

NASD REGULATION, INC. AWARD

OFFICE OF DISPUTE RESOLUTION

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In the Matter of the Arbitration Between

Name of Claimant

Dr. Paul K. Simmons, DDS E/B/P and P/S/P

96-03377

Name of Respondents

James Brennan, III  
\*Koegler, Morgan & Company, Inc.  
National Financial Services Corporation  
Brennan, Dyer & Company, L.L.C.

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REPRESENTATION

For Claimant Dr. Paul K. Simmons ("Claimant") appeared Thornwell F. Sowell, Esq., a solo practitioner located in Columbia, South Carolina.

For Respondents James Brennan, III ("Brennan"), Koegler, Morgan & Co., Inc. ("KM&C") and Brennan, Dyer & Co. ("BD&C"), appeared Leticia Alfonso, Esq., of the law firm Cushing, Morris et al located in Atlanta, Georgia.

For Respondent National Financial Services Corp. ("National") appeared Alicia Reines-Leo, Esq., in-house counsel.

CASE INFORMATION

Statement of Claim filed: August 6, 1996

Claimant's Submission Agreement signed on: July 26, 1996.

Joint Statement of Answer filed by Respondents KM&C, Brennan, and BD&C on: October 2, 1996.

Respondent, KM&C's Submission Agreement signed on: September 30, 1996.

Respondent Brennan's Submission Agreement signed on: September 30, 1996.

Respondent BD&C's Submission Agreement signed on: September 30, 1996.

Respondent National's Statement of Answer filed on: October 4, 1996.

Respondent National's Submission Agreement signed on: October 4, 1996.

**HEARING INFORMATION**

|                         |                 |   |              |
|-------------------------|-----------------|---|--------------|
| Hearing Dates/Sessions: | April 21, 1996  | - | Two Sessions |
|                         | April 22, 1996  | - | Two Sessions |
|                         | June 12, 1996   | - | Two Sessions |
|                         | June 13, 1996   | - | Two Sessions |
|                         | August 14, 1997 | - | Two Sessions |

The hearings were held in Charlotte, North Carolina at locations selected by NASD Regulation, Inc.

**CASE SUMMARY**

Claimant alleged that he is a trustee of the Dr. Paul K. Simmons DDS Employee Benefit Plan, and Profit Sharing Plan ("the Plan(s)"). Claimant went on to allege that Brennan had been his registered agent for several years and, in May, 1994, claimant executed a New Brokerage Account Application with National, with the understanding that Brennan was moving employment to KM&C, with National as the clearing broker. Claimant further alleged that he began to receive account statements and other papers from National which indicated that trades for the account were executed "Thru the Courtesy of: KM&C", and quarterly summaries indicating "Securities offered through KM&C." Claimant also alleged that he believed that the trades were on behalf of KM&C and National, and that the companies shared commissions from the trades made for the Plan accounts. Claimant asserted that the Plan accounts were the trustee's fiduciary accounts, which was known to all respondents, and in August 1995, respondents engaged in excessive and unsuitable trading without claimant's authorization, listed as follows:

**For the Employee Benefit Plan:**

|          |   |
|----------|---|
| 08/25/95 | bought 3,300 shares of Golf Training Systems, Inc.          |
| 08/30/95 | sold 19,752 shares of Capital Reserves Money Mkt. Portfolio |
| 10/26/95 | bought 7,500 shares of National Health & Safety Corp.       |
| 11/08/95 | sold 3,148 shares of Piper Funds Adj. Rate Mtg. Securities  |
| 11/13/95 | bought 3,400 shares of China Container Holdings Ltd.        |
| 11/14/95 | bought 3,600 shares of Credit Depot Corp.                   |
| 11/28/96 | sold 2,115 shares of Golf Training Systems, Inc.            |
| 11/30/95 | bought 2,000 shares of Health Tech Intl. Inc.               |
| 12/07/95 | sold 6,000 shares of FICO STRIP bonds                       |
| 12/07/95 | sold 1,185 shares of Golf Training Systems, Inc.            |
| 12/14/95 | sold 24 shares of Credit Depot Corp.                        |
| 12/27/95 | sold 664 shares of Heritage US Govt.                        |
| 12/27/95 | bought 2,800 shares of Spectratek, Inc.                     |
| 01/11/96 | sold 800 shares of Spectratek, Inc.                         |
| 01/12/96 | sold 2,000 shares of Spectratek, Inc.                       |
| 01/16/96 | bought 2,000 shares of Golf Training Systems, Inc.          |
| 01/23/96 | sold 2,000 shares of Golf Training Systems, Inc.            |

