

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Robert J. Scarano

92-00228

Name of Respondent

Alan Birkley

REPRESENTATION

Claimant, Robert J. Scarano, appeared pro se.

For Respondent Alan Birkley: James J. Moylan, Esq. of James J. Moylan and Associates, LTD., Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed: January 21, 1992.

Claimant's Submission Agreement signed on: January 13, 1992.

Statement of Answer filed by Respondent, Alan Birkley on: March 9, 1992.

The NASD does not have any evidence of Respondent Alan Birkley having filed a Submission to Arbitration.

Amendment to the Statement of Claim removing Rodman & Renshaw from this arbitration which was filed on: October 16, 1992.

HEARING INFORMATION

Hearing Date: November 24, 1992. One session.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant, Robert J. Scarano, ("Claimant") alleged unauthorized trades, misrepresentations, breach of contract, and unsuitability by Respondent Alan Birkley ("Respondent"). The allegations arose out of trades in shares of AT&T and Moscom stock. Claimant went on to allege that Respondent made promises to him that the account would be straightened out, and Claimant allegedly relied on those assertions to keep his position open. Claimant

further alleged that he never agreed to sign a margin or option agreement, but had trades reported in his statements as made on margin. Lastly, Claimant alleged that Respondent had promised to make good on Claimant's losses, and has allegedly failed to keep his promise.

In his Answer, Respondent denied the allegations contained in the Statement of Claim. Respondent asserted that each and every transaction made on behalf of Claimant had been authorized. Respondent also asserted that because of Claimant's failure to tell Respondent of his desire to sell the AT&T shares, Claimant ratified their purchase. Respondent further asserted that both he and his supervisors had advised Claimant to pay off his debit balance or sell the stock, and at no time did Claimant order any shares to be sold.

RELIEF REQUESTED

Claimant requested (\$7,432.56) the sum of all trades, commissions, interest due, credits paid and any other recoverable amounts be paid as a result of the margin purchase dated June 28, 1990. Claimant also requested the interest from his insurance loan, settlement for the time, effort, grief and stress this matter caused the Claimant.

Respondent requested that the Statment of Claim be denied, and that Claimant be held responsible for the costs associated with defending this arbitration.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Alan Birkley did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing and is bound by the determination of the arbitration panel on all issues therefore submitted.

On November 16, 1992, Respondent filed a Motion to Bar Claimant's Evidence. After considering the Motion and Response, the undersigned arbitrator denied the Motion and permitted Claimant to present testimony. The Chairman would consider postponing the arbitration at any point Respondent was surprised by Claimant's evidence.

At the hearing, Respondent requested that a negative inference be taken against Claimant for his refusal to produce his tax returns and statements of his other brokerage accounts. After the Chairman explained to Claimant what Respondent had requested, Claimant did not object. The Chairman would take up each request for negative inference on a case by case basis.

The parties have agreed that the Award in this matter may be executed by counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original remains on file with the NASD.

AWARD

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

1. Claimant Robert J. Scararo's claims against Respondent Alan Birkley are hereby denied and dismissed with prejudice.

2. Each party shall pay their own costs and attorneys' fees.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following Forum Fees are assessed.

1 hearing session X \$200.00 = \$200.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$75.00 and shall retain the hearing session deposit in the amount of \$200.00 previously paid to the NASD by the Claimant.

Pursuant to Sections 43(c) and 30(b) of the Code, the NASD shall retain the \$200.00 postponement fee previously paid to the NASD by Respondent.

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

Concurring Arbitrator's Signature

Dated:

November 27, 1992

/s/

Jonathan P. Tones, Esq.
Jonathan P. Tones, Esq.
Presiding Chair
Public Arbitrator

Date of Service by the NASD: 11/30/92