



N.A.S.D. AWARD

Arbitration

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

**National Association of  
Securities Dealers, Inc.**  
NASD Financial Center  
33 Whitehall Street  
New York, N.Y. 10004  
FAX (212) 858-4389

In the Matter of the Arbitration Between

Name of Claimants

Theodore E. Bindrim & Barbara L. Bindrim as  
Trustees of Theodore E. Bindrim Profit Sharing Plan  
as successors to Theodore E. Bindrim Architect P.C.  
Pension Fund

91-02883

Name of Respondents

Anchor National Financial Services, Inc.  
Robert F. Nash  
Commonwealth Equity Services  
Robert F. Nash & Company

**REPRESENTATION**

For Claimants Theodore E. Bindrim & Barbara Bindrim as Trustees of Theodore E. Bindrim Profit Sharing Plan as successors to Theodore E. Bindrim Architect P.C. Pension Fund ("Claimants"): Scott Salant, of Collier, Cohen et al.

For Respondent Anchor National Financial Services, Inc. ("Anchor"): Jonathan C. Thau, of Wilson Elser et al.

For Respondent Robert F. Nash ("Nash") and Robert F. Nash & Company ("Nash & Co."): Jeffrey B. Kelvin, of The Financial Planners Assistance Corp.

For Respondent Commonwealth Equity Services ("Commonwealth"): Thomas G. Nicholson, of Finneran & Nicholson, P.C.

**CASE INFORMATION**

Statement of Claim filed: September 17, 1991.

Claimants' Submission Agreement signed on: September 11, 1991.

Statement of Answer filed by Respondent Anchor on: December 6, 1991.

Respondent Anchor's Submission Agreement signed on: December 5, 1991.

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Joint Statement of Answer filed by Respondents Nash and Nash & Co. on: November 14, 1991.  
Joint Statement of Answer to the Crossclaim of Commonwealth filed by Respondents Nash and Nash & Co. on: December 12, 1991.

Motion to Dismiss Arbitration Claim filed by Nash & Co. on: February 6, 1992.

Stipulation of Dismissal of Crossclaim previously filed between Nash and Nash & Co. and Commonwealth on: May 28, 1992.

Respondent Nash's Submission Agreement signed on: November 10, 1991.

Respondent Nash & Co.'s Submission Agreement signed on: November 10, 1991.

Statement of Answer and Crossclaim filed by Respondent Commonwealth on: November 27, 1991.

Respondent Commonwealth's Submission Agreement signed on: November 26, 1991.

#### **HEARING INFORMATION**

Pre-Hearing Conference:	October 13, 1992/1 session
Hearing Dates/Sessions:	October 21, 1992/2 sessions
	October 22, 1992/2 sessions
	October 23, 1992/2 sessions
	November 23, 1992/2 sessions
	November 24, 1992/2 sessions
	February 3, 1993/2 sessions

Hearing Location: NASD, Inc., New York City, New York.

#### **CASE SUMMARY**

Claimants alleged they were unsophisticated investors who first sought investment services from Nash in 1981. Claimants alleged Nash represented to them that he was a certified financial planner; skilled in portfolio management of retirement plans; and he recommended investments backed by solid financial institutions. Claimants alleged Nash was a registered representative of Anchor from 1982 through 1988 and of Commonwealth from 1988 through the date of the Statement of Claim.

Claimants alleged Nash recommended they invest in limited partnerships for the Theodore E. Bindrim Architect, P.C. Pension Fund ("Pension Fund") and later the Theodore E. Bindrim Profit Sharing Plan ("Plan"), beginning in 1983. Claimant alleged Nash represented these limited partnerships (first sold through Anchor and then Commonwealth) were safe, conservative investments. Claimants alleged these investments were unsuitable for them; the ratio of limited

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partnership investments to the total value of the Pension Fund violated the Employees' Retirement Income Security Act's ("ERISA") requirement that retirement plans be properly diversified; and that these limited partnerships paid higher commissions to Nash, Nash & Co. and Anchor than suitable investments paid.

Claimants alleged Nash, Nash & Co. and Anchor failed to perform their due diligence obligations before recommending these limited partnerships to Claimants; (e.g. the Equitec investments are the subject of a bankruptcy action in California).

