

AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the matter of the arbitration between

LARRY CRAIG FLOWERS,

Claimant and Counter-Respondent,

and

Case Number 96-01003

SMITH CULVER, INC.

Respondent,

and

JEFFREY R. SENDER,

Respondent and Counter-Claimant.

REPRESENTATION OF PARTIES

Claimant Larry Craig Flowers was represented by Stuart N. Wilson, Esq. and Elyssa Schnurr, Esq., with the law firm of Wilson & Flanz, P.C. located in Houston, Texas.

Respondents Smith Culver, Inc. and Jeffrey R. Senger were represented by William J. Moriarty, Esq., with the Law Offices of William J. Moriarty, located in San Francisco, California.

CASE INFORMATION

Claimant Larry Craig Flowers' original Statement of Claim was filed on or about February 13, 1996, and an amended Statement of Claim was filed on or about April 8, 1996.

The Submission Agreement of Claimant Larry Craig Flowers was signed on February 8, 1996.

Respondents Smith Culver, Inc. and Jeffrey R. Senger's joint Statement of Answer and Respondent Jeffrey R. Senger's Statement of Counter-Claim was filed on or about June 7, 1996.

Respondent Smith Culver, Inc.'s Submission Agreement was signed on June 7, 1996 by Thomas N. Smith, Chairman and Chief Executive Officer.

Respondent Jeffrey R. Senger's Submission Agreement was signed on June 7, 1996.

Claimant Larry Craig Flowers' Reply to the Counter-Claim was filed on or about October 17, 1996.

HEARING INFORMATION

The hearing was held on March 13, 1997 in Houston, Texas for a total of two (2) sessions.

CASE SUMMARY

Claimant, Larry C. Flowers ("Claimant"), made the following allegations against Respondents, Smith Culver, Inc. ("Smith Culver") and Jeffrey R. Senger ("Senger")(hereafter collectively referred as to "Respondents"):

1. Claimant's account at Smith Culver, Inc. was margined without his authorization;
2. The sale commissions on certain "losing stocks" were excessive and contrary to the agreement reached between Claimant and Jeffrey R. Senger;
3. Respondents engaged in activity which amounted to "churning" of Claimant's account;
4. Respondents engaged in false and misleading advertising; and
5. Respondents gave Claimant inappropriate investment advice which was contrary to Claimant's plan and his investment philosophy and objectives.

More specifically, Claimant alleged that he and Senger entered into an agreement, whereby Senger would purchase technology stocks, at approximately \$10.00 per share, and watch said stocks in an effort to ride them to new highs for a three or four point gain, and then Senger would sell said stocks. Claimant and Senger agreed that if the stocks were "losing stocks", then Senger's "sell" commissions would be discounted. Claimant further alleged that although he never authorized margin trading, most of his trades were margined. In the beginning, when Claimant sold his "losing stocks", Senger did as agreed, and discounted the commissions. However, towards the end of their relationship, Senger allegedly charged excessive commissions on the losing trades. In August of 1995, contrary to Claimant's investment objectives and the investment plan in effect, and without Claimant's approval, Senger allegedly purchased approximately \$70,000.00 worth of stock on margin when Claimant only authorized stock to be purchased using monies in his cash account of approximately \$40,000.00. These last trades comprising approximately \$70,000.00, did not fit with the investment plan at all, in that the average price per share was \$20.00 rather than \$10.00, and one of the stocks was not even in the technical sector.

In their Answer, Respondents denied all allegations of wrongdoing contained in the Statement of Claim filed by Claimant. Respondents alleged that the standard Client Agreement signed by Claimant did authorize margin trading. Additionally, Respondent Senger denied entering into any

agreement with Claimant with respect to the commissions to be charged on "losing stock" sales. In addition, Respondents alleged that Claimant was fully aware of all transactions taking place in his account, and said transactions were all authorized by Claimant. Additionally, Senger filed a counterclaim against Claimant, alleging that Claimant engaged in acts which amounted to libel, slander, and defamation of Senger, which caused Senger financial and emotional injury. Senger alleged that Claimant defamed him by Claimant complaining about the transactions in his account, to Smith Culver, the SEC, and the NASD. Because of the pending investigation surrounding Senger's actions, Senger alleged that he was delayed at least one month before beginning work with his new firm of Collner Higgins, and therefore lost commissions.