**For the Profit Sharing Plan:**

|          |  |
|----------|--|
| 10/09/95 | bought 20,000 shares of Golf Training Systems warrants |
| 10/16/95 | sold 12,000 shares of FICO STRIP bonds                 |
| 10/16/95 | sold 3,000 shares of FICO STRIP bonds                  |

10/16/95 sold 93,000 shares of FICO STRIP bonds  
10/20/95 sold 23,000 shares of Golf Training Systems Warrants  
10/23/95 bought 4,000 shares of China Container Holdings Ltd.  
10/25/95 bought 10,500 shares of Newstar Res Inc.  
10/26/95 bought 17,000 shares of Tapistron  
10/26/95 bought 7,500 shares of National Health & Safety Corp.  
10/26/95 bought 4,000 shares of China Container Holdings Ltd.  
10/27/95 bought 10,000 shares of Newstar Res Inc.  
10/27/95 bought 3,000 shares of Credit Deposit Corp.  
11/03/95 sold 3,770 shares of Golf Training Systems, Inc.  
11/08/95 sold 5,424.316 shares of Piper Funds Adjustable Rate Mtg Securities  
11/09/95 bought 3,500 shares of Golf Training Systems, Inc.  
11/14/95 bought 3,300 shares of Spectratek, Inc.  
11/14/95 bought 4,070 shares of Credit Depot Corp.  
11/24/95 bought 13,300 shares of Credit Depot Corp.  
11/29/95 sold 3,010 shares of Golf Training Systems, Inc.  
11/29/95 bought 10,000 shares of Hallmark Finl Services  
11/30/95 bought 5,000 shares of HealthTech Intl. Inc.  
12/06/96 sold 386 shares of Coram Healthcare  
12/06/95 sold 350 shares of Golf Training Systems, Inc.  
12/06/95 sold 200 shares of Home Depot, Inc.  
12/07/95 sold 5,370 shares of Golf Training Systems, Inc.  
12/08/95 sold 20,500 shares of Newstar Res. Inc.  
12/08/95 sold 8,100 shares of Credit Depot Corp.  
12/27/95 bought 16,100 shares of Newstar Res, Inc.  
12/27/95 sold 2,000 shares of PalFred Inc.  
12/29/95 bought 900 shares of National Health & Safety Corp.  
01/24/96 sold 16,100 shares of Newstar Res, Inc.  
01/24/96 bought 2,000 shares of PalFred, Inc. (purchased to replace unauthorized sale of PalFred on 12/27/95)

Claimant further asserted that the small cap securities were not suitable for the Plan's fiduciary account, and that Brennan performed consulting and advisory services for Golf Training Systems, Inc., for which he was awarded warrants by the company. Claimant also asserted that despite the Account Application's objectives indicating "speculation" he did not himself fill out that part of the form. Claimant contended that KM&C and National were controlling persons and are, therefore, liable to claimant for Brennan's actions.

Respondents KM&C, Brennan and BD&C maintained that their response addresses both Statements of Claim as though they were one, due to their similarity. Respondents further maintained that Claimant is a successful physician and businessman, and has had primarily profitable investments with respondents, and the Claim referenced only the investments which lost money. Respondents also maintained that all transactions were executed by claimant, as Brennan had no discretionary authority, and were suitable to

the claimant's investment strategy and financial means. Respondents denied the allegations of improper trading, of excessive commissions, and asserted that all transactions were properly documented. Respondents further asserted that National served solely as the clearing agent for KM&C, and exercised no control, authority, or supervision over any representatives of KM&C, and therefore, has no liability to claimant and should be dismissed from this arbitration. Respondents also asserted that claimant had a legal responsibility to carry out the highest level of fiduciary care with regard to the two Plans, but failed to review or analyze the investments, which admitted his liability for any damages that may have been suffered. By way of Counterclaim, respondents maintained that claimant should indemnify respondents for the full extent of any damages respondents may be ordered to pay, including costs and attorney's fees.

Respondent NFSC maintained that claimant failed to allege a cause of action against it, and requested that the Claim be dismissed with respect to NFSC.

#### **RELIEF REQUESTED**

Claimant requested damages of \$92,030.00 for the profit sharing plan and lost opportunity costs for a total of \$157,527.00, and, \$19,752.00 in damages for the Employee Benefit plan with lost opportunity costs for a total of \$41,152.00 plus attorney's fees and \$100,000.00 in punitive damages.

