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## AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Hamilton Investments, Inc.

Claimant and Counter-Respondent,

v.

No. 95-04466

Kevin Lee Otto

Respondent and Counter-Claimant.

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Securities Dealers

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## REPRESENTATION OF PARTIES

Claimant and Counter-Respondent Hamilton Investments, Inc. (hereinafter sometimes referred to as "Claimant" or "Hamilton") was represented by Michael A. Kraft, Esq. of Gombert Kane & Fischer, Ltd. located in Chicago, Illinois.

Respondent and Counter-Claimant Kevin Lee Otto (hereinafter sometimes referred to as "Respondent" or "Otto") appeared pro se.

## CASE INFORMATION

The Statement of Claim was filed on or about September 19, 1995. Claimant's Submission Agreement was signed on September 7, 1995 by John R. Griggs, Vice President and Chief Financial Officer of Hamilton Investments, Inc.

The Statement of Answer was filed on or about November 16, 1995. Respondent's Submission Agreement was signed on November 13, 1995.

The Counterclaim was filed on or about April 22, 1996.

The Answer to Counterclaim was filed on or about May 22, 1996.

## HEARING INFORMATION

9609175

A telephonic pre-hearing conference was held on June 24, 1996 for one (1) session.

The Hearing was held on:

February 12, 1996 for one (1) session;  
July 22, 1996 for three (3) sessions; and  
July 23, 1996 for two (2) sessions.

The Hearing location was Milwaukee, Wisconsin

### **CASE SUMMARY**

Claimant Hamilton Investments, Inc. alleged that it and Respondent Kevin Lee Otto, a registered representative in one of Hamilton's branch offices, voluntarily entered into a promissory note (the "Note") on April 18, 1991. Claimant asserted that, pursuant to the terms of the Note, Respondent was loaned the sum of \$28,000 by Claimant. Claimant asserted that the Note provided that, in the event Respondent's employment terminates during the term of the Note, the entire amount shall become due and payable after the date of Respondent's termination of employment. Claimant maintained that Respondent resigned from Hamilton on August 18, 1992. Claimant alleged that, pursuant to the terms of the Note, the remaining principal balance due and owing under the Note was the amount of \$21,000, plus interest in the amount of \$875.85. Claimant asserted that, in addition, interest at a rate of 9.5% has accrued in the amount of \$5,995.12. Claimant contended that, to date, Respondent has failed to honor the remaining obligation under the Note.

Respondent Kevin Lee Otto denied all liability to Claimant in the Statement of Answer. Respondent alleged that Claimant's lack of service and support, its show of behavior unbecoming of a broker-dealer, and its unethical securities pricing forced Respondent to terminate employment with Claimant. Respondent asserted that Claimant kept several thousand dollars against commissions due Respondent upon his departure. Respondent maintained that these commissions were not reflected in the alleged amount owed. Respondent contended that for approximately one and three quarter years after Respondent's termination, Hamilton never stated that any funds were owed to it, nor made any attempt to contact Respondent.

In the Counterclaim, Respondent alleged that he agreed to work for Hamilton based on an agreement whereby he would receive a 45% payout on all his commissions. Respondent asserted that Claimant cut his commission payout from 45% to 25% before the first year of his employment. Respondent maintained that Claimant lacked products and services necessary for

9609195

Respondent to service his clients. Respondent asserted that due to his termination from Hamilton, Respondent suffered a significant loss of his customer bases and therefore, a significant loss of future earnings.

Claimant denied all liability to Respondent in its Answer to Counterclaim. Claimant alleged that no commissions were **wrongfully** withheld from Respondent's pay. Claimant asserted that the 45% payout was only for Respondent's first twelve months of employment. Claimant contended that there was no legal support for Respondent's claim of 1.5 million in lost earnings based on his alleged claim of fraudulent inducement of contract.

### **RELIEF REQUESTED**

Claimant requested an award of damages in excess of \$27,842.97, which includes: the principal balance of \$21,000; interest accrued during the period of 4/16/92 through 9/17/92 at the contract rate of 9.5% or \$847.85; interest due from 9/17/92 through 9/18/95 at the contract rate of 9.5% or \$5,995.12; interest at \$5.47 per day from 9/18/95 to date of payment; attorneys' fees; and any other relief deemed just.

Respondent requested that the Statement of Claim be dismissed along with an award of all other relief deemed justified.

In the Counterclaim, Respondent requested: commissions earned but withheld after his termination; the difference between the 25% and 45% payout based on Respondent's gross commissions; lost future earnings in an amount not less than \$1.5 million dollars; lost future benefits; attorneys' fees of no more than \$1,900; punitive damages; and an award of all other relief deemed appropriate.

In the Answer to Counterclaim, Claimant requested that the Counterclaim be dismissed in its entirety and an award of all relief requested in its Statement of Claim.

### **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 receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

### **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. That Respondent and Counter-Claimant Kevin Lee Otto is liable for, and shall pay to Claimant and Counter-Respondent Hamilton Investments, Inc. compensatory damages in the amount of Five Thousand Dollars and No Cents (\$5,000.00), inclusive of interest;
2. That the Counterclaim is hereby dismissed in its entirety with prejudice;
3. That the parties shall each bear their own costs, expenses, and attorneys' fees incurred in this matter; and
4. That other than forum fees which are specified below, all other claims and requests for relief not specifically awarded are, and each of them, hereby dismissed in their entirety with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$600 per hearing session and \$300 per pre-hearing session, if any. There was one (1) pre-hearing session x \$300 = \$300 in forum fees. There were six (6) hearing sessions x \$600 = \$3,600 in forum fees. Total forum fees = \$3,900. Pursuant to §44 (b) of the NASD Code of Arbitration Procedure (the "Code"), 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 §44 (c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant and Counter-Respondent Hamilton Investments, Inc. NASD Regulation, Inc. Office of Dispute Resolution shall retain the postponement fee in the amount of \$600 previously deposited by the Claimant and Counter-Respondent Hamilton Investments, Inc. NASD Regulation, Inc. Office of Dispute Resolution shall also retain the Section 45 Member Surcharge in the amount of \$200.

Pursuant to §44 (c) of the Code, Claimant and Counter-Respondent Hamilton Investments, Inc. is liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$1,200. Pursuant to §44 (c) of the Code, Respondent and Counter-Claimant Kevin

9609175

NASD Regulation, Inc. Office of Dispute Resolution  
Arbitration No. 95-04466 Award Page 5 of 5

Lee Otto is liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$1,800. Pursuant to §44 (a) and §44 (c) of the Code, Respondent and Counter-Claimant Kevin Lee Otto is further liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution the non-refundable filing fee in the amount of \$500 incurred at the time of filing the Counterclaim.

**Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Concurring Arbitrators' Signatures

\s\ Gerald A. Grossman  
Gerald A. Grossman  
Chairperson  
Industry Arbitrator

August 30, 1996  
Dated:

\s\ John E. Sundeen  
John E. Sundeen  
Panelist  
Industry Arbitrator

August 30, 1996  
Dated:

\s\ Terry F. Peppard  
Terry F. Peppard  
Panelist  
Industry Arbitrator

August 26, 1996  
Dated :

For NASD use only:  
Date award served on the parties: Seotember 16, 1996