Claimant categorically denied any sort of defamation of Senger, in that Claimant was merely following proper procedure by voicing his complaints and concerns about various actions which took place in his account with Smith Culver, to Smith Culver, the SEC and the NASD.

RELIEF REQUESTED

Claimant Larry Craig Flowers requested an award of actual damages in the amount of \$13,138.89, plus an award of punitive damages in an unliquidated amount, as well as costs, attorney's fees and other damages to be considered and awarded by the arbitrator.

Respondents Smith Culver, Inc. and Jeffrey R. Senger requested that Claimant's claims be dismissed in their entirety. Respondent Jeffrey R. Senger requested actual damages of \$10,189.00 on his counterclaim for defamation. Respondents also requested that they be awarded attorney's fees and costs.

OTHER MATTERS CONSIDERED AND DECIDED

The parties at the hearing agreed to receive conformed copies of the award while the original remains on file with the NASD Regulation, Inc. Office of Dispute Resolution.

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. Respondents Smith Culver, Inc. and Jeffrey R. Senger are hereby, jointly and severally, liable for and shall pay to Claimant Larry Craig Flowers the sum of \$5,984.00 in actual damages plus pre-award simple interest on that amount at a rate of 6% per annum from September 23, 1995 until the date the award is served on the parties by the NASD Regulation, Inc. Office of Dispute Resolution. Respondents Smith Culver, Inc. and Jeffrey R. Senger are also, jointly and severally, liable for and shall pay to Claimant Larry Craig Flowers post-award simple interest on the above amount of \$5,984.00 in actual damages at the rate of 10% per annum from the date the award is served on the parties by the NASD

Regulation, Inc. Office of Dispute Resolution until the date the award is paid;

2. Respondent Jeffrey R. Senger's Counter-Claim against Claimant Larry Craig Flowers is hereby denied in its entirety and dismissed with prejudice;
3. Respondents Smith Culver, Inc. and Jeffrey R. Senger are hereby, jointly and severally, liable for and shall pay to the Claimant Larry Craig Flowers the sum of \$5,000.00 in attorneys' fees. In determining to award attorneys' fees, the Arbitrator considered the pleadings, the evidence, and the testimony presented by the parties;
4. The parties shall bear their own costs, except for forum fees which are specifically addressed below;
5. Any relief which is not specifically granted herein is hereby denied in its entirety and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$400.00 per hearing session. There were two (2) hearing sessions x \$400.00 = \$800.00 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 hours or less.

Pursuant to Section 10332(c) of the Code, the National Association of Securities Dealers Regulation, Inc. ("NASD Regulation") Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$100.00 and shall retain as forum fees the hearing session deposit of \$300.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant Larry Craig Flowers. The NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$275.00 previously submitted by Respondent Jeffrey R. Senger toward the non-refundable filing fee of \$500.00 for the Counter-Claim.

Pursuant to Section 10332(c) of the Code, Respondents Smith Culver, Inc. and Jeffrey R. Senger are hereby, jointly and severally, liable for and shall pay to Claimant Larry Craig Flowers the sum of \$300.00 as reimbursement of the hearing session deposit. Respondents Smith Culver, Inc. and Jeffrey R. Senger are hereby liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$500.00 in additional forum fees.

Pursuant to Section 10332(c) of the Code, Respondent Jeffrey R. Senger is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the amount of \$225.00 for the balance of the claim filing fee for the Counter-Claim.

In accordance with Section 10333 of the Code, Respondent Smith Culver, Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$200.00 for the member surcharge.

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

Signed:

Dated:

George A. Sellnau, Esq.

March 25, 1997

George A. Sellnau, Esq.
Public Arbitrator, Chairman

Date served by the NASD Regulation, Inc. Office of Dispute Resolution:

March 25, 1997