

NASD Regulation, Inc. Award

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Daniel Schmitz, Executor of
The Estate of Morris Schmitz, and
Robert Jurgensmeyer

Claimants,

vs.

CONSOLIDATED

Case Nos. 96-03581
and 96-04119

Vision Investment Group, Inc.
Cantella & Co., Inc.,
Cantella Management Corp.,
Vincent Cantella, Michael
Corulla, Paul Caruso,
Kevin Scott Horn,
Gerald Powers, and
Christopher Wolf,

Respondents.

REPRESENTATION OF PARTIES

Claimant Robert Jurgensmeyer ("Jurgensmeyer") was represented by John J. Miller, Esq., Overland Park, Kansas.

Claimant Morris H. Schmitz (later captioned as Daniel Schmitz, Executor of the Estate of Morris Schmitz) ("Schmitz") was represented by John D. Hudson, Esq., Williams, Blackburn, et al., Des Moines, Iowa.

Respondents Cantella & Company, Inc. ("Cantella"), Cantella Management Corp. ("CMC"), Vincent Cantella ("Vincent Cantella"), and Gerald Powers ("Powers") were represented by Peter Coppinger, Michael Sheetz and Risa G. Sorkin, Gadsby & Hannah LLP, Boston, Massachusetts.

Respondents Christopher Wolf ("Wolf") and Michael Corulla ("Corulla") were represented by Darren Lampert, Lampert & Lampert, New York, New York. On May 5, 1997, Darren Lampert, Lampert & Lampert, filed a notice of withdrawal of representation of Corulla and Wolf. On May 29, 1997, Lampert & Lampert re-entered its appearance on behalf of Wolf and Corulla. On March 9, 1998, Darren Lampert, Lampert & Lampert, again filed notice of

withdrawal of representation of Corulla and Wolf. Lampert & Lampert appeared for Corulla at the hearing of this matter. Wolf did not appear at the hearing.

Respondent Vision Investment Group, Inc. ("Vision") did not participate in the hearing in this matter. Claimant Jurgensmeyer and Schmitz dismissed their claims against Vision prior to the hearing.

Respondent Kevin Scott Horn ("Horn") did not participate in this matter and did not appear at the hearing.

During the initial hearing session, Claimants reached a settlement with Respondent Corulla, and Respondent Corulla did not participate in the final hearing session. During the adjournment of the hearing, Claimants reached a settlement with Respondents CMC, Cantella, Vincent Cantella, and Powers, and those respective Respondents did not participate in the final hearing session.

CASE INFORMATION

Claimant Jurgensmeyer

Statement of Claim and Submission agreement were filed: August 6, 1996.

Submission Agreement signed: August 9, 1996.

Respondents Cantella and Powers' Answer filed: October 23, 1996.

Respondents Cantella and Powers' Submission Agreement signed: October 19, 1996.

Respondents Wolf and Corulla's Answer filed: February 3, 1997.

Vision and Caruso did not file an Answer to the Statement of Claim.

Jurgensmeyer Amended Statement of Claim filed: May, 1997.

Respondents Cantella and Powers' Answer to Amended Claim filed: May 22, 1997.

Vision, Caruso, Wolf, and Corulla did not file an Answer to the Amended Statement of Claim.

NASD Regulation, Inc., Office of Dispute Resolution does not have a record of Respondents Wolf and Corulla having filed Submission Agreements.

Claimant Schmitz

Statement of Claim and Submission Agreement filed: September, 1996.

Daniel Schmitz, Executor of the Estate of Morris Schmitz, was substituted as Claimant for the deceased Morris Schmitz as Claimant. Daniel Schmitz Submission Agreement filed: April 7, 1997.

Respondents Cantella, Vincent Cantella, and Power's Answer and Counterclaim filed: December 13, 1996.

Vision, Caruso, and Horn did not file an Answer to the Statement of Claim.

Amended Statement of Claim filed: April, 1997.

Respondents Cantella, Vincent Cantella and Power's Answer to the Amended Claim was filed on: June, 1997.

Respondents Vision, Caruso, and Horn did not file an Answer to the Amended Statement of Claim.

Claimant Jurgensmeyer and Schmitz

Claimants' Amended and Consolidated Statement of Claim filed: January 9, 1998.