Claimants further alleged Nash and Anchor induced them to invest in other unsuitable investments vehicles which were recommended for the purpose of generating excessive commissions and Nash and Anchor failed to perform their due diligence obligations in regard to these non-limited partnership investments, including Keystone Custodian Precious Metals Fund.

Claimants also alleged that when Nash went to Commonwealth, he again recommended unsuitable limited partnerships to them, and that these recommendations were made to generate commissions to Nash and Nash & Co. Finally, Claimant alleged Respondents mismanaged the assets of the Plan.

Respondents Nash and Nash & Co. denied there were violations of ERISA and that ERISA had no application to the facts and circumstances of this case in that they, Nash and Nash & Co., could not as a matter of law be considered statutory fiduciaries under ERISA.

Respondents Nash & Nash & Co. denied they ever recommended unsuitable investments to Claimants. They alleged that the specific programs sold to Claimants were designed to produce income and long-term appreciation. Respondents alleged they relied on projections and other financial information provided by product sponsors as well as the relevant broker/dealer at the time of the sale to conclude that the investments at issue were suitable for Claimants.

Respondents denied that any churning of Claimants' accounts occurred. Respondents denied they induced Claimants to invest pension fund assets solely for the purpose of earning commissions. Respondents maintained they were not Claimants' financial planners, investment advisers or managers; Nash as an individual never held himself out as a financial planner; Nash & Co. never held itself out as a financial planner; and Respondents never pursued discretionary or nondiscretionary management activity with Claimants. Respondents maintained Nash acted as a registered representative of a broker/dealer for the purpose of selling security products. Respondents denied Claimants sought investment and financial services from Respondents;

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denied that Nash asserted he was an expert in making investment decisions on behalf of his clients or skilled in portfolio management or retirement plans; and denied that Nash represented the investments he recommended were backed by solid financial institutions.

Respondents maintained Claimants were not unsophisticated in the financial and securities markets as investors. Respondents admitted that Nash advised Claimants that Anchor and Commonwealth had advised him that all due diligence had been taken care of by broker/dealers prior to the time Nash sold these investments to Claimants. Respondent admitted the Equitec investments were the subject of a bankruptcy action in California. Respondents maintained that no improprieties on the part of the partnership were hidden by them. Respondents also denied they mismanaged the investments of the Plan.

Respondent Nash & Co. alleged it was a sole proprietorship which was not a separate legal entity and did not have any separate and independent identity. Nash & Co. moved that the arbitration panel dismiss it as a separately named party.

Respondent Anchor alleged Claimants had the intellectual capacity and financial resources to select investments with a potential for risk and reward. Anchor maintained investments recommended for Claimants were not unsuitable and that it is not a guarantor of the investments made by its clients. Anchor asserted Claimants ratified Nash's activities which they now complain about. Anchor further maintained Claimants could have selected Certificates of Deposits or money market investments had they wished to obtain a reasonable assurance of ultimate return; however, they knowingly selected other investments with a greater potential for both risk and reward.

Finally, Anchor asserted that Claimants' decision to transfer their account from Anchor and continue doing business with Nash at another firm should be taken into consideration regarding their filing of claims.

Respondent Commonwealth and Respondents Nash & Nash & Co. executed a Stipulation of Dismissal of the Crossclaims previously filed in the matter as between those Respondents.

Respondent Commonwealth maintained it fulfilled all its responsibilities on behalf of Claimants; it did not undertake to provide or receive compensation for providing investment advice other than as "incidental" to its brokerage function; and that Claimants maintained and exercised

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investment discretion. Commonwealth also asserted it exercised requisite supervision and control over Nash.

Commonwealth denied Claimants' allegations they entrusted to it the full responsibility for investing the assets of the Plan. Commonwealth asserted it performed its requisite due diligence in determining suitability of the investments selected by Claimants; that the investments made by Claimants through it were suitable and conservative investments; that Nash recommended suitable limited partnerships to Claimants while registered at Commonwealth; and that it did not assume control and/or discretionary decision making power relative to the investments held by Claimants. Commonwealth denied that it or Nash were statutory fiduciaries under ERISA and maintained it did not have any authority or responsibility to make decisions relative to the investment of the assets of the Plan. Commonwealth denied any responsibility or liability regarding the Equitec investments. Commonwealth denied that certain investments were risky and made solely to generate premium commissions; and denied the allegations that it mismanaged the assets of the Plan.

