

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Daniel J. Malicki

96-01516

Name of Respondents

Oppenheimer & Co., Inc.  
Keith Simons

REPRESENTATION

Claimant Daniel J. Malicki ("Claimant") was represented by Earl R. Frost, Jr., Esq., Frost & Danchak, Columbus, OH.

Respondents Oppenheimer & Co., Inc. ("Oppenheimer") and Keith Simons ("Simons") were represented by Michelle A. Murphy, Vice President, Oppenheimer & Co., Inc., New York, NY.

CASE INFORMATION

The Statement of Claim was filed April 8, 1996.

Claimant's Uniform Submission Agreement was signed April 1, 1996.

The Joint Statement of Answer of Oppenheimer and Simons (collectively "Respondents") was filed June 14, 1996.

Oppenheimer's Uniform Submission Agreement was signed June 13, 1996.

Simon's Uniform Submission Agreement was signed June 14, 1996.

HEARING INFORMATION

Hearing Dates/Sessions: January 21, 1997/2 sessions

Hearing Location: Doubletree Guest Suite Hotel  
Columbus, OH

CASE SUMMARY

Claimant alleged that Respondents failed to provide Claimant with competent and professional services and thereby breached their contractual and legal duties to Claimant. Claimant alleged Respondents induced him to purchase 2,000 shares of Smith-Micro Software ("Smith-Micro") on September 20, 1995 at \$14.50 per share by through a series of misrepresentations about the value of the security. Claimant alleged that Respondents failed to provide a prospectus dated September 18, 1995 to Claimant with his purchase confirmation or prior thereto, and, in fact, Claimant did not received the prospectus until October 3, 1995. Claimant alleged that Smith-Micro was not registered for sale in Ohio at the time that

Respondents solicited Claimant. Claimant alleged that Respondents' actions violated Rules 401, 405 and 723 of the New York Stock Exchange and Rules 1, 2 and 27 of the NASD Rules of Fair Practice. In addition, Claimant alleged Breach of Fiduciary Duty; Fraudulent Misrepresentations and Misleading Omissions; Possible Self-Dealing and Manipulation of Market Prices; Rescission and Suitability.

Respondents denied all allegations of wrong-doing as asserted in the Statement of Claim. Respondents maintained that Claimant informed them, contemporaneous with opening his account, that his investment objectives were income, moderate and long-term growth and business risk appreciation. Respondents maintained, in addition, that Claimant informed Respondents that his annual income was in excess of \$80,000.00, his net worth, exclusive of residence, in excess of \$200,000.00 and that he had twenty years of investment experience in various types of investments. Respondents maintained that every investment purchased in Claimant's account was consistent with Claimant's stated investment objective, including the shares of Smith-Micro. Respondents maintained that it was suggested to Claimant that he only purchase 1,000 shares of Smith-Micro but Claimant chose to be more aggressive and purchased 2,000 shares. Respondents maintained that a prospectus was sent to Claimant a few days after the purchase of Smith-Micro and the prospectus clearly disclosed risk factors including fluctuations in quarterly operating results, reliance on U.S. Robotics, technology change and competition. Respondents raised the affirmative defenses of failure to state a claim upon which relief can be granted; estoppel; ratification; contributory negligence; mitigation of damages; and a failure to timely notify Respondents of any complaint. Respondents maintained that any loss suffered by Claimant is the result of the market fluctuations and Claimant's own decisions.

#### RELIEF REQUESTED

Claimant is seeking compensatory damages in the amount of \$10,507.70 plus interest at the legal rate in Ohio of 10%. In addition, Claimant should be awarded his expenses, the cost of this proceeding and punitive damages in the arbitrator's discretion (\$5,000 is suggested), and all other relief to which Claimant may be entitled.

Respondents requested that the Statement of Claim be dismissed and that costs, disbursements and attorneys' fees be assessed to Claimant.

#### 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 the NASD.

#### 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 the Statement of Claim is dismissed in its entirety.
2. That each party shall bear its own costs and expenses with the exception of the forum fees as discussed below.
3. That any and all relief not specifically addressed herein is denied.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed:

2 sessions x \$400.00 = \$800.00

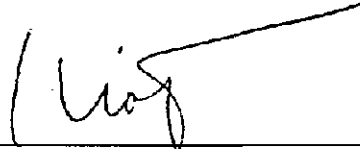
Forum Fees assessed against Claimant. Claimant is to receive credit for the \$400.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net assessment due of \$400.00.

Fees are payable to the National Association of Securities Dealers Regulation, Inc.

DATE

CONCURRING ARBITRATORS' SIGNATURES

2-4-97



\_\_\_\_\_  
Kevin R. McDermott, Chairman  
Public Arbitrator

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Michael Guy  
Public Arbitrator

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Robert B Holodnak  
Industry Arbitrator

Date Decision Served by NASD Regulation:

February 12, 1997

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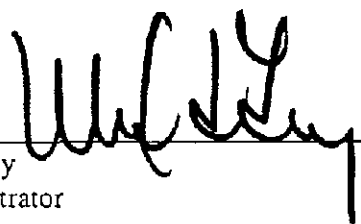
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