

## **NASD REGULATION AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

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In the Matter of the Arbitration Between

Name of Claimant

Donald F. Lawrence, Jr.

and

Case Number 95-03888

Names of Respondents

Oppenheimer & Company, Incorporated and  
Harold M. Finstad

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### **REPRESENTATION OF PARTIES**

Donald F. Lawrence, Jr. ("Claimant") was represented by Barry G. Flynn, Esq. of Flynn, Hoefker & Thayer from Houston, Texas.

Oppenheimer & Co., Inc. ("Respondent") was represented by Andrew R. Harvin, Esq. of Doyle, Restrepo, Harvin & Robbins, L.L.P. from Houston, Texas.

Harold M. Finstad ("Respondent") was represented by Suzanne Finstad, Esq., Sole Practitioner, from Conroe, Texas in the filing of the Statement of Answer yet this party appeared pro se' at the hearing.

### **CASE INFORMATION**

The Statement of Claim was filed on or about August 11, 1995.

The Submission Agreement of the Claimant was signed on August 28, 1995.

The Statement of Answer of Respondent Oppenheimer & Co., Inc. was filed on or about November 1, 1995.

The Submission Agreement of Respondent Oppenheimer & Co., Inc. was signed on October 31, 1995 by Frank James, Managing Director.

The Statement of Answer of Respondent Harold M. Finstad was filed on or about August 1, 1996.

The Submission Agreement of Respondent Harold M. Finstad was signed on August 28, 1996.

### HEARING INFORMATION

The hearing was held in Houston, Texas on the following dates:

- August 6, 1996 for two (2) sessions
- August 7, 1996 for two (2) sessions, and
- August 23, 1996 for two (2) sessions.

### CASE SUMMARY

Donald F. Lawrence, Jr. alleged that after he opened an account at Oppenheimer & Co., Inc. ("Oppenheimer") on April 28, 1992, Harold M. Finstad ("Finstad"), a broker at Oppenheimer, aggressively promoted the stock of Skolniks, Inc. by claiming that the stock would eventually attain a price of \$45.00 to \$50.00 per share. As alleged, Lawrence authorized the following purchases and sales of stock and warrants in Skolniks, Inc. based upon the representations and direction of Finstad: (1) on August 6, 1992, purchase of 690 shares of stock or warrants at 9 3/4 each; (2) on September 17, 1992, purchase of 1000 shares of stock or warrants for 14 1/4 each; (3) purchase of 1000 shares of stock at 7 1/2; (4) On October 1, 1993, sold 570 shares of stock at 15 1/2; and (5) on October 1, 1993, sold 533 warrants at 11 1/4. Claimant alleged that prior to his initial investment in Skolniks, the asset value in his portfolio was about \$35,000.00. According to the Claim, Skolniks comprised 63% of the Claimant's portfolio in September of 1992, 89% of the portfolio by November of 1992 and 97% at a later point. Lawrence claimed that within the first few months of the initial Skolniks investment, a substantial majority of his investments was converted to Skolniks' holdings at the urging of Finstad. The value of Skolniks stock allegedly increased substantially in 1992 and 1993 boosting the value of Lawrence's portfolio to \$172,847.06. According to the Claimant, he specifically requested on several occasions during 1993 and 1994 that Finstad sell a portion of the Skolniks stock in order to invest in other securities and diversify his portfolio yet Finstad aggressively discouraged him and reiterated his belief that the price would rise to \$50.00. As alleged, when the Skolniks stock began to dramatically decline in value in January of 1994, Lawrence expressed his concerns to Finstad, again suggesting selling a portion of the holdings but Finstad convinced Lawrence not to sell. Throughout the remainder of 1994 and early 1995, Lawrence was allegedly unable to reach Finstad over the telephone despite repeated attempts. Lawrence made other specific allegations against the Respondents including, but not limited to, negligent misrepresentation, fraud, breach of fiduciary duty. Claimant alleged that Oppenheimer was liable to him for the conduct of the broker under the theories of agency and respondeat superior. Claimant alleged that Finstad was liable under a general negligence theory for failing to sell the stock upon request and for maintaining a disproportionate investment portfolio.

In their respective Statements of Answer, Respondents Oppenheimer & Co., Inc. and Harold M. Finstad denied the allegations set forth in the Statement of Claim. Respondents asserted that Skolniks was a suitable recommendation for a well educated, young professional who had several years of investment experience and assumed an objective of business risk appreciation. Respondents denied any failure to execute orders and that the decision to hold or sell was the responsibility of the

customer and that Lawrence had at one point recouped half of his investment in Skolniks by the sale of warrants and shares and that it was his election not to sell more shares at a profit. Respondents asserted that Lawrence learned during 1993 and 1994 at least twice through different sources of circumstances that could have negatively affected the Skolniks stock but chose to hold his position and never complained about any failure to execute any sale instruction. As alleged, in December of 1993, Lawrence held 3000 warrants and 9000 shares of Skolniks stock with a net worth of \$146,625.00 and continued to hold these positions while the price of the stock declined and the first complaint to the Branch Manager about losing money on Skolniks was made on September 20, 1994. Respondents contended that the claim of \$154,875.00 in damages was more than six times the net investment in Skolniks of approximately \$22,890.00. Oppenheimer and Finstad asserted the following affirmative defenses;

