

**N.A.S.D. AWARD****NASD Regulation, Inc. Office of Dispute Resolution****In the Matter of the Arbitration Between****Name of Claimants**

Community Diagnostic Centers, Inc.,  
H. Christopher Starkey and  
Louisa H. Starkey

NASD CASE NO. 96-01341

**Name of Respondents**

W.J. Gallagher & Company, Inc.,  
William J. Gallagher,  
Robert W. Kendrick,  
Robert P. Lentz, III, and  
Harold H. Harris

**REPRESENTATION**

For Claimants: Scott J. Link, Esq. and Tracy L. Gerber, Esq. of Ackerman, Link & Sartory, P.A., West Palm Beach, Florida filed a Notice of Appearance of Counsel on April 24, 1997. Scott J. Link, Esq. and John C. Kelly, Esq. of Ackerman, Link & Sartory, P.A. appeared on behalf of the Claimants at the evidentiary hearing of this matter.

For Respondents W.J. Gallagher & Co., Inc. ("Gallagher & Co.") and William J. Gallagher ("Gallagher"): Stephen Acker, Esq. of Acker, Kowalick & Whipple, Los Angeles, California.

For Respondent Robert P. Lentz, III ("Lentz"): Scott C. Ilgenfritz, Esq. of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., Tampa, Florida. Prior to April 23, 1997, Lentz was represented by Shannon Roberts Boyd, Esq. of Boyd & Chang, LLP, Newport Beach, California (see below).

For Respondents Robert Kendrick ("Kendrick") and Harold H. Harris ("Harris"): Shannon Roberts Boyd, Esq. of Boyd & Chang, LLP. On April 23, 1997, NASD Regulation, Inc. was advised that Boyd & Chang, LLP no longer represented Lentz or Harris. Thereafter, Harris appeared pro se. On October 28, 1997, NASD Regulation, Inc. was advised that Boyd & Chang, LLP no longer represented Kendrick in this matter.

**CASE INFORMATION**

Statement of Claim filed by Community Diagnostic Centers, Inc. ("CDC") on March 27, 1996. First Amended Statement of Claim adding H. Christopher Starkey and Louisa H. Starkey as Claimants filed on November 19, 1997. CDC's Submission Agreement signed on March 26, 1996 by H.C. Starkey, President of Community Diagnostic Centers, Inc. H. Christopher Starkey's Submission Agreement signed on May 5, 1998. Louisa H. Starkey's Submission Agreement signed on May 5, 1998.

Statement of Answer of Gallagher & Co. and Gallagher filed on May 15, 1996. Statement of Answer to Amended Statement of Claim filed by Gallagher & Co. and Gallagher on May 1, 1998. Gallagher & Co.'s Submission Agreement signed on August 20, 1996 by William J. Gallagher, President of W.J. Gallagher & Co., Inc. Gallagher's Submission Agreement signed on August 20, 1996.

Statement of Answer filed by Lentz, Kendrick and Harris on June 4, 1996. Lentz's Submission Agreement signed on November 10, 1997. Kendrick and Harris did not file executed Submission Agreements.

Cross-Claim of Respondents Gallagher & Co. and Gallagher against Kendrick filed on May 15, 1996. Answer to Cross-Claim filed by Kendrick on May 23, 1996.

Counterclaim for Breach of the Duty of Good Faith and Fair Dealing, and for Fraud against CDC filed by Kendrick, Lentz and Harris on June 4, 1996. Answer to counterclaim filed by CDC on November 12, 1996.

Answer to First Amended Statement of Claim filed by Lentz on March 20, 1998. Amendment to Prayer Clause in Answer to First Amended Statement of Claim filed by Lentz on April 15, 1998. Notice of Voluntary Dismissal of Counterclaim, without prejudice, as a counterclaimant filed by Lentz on April 15, 1998.

#### HEARING INFORMATION

On February 24, 1998, a telephonic pre-hearing conference lasting one (1) session was conducted with the Chairperson of the arbitration panel. On April 24, 1998, a telephonic pre-hearing conference lasting one (1) session was conducted with the arbitration panel (the "Panel"). On May 4, 5, 6 and 7, 1998, in Fort Lauderdale, Florida, hearings lasting eight (8) sessions were conducted with the Panel.

#### CASE SUMMARY

Claimants alleged the following: that Respondents demanded and received unearned selling commissions and fees in connection with the underwriting of Claimants' securities by Respondents; that the actual fees paid by the Claimants equalled 40% of the gross proceeds of the offering and were far in excess of the reasonable underwriting fees permitted by existing securities rules and regulations; that Respondents threatened to send the underwriting proceeds back to the investors if Claimants did not agree to the payment of the unearned fees; and, in addition, that Respondents failed to supervise their agents and prevent the extortion of the unearned commissions and fees from Claimants.

Respondents W.J. Gallagher & Co., Inc. and Gallagher denied the allegations made by Claimants and asserted the following: that they did not agree to act as the selling agent for the private placement offering and as the underwriter for an eventual public offering of CDC; that they never authorized any of the transactions relating to the promotion, placement or selling of securities of CDC; and, that all of the actions taken by, or agreements entered into between Mr. Starkey and Kendrick, a registered representative at the Gallagher firm, were done so without the knowledge or authorization of Gallagher.