Respondents KM&C, Brennan and BD&C requested that claimant's claim be dismissed in its entirety, and that they be awarded all expenses and attorney's fees.

#### **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 original remains on file with the NASD.

At Claimants request, the claim against National Financial Services Corp. was dismissed with prejudice prior to a decision on the merits.

#### **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 Koegler, Morgan & Company, Brennan Dyer & Company, and James H. Brennan be and hereby are jointly and severally liable and shall pay to claimant Dr. Paul K. Simons as Trustee for the Dr. Paul K. Simons Profit Sharing Plan \$88,000.00 in damages.
2. Respondents Koegler, Morgan & Company, Brennan Dyer & Company, and James H. Brennan be and hereby are jointly and severally liable and shall pay to claimant Dr. Paul K. Simons as Trustee for the Dr. Paul K. Simons Employee Benefit Plan \$26,000.00 in damages.

3. The counterclaim of respondents Keogler, Morgan & Company, Brennan Dyer & Company, and James H. Brennan against claimant Dr. Paul K. Simmons is denied in its entirety.
4. The parties shall bear their respective costs and attorney's fees.
5. All other relief requests are denied.

#### OTHER COSTS

Respondents Keogler, Morgan & Company and National Financial Services Corp are each separately liable to NASD Regulation in the amount of \$350.00 in satisfaction of the member surcharge under Rule 10333 of the Code of Arbitration Procedure.

Claimants are liable for \$165.00 representing costs incurred in the processing of the claim.

#### FORUM FEES

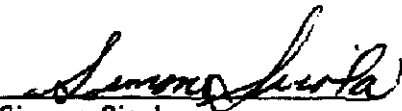
Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$200.00 non-refundable filing fee previously deposited by the Claimant. Respondent Keogler, Morgan & Company is liable and shall pay to NASD Regulation \$500.00 to satisfy the non-refundable counterclaim filing fee. Furthermore, the arbitrators have assessed the following forum fees:

|                                  |                    |
|----------------------------------|--------------------|
| 10 sessions x \$750.00           | = \$7,500.00       |
| minus claimants \$750.00 deposit | = <u>\$ 750.00</u> |
| total outstanding                | = \$6,750.00       |


The panel has determined that respondent Keogler, Morgan & Company is liable for the full amount of forum fees. Therefore, respondent Keogler, Morgan & Company shall pay to claimant \$750.00 as reimbursement of the hearing session deposit. In addition, respondent Keogler, Morgan & Company shall pay to NASD Regulation \$6,750.00 in satisfaction of outstanding forum fees.

**ARBITRATORS' SIGNATURES**


I, Simone Sicola, do hereby swear or affirm, that I am the individual described herein, and who executed this instrument which is my oath and award.

  
Simone Sicola  
Public Chairperson

I, Thomas S. Wallace, do hereby swear or affirm, that I am the individual described herein, and who executed this instrument which is my oath and award.

  
Thomas S. Wallace  
Public Arbitrator

I, Louis M. Davis, do hereby swear or affirm, that I am the individual described herein, and who executed this instrument which is my oath and award.

  
Louis M. Davis  
Industry Arbitrator

Date of Decision: September 9, 1997

**ARBITRATORS' SIGNATURES**

I, Simone Sicola, do hereby swear or affirm, that I am the individual described herein, and who executed this instrument which is my oath and award.

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Simone Sicola  
Public Chairperson

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Thomas S. Wallace  
Public Arbitrator

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Louis M. Davis  
Industry Arbitrator

Date of Decision: September 9, 1997

ARBITRATORS' SIGNATURES

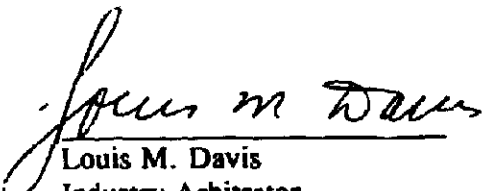
I, Simone Sicola, do hereby swear or affirm, that I am the individual described herein, and who executed this instrument which is my oath and award.

\_\_\_\_\_  
Simone Sicola  
Public Chairperson

I, Thomas S. Wallace, do hereby swear or affirm, that I am the individual described herein, and who executed this instrument which is my oath and award.

\_\_\_\_\_  
Thomas S. Wallace  
Public Arbitrator

I, Louis M. Davis, do hereby swear or affirm, that I am the individual described herein, and who executed this instrument which is my oath and award.

  
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Louis M. Davis  
Industry Arbitrator

Date of Decision: September 9, 1997