

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Richard D. Niemi,

Claimant,

and

No. 95-05360

Equity Securities Trading Co., Inc.,

Respondent.

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### **REPRESENTATION OF PARTIES**

Claimant Richard D. Niemi was represented by Daniel P. Taber, Esquire, located in Minneapolis, Minnesota.

Respondent Equity Securities Trading Co., Inc. was represented by Vincent D. Louwagie, Esquire of Fruth & Anthony, P.C., located in Minneapolis, Minnesota.

### **CASE INFORMATION**

Claimant Richard D. Niemi's Statement of Claim was filed on or about November 14, 1995. Claimant Richard D. Niemi's Reply to Counterclaim was filed on or about January 24, 1996. Claimant Richard D. Niemi's Submission Agreement was signed on January 28, 1993..

Respondent Equity Securities Trading Co., Inc.'s Statement of Answer and Counterclaim was filed on or about January 10, 1996. Respondent Equity Securities Trading Co., Inc.'s Submission Agreement was signed on December 20, 1995, by Nathan Newman, President of Equity Securities Trading Co., Inc.

### **HEARING INFORMATION**

A pre-hearing conference was held on July 15, 1996, for one (1) session.

The hearing was held on:     December 2, 1996, for two (2) sessions;  
                                      December 3, 1996, for two (2) sessions; and  
                                      December 4, 1996, for two (2) sessions.

The hearing was held in Minneapolis, Minnesota.

### CASE SUMMARY

Claimant Richard D. Niemi ("Claimant") alleged that Equity Securities Trading Co., Inc. ("Respondent") made misrepresentations and omissions of material facts. Claimant asserted that Respondent's representative, Claimant's stockbroker, contacted Claimant in the fall of 1989 and recommended buying Nuclear Support Services, Inc. ("Nuclear") stock, in which Respondent was a market maker. According to Claimant, Respondent's representative stated that he was very familiar with Nuclear, that he had in depth knowledge of the company's management and operations, that Nuclear was about to be bought out at \$16 to \$22 per share when it was currently selling at \$7 to \$8 per share, and that Claimant would double his money in three to four months. Claimant further asserted that due to Respondent's representative's assurances and inducements to buy and buy more Nuclear stock, he relied on these representations and recommendations and made the following purchases of Nuclear stock:

- 1,500 shares on November 13, 1989;
- 4,000 shares between November 22, 1989 and December 7, 1989;
- 2,000 shares between December 22, 1989 and January 3, 1990;
- 2,400 shares between January 18, 1990 and February 5, 1990;
- 500 shares on or about April 4, 1990;
- 6,025 shares on or about April 4, 1990 (through other brokerage firms);
- 1,600 shares on April 9, 1990;
- 5,560 shares on April 9, 1990 (through other brokerage firms);
- 2,000 shares on October 2, 1990;
- 4,800 shares on October 2, 1990 (through other brokerage firms);
- 6,600 shares between October 24, 1990 and November 2, 1990;
- 400 shares on October 24, 1990 (through other brokerage firms); and
- 2,500 shares between January 22, 1991 and January 24, 1991.

In April, 1991, according to Claimant, Respondent's representative contacted him and informed him that Nuclear was trading in about \$5 per share and was going nowhere, and that Claimant could recover his losses by selling Nuclear stock and buying Mentor stock because it had a new product that was about to get FDA approval and that its stock was going to at least double. Claimant stated that he again relied on the advice and recommendations of Respondent's representative and sold all of his Nuclear stock between April 11, 1991 and April 16, 1991, and bought 4,800 shares of Mentor stock for \$105,123.50. Claimant stated that subsequent to buying the Mentor stock, its price dropped, and that when he eventually sold this stock in 1992, he suffered a loss in the amount of \$49,279.40. Claimant alleged that Respondent's representative breached his fiduciary duty to Claimant in recommending Nuclear and Mentor stock. Claimant further alleged that he believed that the markup charged by Respondent for the Nuclear stock was excessive, and was an inducement to Respondent's representative to recommend it. Consequently, Claimant complained of losses in the amounts of \$89,838.04 from buying Nuclear stock through Respondent, \$75,909.37 from buying

Nuclear stock through other brokerage firms, and \$49,279.40 from buying Mentor stock through Respondent.

Respondent denied the allegations set forth in the Statement of Claim. Respondent stated that Claimant is a wealthy, sophisticated, and experienced investor. Furthermore, Respondent alleged that Claimant owes it a debit balance for shares he refused to pay for. Respondent asserted that on May 25, 1994, Claimant ordered 3,000 shares of MCDC Casino Corp. for an initial public offering price of \$6.00 per share, for a total purchase price of \$18,000. Respondent further asserted that it confirmed the order with Claimant and provided him with a confirmation sheet. However, according to Respondent, when the price of the stock declined, Claimant refused to pay for the shares and denied that he ever ordered the stock. Respondent claimed that the stock was sold for non-payment at a loss of \$8,253.50.

Claimant denied the allegation set forth in the counterclaim. Claimant stated that he did not order the stock at issue in the counterclaim, and upon receipt of a confirmation statement for the purchase of the 3,000 shares of MCDC Casino Corp. he immediately called and complained and objected to the order, and then made a written objection and demanded that the purchase order be cancelled. Claimant further stated that Respondent brought this same claim 15-18 months ago, but dropped the claim and removed the disputed debit from Claimant's account.

#### **RELIEF REQUESTED**

Claimant Richard D. Niemi requested: an award in the amount of \$215,026.81 in compensatory damages; an award for interest; and an award for costs and expenses, including attorney fees. Claimant Richard D. Niemi further requested that the counterclaim be dismissed in its entirety and that he be awarded his costs in defending the counterclaim.

Respondent Equity Securities Trading Co., Inc. requested that the claims asserted against it be dismissed in their entirety and an award in the amount of \$8,253.50 for compensatory damages plus interest.

#### **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 Equity Securities Trading Co., Inc. is liable for and shall pay claimant Richard D. Niemi \$80,479.54 in compensatory damages, plus interest which begins to accrue from the date of this award;
2. That claimant Richard D. Niemi is liable for and shall pay respondent Equity Securities Trading Co., Inc. \$8,253.50 in compensatory damages, plus interest which begins to accrue from the date of this award; and
3. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conferences x \$300 = \$300 in forum fees, and there were six (6) hearing sessions x \$750 = \$4,500 in forum fees. Total forum fees are \$300 + \$4,500 = \$4,800. Pursuant to §10332(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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Richard D. Niemi.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by respondent Equity Securities Trading Co., Inc.

Claimant Richard D. Niemi is liable for and shall pay postponement fees in the amount of \$750. Claimant Richard D. Niemi is also liable for and shall pay forum fees in the amount of \$1,650 (= ½\$4,800 total forum fees - \$ 750 hearing session deposit).

Respondent Equity Securities Trading Co., Inc. is liable for and shall pay its non-refundable filing fee in the amount of \$500 pursuant to §10332(c) of the Code. Respondent Equity Securities Trading

Co., Inc. is also liable for and shall pay forum fees in the amount of \$2,400 (= 1/2\$4,800 total forum fees).

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

Dated:

/s/ Charles D. Reite  
Charles D. Reite, Esquire  
Public Arbitrator, Presiding Chair

January 9, 1997

/s/ Arlen G. Restad  
Arlen G. Restad  
Public Arbitrator

January 9, 1997

/s/ Paul J. Hennen  
Paul J. Hennen  
Industry Arbitrator

January 21, 1997