

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

John Siragusa,

Claimant,

and

No. 96-00700

Robert Smith, and Tom Niemczyk,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimant John Siragusa ("Claimant") appeared pro se.

Respondents Robert Smith ("Smith") and Tom Niemczyk ("Niemczyk") (hereinafter collectively referred to as "Respondents") did not appear at the hearing and were unrepresented. Respondents were previously represented by Gregg R. Evangelist, Esquire of Ormsten & Evangelist located in Jericho, New York.

### **CASE INFORMATION**

The Statement of Claim was filed on or about February 15, 1996.

Claimant's Submission Agreement was signed on February 12, 1996.

Respondents' Joint Statement of Answer was filed on or about April 3, 1996.

NASD Regulation, Inc. Office of Dispute Resolution has no record of a signed Submission Agreement from Respondents Smith and Niemczyk.

### **HEARING INFORMATION**

No pre-hearing conferences were held.

The hearing was held on February 25, 1997 for one (1) session.

The hearing was held in New Orleans Louisiana.

### CASE SUMMARY

Claimant alleged that Respondents, as employees of Stratton Oakmont, Inc., made omissions and misrepresentations of material facts, sold him unsuitable investments, and were negligent in the handling of his investments. Claimant described himself as a conservative investor who had never invested in individual stocks until he was overcome by Respondents' sales pressure. Claimant contended that he was contacted by phone by Respondents who began a high pressure sales pitch for investing in individual stocks recommended by Stratton Oakmont, Inc. Claimant asserted that Respondent Niemczyk mislead him by stating that: (1) the investments recommended could outperform Claimant's mutual funds; (2) that risk should be of no concern because Respondent Niemczyk would limit and control any risk of losses through very close attention, close contact with Claimant, and the use of sell orders; and (3) that Respondent Niemczyk would earn Claimant's confidence through his performance. Claimant alleged that, based on Respondents' persistent and persuasive sales tactics, Claimant made various investments through Respondents including, Calloway Golf stock; Madden Shoe stock, Modular Vision Systems stock; and Hemispherx Biopharma stock. Claimant alleged that, as a result of Respondents' actions, Claimant has incurred a total loss in the amount of \$45,342.50.

Respondents denied the allegations set forth in the Statement of Claim. Respondents alleged that, even if Claimant's allegations were true, he exaggerated his calculation of damages by failing to account for a \$11,262 net gain in his account. Respondents asserted that Claimant indicated that his investment objectives included growth and speculation, which he confirmed by signing a customer agreement on July 21, 1995. Respondents contended that they made certain that Claimant fully understood the risks he was assuming, and confirmed his investment objectives through an account-opening disclosure letter sent to him on July 19, 1995. Respondents maintained that every trade was discussed prior to the transaction, and that each trade was fully authorized, paid for, and confirmed in writing. Respondents contended that, despite the fact that the Claimant received confirmations and monthly statements for all of the transactions in his account, he never objected to any of them as is required under the customer agreement.

Respondents made the following affirmative defenses, including, but not limited to: (1) New York law applies to this proceeding pursuant to the customer agreement; (2) Claimant's claims are barred in whole or in part by the agreement between the parties; (3) Claimant's claims fail to state a cause of action for which relief can be granted; (4) to the extent Claimant is attempting to set forth a claim for fraud, the Statement of Claim fails to plead fraud with particularity and fails to set forth specific facts underlying the elements of an action for fraudulent misrepresentation; (5) Claimant's damages,

if any, have no causal relationship with any act committed by or legally attributable to Respondents; (6) Claimant neither reasonably relied to his detriment on any action or inaction of the Respondents, nor any action legally attributable to Respondents; (7) Claimant is barred from recovery of any damages due to his greed, negligence, comparative fault, lack of diligence, failure to mitigate his damages, and failure to conduct his financial affairs reasonably and responsibly; (8) Claimant knowingly and voluntarily assumed the risk of his investments; (9) Claimant is limited to actual damages or net loss; (10) Respondents discharged their responsibilities in a professional and ethical manner and all of Respondents' actions were well within the parameters of accepted brokerage procedure and all exchange and governmental regulations; (11) Claimant is estopped from recovery due to his approval, authorization, and ratification of Respondents' actions; and (12) Respondents' actions are not the proximate cause of Claimant's losses.

### **RELIEF REQUESTED**

Claimant requested an award for compensatory damages in the amount of \$45,342.50, to be adjusted for market value changes, plus interest and related costs.

Respondents requested that the claims asserted against them be dismissed with prejudice.

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

Claimant originally named Stratton Oakmont, Inc. as a Respondent in this matter, together with Respondents Smith and Niemczyk. Pursuant to an Order entered by the United States District Court upon the application of the Securities Investor Protection Corporation, all matters concerning Stratton Oakmont, Inc. were indefinitely stayed. The undersigned panel of arbitrators acknowledge that, pursuant to the United States District Court Order, the Claimant had no ability to continue this proceeding against Stratton Oakmont, Inc. so long as the stay is in place, but that this matter could proceed against the remaining named Respondents.

Respondents Smith and Niemczyk failed to appear at the hearing. Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrators have determined that Respondents have been properly served with the Statement of Claim pursuant to §10302 and §10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that Respondents had received due notice of the hearing as required under §10315 of the Code and that arbitration of the matter would proceed pursuant to §10318 of the Code. The panel specifically determined that notice of the hearing was duly given to the Respondents through prior counsel.

Respondents did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration, but they are required to submit to arbitration pursuant to §10301 of the Code and having answered the claim are bound by the determination of the arbitration panel on all issues submitted.

The Award in this matter may be executed in counterpart copies or a handwritten, signed Award may be entered. In either case, the parties will 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. Respondents Robert Smith and Tom Niemczyk are jointly and severally liable for and shall pay to Claimant John Siragusa compensatory damages in the amount of Five Thousand Dollars and No Cents (\$5,000.00), plus interest at 9.25%, which shall begin to accrue from the date of this award and shall continue to accrue until the date this award is paid in full;
2. Respondents Robert Smith and Tom Niemczyk are jointly and severally liable for and shall reimburse Claimant John Siragusa for his filing fee and hearing session deposit paid to the NASD Regulation, Inc. Office of Dispute Resolution in the amount of Five Hundred Twenty Dollars and No Cents (\$520.00); and
3. 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 \$400 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there was one (1) hearing session  $\times \$400 = \$400$  in forum fees. 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 \$120 and shall **retain** as forum fees the hearing

session deposit in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant John Siragusa.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$200 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Stratton Oakmont, Inc.

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

Concurring Arbitrators' Signatures

\s\ Edward J. Gay, III, Esquire  
Edward J. Gay, III, Esquire  
Chairman  
Public Arbitrator

March 17, 1997  
Dated

\s\ Louis M. Jones, Esquire  
Louis M. Jones, Esquire  
Panelist  
Public Arbitrator

March 17, 1997  
Dated

\s\ Frederick H. Bruce  
Frederick H. Bruce  
Panelist  
Industry Arbitrator

March 13, 1997  
Dated

For NASD Regulation use only:  
Date Award served on the parties: March 21, 1997