Gallagher & Co. and Gallagher asserted a cross-claim against Kendrick alleging that Kendrick was not authorized to engage in the conduct alleged by Claimants, and that such conduct, if it occurred, was beyond the course and scope of Kendrick's agency and authority as an employee of the Gallagher firm. Kendrick denied the allegations contained in the cross-claim.

Respondents Lentz, Kendrick and Harris also denied the allegations made by CDC in its Statement of

Claim, and asserted a counterclaim against CDC for breach of its duty of good faith and fair dealing and for fraud. Lentz, individually, further denied all allegations of wrongdoing made against him in the First Amended Statement of Claim, asserted numerous affirmative defenses thereto and denied any liability to the Claimants. Claimant CDC denied the allegations contained in the counterclaim against it.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages, including lost opportunity damages, in the amount of \$1,352,951.00 plus interest at the statutory rate, together with punitive damages and their attorneys' fees and costs incurred in connection with this action. Claimant CDC further requested that the Respondents' counterclaim be dismissed in its entirety.

Respondents W.J. Gallagher & Co., Inc. and Gallagher requested dismissal of all claims against them together with an award of their costs and attorneys' fees. Gallagher & Co. and Gallagher further requested an award on its cross-claim against Kendrick for full or partial indemnification of any damages, attorneys' fees or related expenses incurred by them in this matter, plus costs and attorneys' fees.

Respondents Lentz, Kendrick and Harris requested dismissal of all claims against them and that they be awarded their costs and attorneys' fees, together with damages on their counterclaim in an unspecified amount. Kendrick further requested that the cross-claim against him by Gallagher & Co. and Gallagher be dismissed in its entirety, and that he be awarded his costs and attorneys' fees incurred in defense of the cross-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 originals remain on file with NASD Regulation, Inc.

Respondents Harris and Kendrick did not file with the NASD Regulation, Inc., Office of Dispute Resolution properly executed submissions to arbitration but were required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, are bound by the determination of the arbitration panel on all issues submitted.

All claims against Respondent Kendrick were stayed on September 4, 1997 in view of his Chapter 7 bankruptcy filing. Therefore, the Panel did not reach any determinations with respect to this Respondent.

During the evidentiary hearing, the Claimants announced on the record before the arbitration panel that they were dismissing their claims against Respondent Harris without prejudice. Claimants further announced on the record that they were dismissing their claims against Respondent Lentz with prejudice, with Lentz and the Claimants to bear their own attorneys' fees and costs, and that any forum fees that might be allocated to Lentz by the arbitrators would be borne and paid by the Claimants.

#### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent W.J. Gallagher & Co., Inc. is found liable and shall pay compensatory damages to Claimants in the amount of \$201,392.00 plus post-award interest at the Florida statutory rate from the

date of this award through the date of payment.

2. All claims against Respondent William J. Gallagher are dismissed.
3. The counterclaim by Respondents Kendrick, Lentz and Harris against CDC is dismissed without prejudice.
4. All other claims for relief, including Claimants' request for punitive damages and the parties' requests for attorneys' fees and costs, are denied.

#### FORUM FEES

Pursuant to Rule 10332(c) of the Code, the Panel has assessed forum fees in the amount of \$9,300.00 (8 sessions x \$1,000.00 per session, plus 1 pre-hearing conference with the Panel x \$1,000.00 and 1 pre-hearing conference with the Chairperson x \$300.00) as follows:

1. Claimants are hereby assessed the sum of \$4,650.00 for which NASD Regulation, Inc. shall retain the \$700.00 hearing session deposit previously paid by Claimant CDC in partial satisfaction thereof, leaving a balance due in the amount of \$3,950.00.
2. Respondent W.J. Gallagher & Co., Inc. is hereby assessed the sum of \$4,650.00 for which NASD Regulation, Inc. shall retain the \$750.00 hearing session deposit previously paid by said Respondent in partial satisfaction thereof, leaving a balance due in the amount of \$3,900.00.

#### OTHER FEES

Pursuant to Rule 10332(a) of the Code, Claimant CDC has paid to NASD Regulation, Inc. the \$250.00 claim filing fee; Respondents Gallagher & Co. and Gallagher have paid to NASD Regulation, Inc. the \$500.00 cross-claim filing fee; and, Respondents Lentz, Kendrick and Harris have paid to NASD Regulation, Inc. the \$500.00 counterclaim filing fee.

Pursuant to Rule 10333 of the Code, Respondent Gallagher & Co. has further paid to NASD Regulation, Inc. the \$350.00 member surcharge previously invoiced.

Pursuant to Rule 10319, Claimant CDC has further paid to NASD Regulation, Inc. the sum of \$1,250.00 representing the fees for the postponements of the April 21 - 25, 1997 and November 10 - 14, 1997 scheduled hearing dates.

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

Concurring Arbitrators' Signatures  
Name

Public/Industry

\_\_\_\_\_/s/\_\_\_\_\_  
John Darling  
Chairperson

Industry

/s/  
John N. Breazeale

Industry

/s/  
R. Peter Olin

Industry

Date of Decision: July 13, 1998