

**NASD DISPUTE RESOLUTION AWARD**  
**NASD DISPUTE RESOLUTION**

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CASE: 04-03721

Stifel, Nicolaus & Company, Inc., Claimant v. James Gerwin, Respondent

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**ATTORNEYS:**

For Claimant Stifel, Nicolaus & Company, Inc. ("Claimant") appeared Peter R. Sonderby, Esq., of the firm Ulmer & Berne, LLP, Chicago, IL.

Respondent James Gerwin ("Respondent") appeared *pro se*, Cincinnati, OH.

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**NATURE OF DISPUTE:** Member v. Associated Person.

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**DATE FILED:** May 24, 2004.

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**CASE SUMMARY:** Claimant alleged that Respondent failed to repay monies owed pursuant to the terms of a promissory note. Claimant maintained that due to Respondent's actions, it suffered losses.

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**ARBITRATOR'S REPORT:** See attached Exhibit "A".

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**Claim Data**

Claim: \$13,333.33  
Interest: Unspecified  
Attorney Fees: Unspecified  
Filing Fees: Unspecified  
Other: Unspecified

**Award Data**

Award: \$13,333.33  
Interest: \$2,918.54  
Attorney Fees: \$.00  
Filing Fees: \$1,050.00  
Other: \$.00

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**AWARD:** The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) Respondent is liable for and shall pay to the Claimant \$13,333.33. 2) Respondent is liable for and shall pay to the Claimant interest in the amount of \$2,918.54. Interest at the rate of 9% continues to accrue on any unpaid balance on the Note until payment in full is made. 3) All requests for attorney fees are denied. 4) All other relief requests are denied. 5) NASD Dispute Resolution shall retain the \$1,050.00 filing fee that the Claimant deposited previously. 6) Respondent is liable for and shall pay Claimant \$1,050.00 as reimbursement of the filing fee.

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**OTHER FEES:** Pursuant to Rule 10333 of the Code, Claimant has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

Page Two  
Award 04-3721

Neal D. Baker, J.D.

Sole Public Arbitrator

AFFIRMATION

I, Neal D. Baker, J.D., do hereby affirm, upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.

Neal D. Baker

Neal D. Baker, J.D.

12-17-04

Signature Date

December 27, 2004

Date of Service (For NASD-DR office use only)

### FINDINGS AND DECISION

1. Respondent was employed by claimant from January 10, 2000 until June 24, 2002.
2. On February 4, 2000, respondent signed a promissory note which is attached to the Statement of Claim as Exhibit A (the "Note"). Claimant's authorized representative signed the Note on February 8, 2000.
3. Although respondent asserts that the Note is not enforceable because claimant breached their agreement with him, respondent has not submitted any evidence to support this defense.
4. The terms of the Note are clear and unambiguous.
5. Pursuant to the terms of the Note, respondent owed claimant \$13,333.33 at the time he ceased employment with claimant on June 24, 2002.
6. Respondent has not paid claimant all or part of the balance due on the Note.
7. Pursuant to Paragraph 4 of the Note and Section 408.020 of the Missouri Revised Statutes, respondent owes claimant \$13,333.33 plus interest at the rate of 9% per annum.
8. As of October 7, 2004, respondent owed claimant \$16,251.87, consisting of \$13,333.33 in principal and \$2,918.54 in interest. Interest at the rate of 9% continues to accrue on any unpaid balance on the Note until payment in full is made.
9. In Paragraph 5 of its Statement of Claim, claimant requests legal fees in connection with enforcement of the Note. Claimant relies on Paragraph 5 of the Note in support of its request for these legal fees. On October 7, 2004, claimant submitted a letter to NASD Dispute Resolution. That letter, in part, sets forth that claimant has incurred \$2,500.00 in connection with enforcing the Note. Pursuant to Paragraph 5 of the Note, respondent agreed "to pay . . . reasonable attorneys fees . . . incurred by [claimant] in connection with the enforcement of any and all provisions of this note and in regard to any defenses to the Note . . ."
10. Claimant's demand for legal fees is denied. Claimant has not submitted any evidence - other than counsel's allegations (see October 7, 2004 letter from Mr. Sonderby) - that legal fees were incurred and that the fees are reasonable. This unsworn assertion does not constitute evidence. Claimant has not submitted time records, work descriptions, fee rates or schedules or any other documents to support the allegation that reasonable attorney fees have been incurred. While claimant points out that respondent's unsubstantiated assertion of breach of contract does not constitute evidence (See ¶ 4 of October 7, 2004 Letter from Mr. Sonderby), the same is true for claimant's unsubstantiated allegation that it incurred legal fees of \$2,500.00 and that the fees are reasonable.

11. Claimant has also made a request for costs. Pursuant to Paragraph 5 of the Note, respondent agreed to "pay any and all costs . . . incurred by [claimant] in connection with the enforcement of any and all provisions of this Note and in regard to any defenses to the Note . . ."

12. On October 7, 2004, claimant submitted a copy of check number 435104 drawn on U.S. Bank, made payable to the NASD in the amount of \$1,475.00 for costs in this case. It is clear from claimant's Exhibit 2 (attached to Mr. Sunderby's Letter of October 7, 2004) that this payment was tendered for costs in this case. Pursuant to Paragraph 5 of the Note, respondent is liable for these costs.

*Nial D. Baker 12-6-04*