would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements.
- 4.) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Michael J. Rukujzo's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Rukujzo must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 5.) Except as otherwise specified herein, parties shall bear their own costs, including attorneys' fees.
- 6.) Any and all relief not specifically enumerated, including punitive damages 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 | = \$ 300.00 |
| Cross-claim fee          | = \$ 250.00 |

### **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 persons at the time of the events giving rise to the dispute. In this matter, Birkelbach and Peregrine are both members and parties to this proceeding.

|                         |              |
|-------------------------|--------------|
| Member surcharge        | = \$1,700.00 |
| Pre-hearing process fee | = \$ 750.00  |
| Hearing process fee     | = \$2,750.00 |

### **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 sessions x \$1,125.00    | = \$1,125.00 |
| Pre-Hearing Date: January 20, 2004 1 session |              |
| Total Forum Fees                             | = \$1,125.00 |

1. The Panel assessed 50% of the total forum fees in the amount of \$562.50 solely to Claimant, Catherine Dwyer.
2. The Panel assessed 50% of the total forum fees in the amount of \$562.50 jointly and severally to Respondents, Birkelbach Securities, Inc., Peregrine Financials & Securities, Inc., William J. Murphy, James F. Kelly and Patrick S. Jage.

Pursuant to NASD Dispute Resolution Code of Arbitration Procedure Rule 10332(f), Claimant's Hearing Session deposit of \$562.50 is retained by NASD.

### **FEE SUMMARY**

Claimant, Catherine Dwyer, is hereby solely liable for:

|                                     |              |
|-------------------------------------|--------------|
| Initial Filing Fee                  | = \$ 300.00  |
| Forum Fees                          | = \$ 562.50  |
| Hearing Deposit Retention           | = \$ 562.50  |
| Total Fees                          | = \$1,425.00 |
| Less payments                       | = \$1,425.00 |
| Balance Due NASD Dispute Resolution | = \$ 0.00    |

Respondent, Peregrine Financials & Securities, Inc. is solely liable for:

|                                     |              |
|-------------------------------------|--------------|
| Member Fees                         | = \$5,200.00 |
| Less payments                       | = \$5,200.00 |
| Balance Due NASD Dispute Resolution | = \$ 0.00    |

Respondent, Birkelbach Investment Securities, Inc. is hereby solely liable for:

|   |              |
|---|--------------|
| Member Fees                             | = \$5,200.00 |
| Less payments                           | = \$5,762.50 |
| Refund Due from NASD Dispute Resolution | = \$ 562.50  |

Respondents, Birkelbach Investment Securities, Inc., Peregrine Financials & Securities, Inc., Patrick S. Jage, William J. Murphy, James F. Kelly and Michael Rukujzo are hereby jointly and severally liable for:

|                                     |                    |
|-------------------------------------|--------------------|
| Forum Fees                          | = \$ 562.50        |
| <u>Less payments</u>                | <u>= \$ 562.50</u> |
| Balance Due NASD Dispute Resolution | = \$ 0.00          |

Respondents, Thomas E. Pearson and James F. Kelly, are hereby jointly and severally liable for:

|   |                      |
|---|----------------------|
| Cross-claim Filing Fee                  | = \$ 250.00          |
| <u>Less payments</u>                    | <u>= \$ 1,250.00</u> |
| Refund Due from NASD Dispute Resolution | = \$ 1,000.00        |

All balances are due to NASD Dispute Resolution.

**ARBITRATION PANEL**

|                             |   |  |
|-----------------------------|---|--|
| Mitchell L. Marinello, Esq. | - | Public Arbitrator, Presiding Chairperson |
| David L. Buffen, Esq.       | - | Public Arbitrator                        |
| Frederic M. Rizzo           | - | Non-Public Arbitrator                    |

**Concurring Arbitrators' Signatures**

/s/ Mitchell L. Marinello, Esq.  
Mitchell L. Marinello, Esq.  
Public Arbitrator, Presiding Chair

4/27/06  
Signature Date

/s/ David L. Buffen, Esq.  
David L. Buffen, Esq.  
Public Arbitrator

5/23/06  
Signature Date

/s/ Frederic M. Rizzo  
Frederic M. Rizzo  
Non-Public Arbitrator

5/1/06  
Signature Date

5/2/06  
Date of Service (For NASD office use only)

Respondents, Birkelbach Investment Securities, Inc., Peregrine Financials & Securities, Inc., Patrick S. Jage, William J. Murphy, James F. Kelly and Michael Rukujzo are hereby jointly and severally liable for:

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Mitchell L. Marinello, Esq.  
Public Arbitrator, Presiding Chair

April 27 2006  
Signature Date

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David L. Buffen, Esq.  
Public Arbitrator

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Signature Date

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