#### **RELIEF REQUESTED**

Claimants requested: actual damages in the amount of \$618,000.00; costs; disbursements; and attorneys' fees, as specifically provided under ERISA.

Respondents Nash and Nash & Co. requested: the arbitration panel discharge them from any liability, find neither of them liable or culpable and discharge them from any possible liability in this matter.

Respondent Nash and Co. requested: the arbitration panel dismiss it as a separately named party.

Respondent Anchor requested: dismissal of the Statement of Claim as to Anchor in its entirety; costs; and forum fees.

Respondent Commonwealth requested: Claimants' claim be dismissed; costs and attorney' fees.

#### **OTHER ISSUES CONSIDERED & DECIDED**

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. In either case, the parties have agreed to

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receive conformed copies of the Award while the originals remain on file with the NASD.

### AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The claims of the Claimants Theodore E. Bindrim and Barbara L. Bindrim as Trustees of Theodore E. Bindrim Profit Sharing Plan as successors to Theodore E. Bindrim Architect P.C. Pension Fund are denied;
2. Respondent Commonwealth Equity Services, Inc.'s Motion for Refund of its \$1,000.00 postponement fee is granted;
3. Motion of Respondent Robert F. Nash & Company to Dismiss Arbitration Claim is denied;
4. All other claims are denied;
5. Each party shall bear its own expenses, including attorneys' fees.

### FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the NASD shall retain the \$250.00 non-refundable filing fee previously paid by Claimants and the following Forum Fees are assessed.

1 pre-hearing conference X \$300.00 = net \$300.00 due.

12 sessions X \$1,000.00 = \$12,000.00 minus hearing session deposit of \$1,000.00 previously paid by Claimants = net \$11,000.00 due.

Forum fees Assessed Against:

1. Claimants Theodore E. Bindrim and Barbara L. Bindrim as Trustee of Theodore E. Bindrim Profit Sharing Plan as successors to Theodore E. Bindrim Architect P.C. Pension Plan are hereby liable and shall pay to the NASD the sum of

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\$11,300.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Arbitrator Signature



Joseph B. Russell/Public Arbitrator

Date of Decision: March 1, 1993

STATE OF *NEW YORK*

COUNTY OF *NEW YORK*

On this *12* day of *February* 1993, before me personally appeared Joseph B. Russell known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

*Catar M. Neelakum*

NOTARY PUBLIC  
State of New York  
Commenced in 1988  
Certificate No. 1005  
Commission Expires Sept. 30, 1993

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\$11,300.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Arbitrator Signature

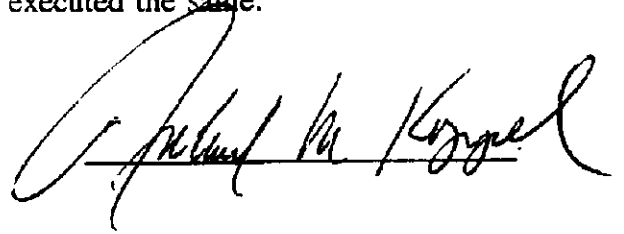


Thomas A. Turley/Industry Arbitrator

Date of Decision: March 1, 1993

STATE OF *New York*  
COUNTY OF *New York*

On this *26<sup>th</sup>* day of *February*, 1993, before me personally appeared Thomas A. Turley known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.



RICHARD M. KOPPEL  
Notary Public, State of New York  
No. 44-2177860  
Qualified in Rockland County  
Certificate filed in New York County  
Commission Expires Aug. 31, 1993

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\$11,300.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Arbitrator Signature

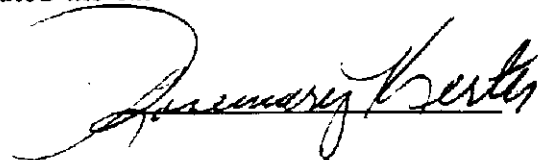
  
William J. Brennan/Public Arbitrator

Date of Decision: March 1, 1993

STATE OF NEW JERSEY

COUNTY OF MIDDLESEX

On this 13 day of FEBRUARY, 1993, before me personally appeared William J. Brennan known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.



ROSEMARY KERTIS  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires July 25, 1993