

NASD Regulation, Inc. AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant(s)

John Teixeira

96-02581

Name of Respondent(s)

Hunter International Securities, Inc.
Stephen H. Larkin
Michael C. Hiler

REPRESENTATION

Claimant John R. Teixeira ("Teixeira") was represented by Mitchell T. McRae, Esq. of Mitchell T. McRae, P.A., Boca Raton, Florida.

Respondents Hunter International Securities, Inc. ("Hunter") and Stephen H. Larkin ("Larkin") were represented by Howard A. Tescher, Esq. of Kipnis, Tescher, Lippman, Valinsky and Klein, Ft. Lauderdale, Florida.

Respondent Michael C. Hiler ("Hiler") appeared pro se.

CASE INFORMATION

Statement of Claim filed on: June 17, 1996. Claimant's Submission Agreement signed on: August 5, 1996.

Joint Statement of Answer filed by Respondents Hunter and Larkin on: August 12, 1996. Respondent Hunter's Submission Agreement signed on: August 19, 1996 by Howard C. Jones on behalf of Hunter. Respondent Larkin's Submission Agreement signed on: April 7, 1997.

Statement of Answer filed by Respondent Hiler on March 21, 1997. Respondent Hiler's Submission Agreement signed on: April 7, 1997.

HEARING INFORMATION

On April 7, 1997 in Ft. Lauderdale, Florida, a hearing lasting 2 sessions was conducted.

CASE SUMMARY

Claimant alleged that, from October 24, 1994 through June 30, 1995, the funds in Claimant's Qualified Individual Retirement Account were depleted through the selection of an unsuitable investment portfolio by Respondents. Claimant maintained that he had no prior experience in the stock market and that Respondent Hiler sold Claimant funds which were unsuitable for him and misrepresented the risks involved. Claimant maintained that Hiler knew that the funds which were to be invested represented Claimant's retirement savings and that Respondents had a fiduciary responsibility not to churn the account. Claimant maintained that he was not contacted prior to any decisions to buy or sell any of the investments notwithstanding the fact that many of the purchase orders were marked "unsolicited".

Respondents Hunter and Larkin denied all allegations of wrongdoing and alleged that Hunter was not a guarantor nor insurer of market performance with respect to securities it sold to its clients. Hunter and Larkin maintained that all the securities sold to Claimant were suitable considering Claimant's investment objectives and all risks associated therewith were explained to Claimant. Respondents Larkin and Hunter alleged that there was no churning in the account and that the Claimant at no time granted Respondents discretion to trade in the account. Larkin further alleged that he was, at no time, the office manager of Hunter.

Respondents Hunter and Larkin asserted affirmative defenses including waiver, estoppel, good faith, compliance with all applicable rules and regulations, lack of proximate cause, failure to state a cause of action, failure to mitigate damages, failure to allege reliance on any purported misrepresentations, and Claimant was a sophisticated investor and any losses resulted from Claimant's own investment decisions.

Respondent Hiler denied all allegations of wrongdoing and alleged that he relied upon the releases and filings made by the companies whose stock he sold to the Claimant as a basis for recommending said stock.

RELIEF REQUESTED

Claimant requested damages in the amount of \$17,425.27 plus interest and costs.

Respondents Hunter and Larkin requested dismissal of the claim plus costs.

Respondent Hiler requested dismissal of the claim.

OTHER ISSUES CONSIDERED & DECIDED

On March 4, 1997 Claimant filed a Motion to Compel Production of Documents and for Sanctions. On March 26, 1997 the arbitrator granted the motion to compel and ordered Respondents Hunter and Larkin to immediately produce the requested documents. The arbitrator took the Claimant's Motion for Sanctions under advisement and determined that it would be ruled on at the beginning of the April 7, 1997 hearing.

At the April 7, 1997 hearing, Respondent Larkin testified under oath that he did not have any of the documents requested in his possession. Counsel for Hunter admitted that no documents had been produced pursuant to the arbitrator's order nor had any officer or director of Hunter made a written response to the arbitrator's order to produce. The arbitrator advised the parties that he would continue to take the Motion for Sanctions under advisement and make a ruling thereon in conjunction with the final award. The arbitrator hereby grants Claimant's Motion for Sanctions and, in connection therewith, rules as follows:

The arbitrator will make an adverse inference regarding the documents that Hunter was ordered to and refused to produce. As a result of this adverse inference, the arbitrator will assume that the documents, if produced, would support Claimant's claims and allegations and would disprove and fail to support Hunter's defenses. In addition, the arbitrator will assume that the documents would provide a legal basis for the arbitrator's award of the monetary sanctions set forth in paragraph number three (3) below and would provide a legal basis for each and every aspect of the arbitrator's decision and award in this case, including the award of attorney's fees set forth in paragraph number four (4) below.

The parties have agreed that a handwritten, signed Award may be entered. In this case, the parties have agreed to receive a conformed copy of the Award while the original remains on file with the NASD.

AWARD

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

1. Respondents Larkin and Hiler are found not liable and, therefore, all claims against them are hereby dismissed.
2. Respondent Hunter is found liable and shall pay to Claimant the sum of \$17,284.00 plus interest at the rate of 8% per annum from October 24, 1994 to April 7, 1997 in the amount of \$3,403.62 for a total due to Claimant in the amount of \$20,687.62.
3. Respondent Hunter is also found liable and shall pay to Claimant the further amount of \$3,000.00 for reimbursement of Claimant's costs and expenses incurred in attempting to obtain the production of documents and the enforcement of the arbitrator's order of production.
4. Respondent Hunter is also found liable for attorney's fees pursuant to the adverse inference sanction described above in "Other Issues" and shall pay to Claimant the further amount of \$5,705.00. The arbitrator bases his authority to award attorney's fees on the Federal Arbitration Act and the underlying case law.
5. Respondent Hunter is also found liable and shall pay to Claimant the further amount of \$300.00 as a reimbursement of the hearing session deposit previously paid by Claimant to NASD Regulation, Inc.
6. Respondent Hunter is also found liable and shall pay to Claimant the further amount of

\$100.00 as a reimbursement of the claim filing fee previously paid by Claimant to NASD Regulation, Inc.

FORUM FEES

Pursuant to Rule 10332 (c) of the Code of Arbitration Procedure, the arbitrator has assessed forum fees in the amount of \$600.00 (2 sessions x \$300.00 per session).

1. Respondent Hunter is hereby assessed \$600.00 for which NASD Regulation, Inc. shall retain the \$300.00 previously deposited by Claimant in partial satisfaction thereof, leaving a balance due to NASD Regulation, Inc. of \$300.00.

2. Respondent Hunter is hereby assessed \$200.00 for the member surcharge pursuant to Rule 10333 of the Code.

Fees are payable to NASD Regulation, Inc.

Arbitrator's Signature

Name

Public/Industry

_____/s/_____
William M. Howard, Esq.

Public/Chairman

Date of Decision: May 1, 1997