1. The Statement of Claim failed to state any cause of action against Oppenheimer for which relief may be granted;
2. Claimant was an educated and knowledgeable person who, at all relevant times, understood the risks associated with investing in the stock market. All decisions to buy, hold, or sell security positions were the ultimate decisions of Lawrence. To the extent that there was any loss or diminution in value of Lawrence's account, such loss or diminution was the result of market fluctuation and was within the risk that Lawrence voluntarily assumed;
3. The damages alleged by Lawrence had no causal relationship with any act committed by or legally attributable to Oppenheimer;
4. Lawrence's claims were barred because representations complained of, if true, were merely expressions of opinion, not fact, and as such were not actionable;
5. Lawrence directed and/or authorized the purchase of all investments for his account. In addition, immediately after purchases and sales were made, he received transaction confirmations and monthly statements which inter alia advised him of the price, quantity and value of all positions and to contact the branch immediately if he had any objections to account activity. Lawrence did not timely object to any alleged over concentration in Skolniks or to any alleged unexecuted orders of sale. Consequently, Oppenheimer could not investigate and promptly take appropriate action. Accordingly, the claims were barred by the principles of waiver, estoppel and ratification;
6. The damages, if any, alleged to have been sustained by Lawrence were caused, in whole or in part, by Lawrence's failure to mitigate his damages;
7. Lawrence's comparative fault, lack of diligence and failure to notify Oppenheimer's management timely of any problems in the handling of his account barred any recovery of damages herein;
8. This controversy was governed by the laws of the State of New York. Accordingly, Lawrence was barred from recovering lost profits or attorneys' fees;
9. The measure of damages, if any, applicable to the case was the out-of-pocket loss, or net cost of Claimant's investment, rather than an award of profits which would be conjectural;

10. Oppenheimer had no knowledge of or reasonable grounds to believe in the existence of any facts by reason of which any alleged control person was alleged to be liable to Lawrence;
11. Oppenheimer did not make untrue statements of material facts or omit to state material facts the it knew or in the exercise of reasonable care could have known to be untrue or omitted; and
12. Lawrence's claims were barred in whole or in part by the applicable statutes of limitations and/or by the doctrine of laches.

#### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$154,975.00 in actual damages plus costs and attorneys' fees.

Respondent Oppenheimer & Co., Inc. requested that the claims asserted against it be denied in its entirety and that it be awarded its' costs.

Respondent Harold M. Finstad requested that the Statement of Claim be dismissed and that he be awarded his costs.

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

During the hearing, the Claimant moved to bar Respondent Harold M. Finstad's presentation of a defense due to the late filing of his Statement of Answer pursuant to Section 10314 of the Code of Arbitration Procedure (the "Code"). After hearing oral arguments from the parties, the arbitrators determined that Finstad would be allowed the opportunity to present his case and would be allowed to cross-examine other parties' witnesses. The arbitrators further decided that Finstad would not be allowed to assert affirmative defenses, call witnesses other than himself and produce any documentary evidence.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD REGULATION.

#### **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 Statement of Claim is hereby denied in its entirety;
2. The parties shall bear their own costs including attorneys' fees except for those fees specifically enumerated herein; and
3. Any relief requested not specifically granted is hereby denied in its entirety.

#### **FORUM FEES**

Forum fees are calculated at the rate of \$750.00 per hearing session. There were six (6) sessions x \$750.00 = \$4,500.00 in forum fees. Pursuant to Section 10332(b) of the Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 10332(c) of the Code, the National Association of Securities Dealers Regulation, Inc. ("NASD REGULATION") shall retain the non-refundable filing fee in the amount of \$200.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD REGULATION by the Claimant Donald F. Lawrence, Jr. Claimant Donald F. Lawrence, Jr. is hereby liable for and shall pay to the NASD REGULATION the sum of \$1,500.00 in additional forum fees.

Respondent Oppenheimer & Co., Inc. is hereby liable for and shall pay to the NASD REGULATION the member surcharge in the amount of \$350.00 assessed in accordance with Section 10333 of the Code. Respondent Oppenheimer & Co., Inc. is also liable for and shall pay to the NASD REGULATION the sum of \$2,250.00 in forum fees. Fees are payable to the National Association of Securities Dealers Regulation, Inc.

Signed:

Dated:

Russell E. Rains, Esquire  
Russell E. Rains, Esquire  
Public Arbitrator, Presiding Chair

October 25, 1996

Donald H. Fidler, Esquire  
Donald H. Fidler, Esquire  
Public Arbitrator

October 24, 1996

Janet E. Ginn  
Janet E. Ginn  
Industry Arbitrator

October 25, 1996

Date served by the NASD REGULATION: October 25, 1996