Respondents Cantella, Vincent Cantella and Power's Answer to the Amended and Consolidated Statement of Claim and Counterclaim (against Schmitz) filed: January 27, 1998.

Schmitz Answer to the Counterclaim filed: February 20, 1998.

Respondent CMC, through their counsel, refused to execute a Uniform Submission Agreement and did not file an Answer in this matter.

Respondent Vincent Cantella did not file with the NASD Regulation, Inc., Office of Dispute Resolution a properly executed submission to arbitration, but is required to submit to arbitration pursuant to Section 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, is bound by the determination of the arbitration panel on all issues submitted.

Respondents Caruso, Horn, Corulla, and Wolf did not file an Answer to the Consolidated and Amended Statement of Claim, but are required to submit to arbitration pursuant to Section 10301 of the Code and having answered the claim, is bound by the determination of the arbitration panel on all issues submitted.

HEARING INFORMATION

The hearing was held in Kansas City, Missouri.

Pre-Hearing Conference: May 7, 1997 for one (1) session with the panel; and
June 30, 1997 for one (1) session with the panel.

Hearing Dates/Sessions: April 28, 1998 for two (2) sessions;
April 29, 1998 for two (2) sessions;
April 30, 1998 for two (2) sessions; and
July 7, 1998 for one (1) session.

CASE SUMMARY

Claimant Jurgensmeyer

In his Statement of Claim, Claimant Jurgensmeyer alleged that Respondents Vision, Cantella, Wolf, Corulla, Caruso, and Powers: Violated state and federal Securities laws; violated the Missouri Merchandising Practices Act; committed fraud and misrepresentation; was negligent; committed breach of contract; and breached their fiduciary duty.

Respondents Cantella and Powers asserted the following defenses: The Statement of Claim failed to state a claim against Cantella for which relief can be granted; if the Claimant suffered the damages complained of, such damages were caused by persons or entities for whom Cantella is not legally responsible; Claimant cannot recover or his recovery must be reduced because Claimant failed to mitigate his damages, if any; as clearing broker, Cantella cannot be held responsible for the actions of the other Respondents; as clearing broker only, Cantella owes no fiduciary duty to the Claimant; Claimant cannot recover or his recovery must be reduced because if the Claimant suffered the damages complained of, such damages were caused in whole or in part by the negligence of the Claimant; Claimant cannot recover against Powers individually because he was acting within the scope of his employment.

In his Amended Statement of Claim, Claimant Jurgensmeyer added legal claims of conspiracy to violate securities laws and to commit fraud, and breach of fiduciary duty.

In their Answer to the Amended Statement of Claim, Respondents Cantella and Powers re-asserted the affirmative defenses from their Answer to the Statement of Claim.

Claimant Schmitz

In his Statement of Claim, Claimant Schmitz alleged that Respondents Vision, Caruso, Horn, Wolf, Vincent Cantella, Powers and Cantella: Violated state and federal securities laws;

committed fraud and misrepresentation; were negligent; committed breach of fiduciary duty; and violated NASD and NYSE Rules.

In their Answer, Cantella and Powers asserted the following defenses: The Statement of Claim failed to state a claim against Cantella for which relief can be granted; if the Claimant suffered the damages complained of, such damages were caused by persons or entities for whom Cantella is not legally responsible; Claimant cannot recover or his recovery must be reduced because Claimant failed to mitigate his damages, if any; as clearing broker, Cantella cannot be held responsible for the actions of the other Respondents; as clearing broker only, Cantella owes no fiduciary duty to the Claimant; Claimant cannot recover or his recovery must be reduced because if the Claimant suffered the damages complained of, such damages were caused in whole or in part by the negligence of the Claimant; Claimant cannot recover against Respondent Powers individually, because he was acting within the scope of his employment; Claimant cannot recover against Respondent Vincent Cantella individually because Claimant has not contended that Cantella's corporate veil should be pierced, nor has Claimant made any allegations to support such a contention; Claimant is estopped from recovery because he has perpetrated fraud on Cantella, breached his contract with Cantella, converted monies belonging to Cantella, and violated the Securities and Exchange Act as a result of his intentional failure to pay Cantella for the purchase of approximately \$1.5 million worth of stock, as fully alleged in Cantella's counterclaim.

In their counterclaim, Cantella, Vincent Cantella and Powers alleged that Claimant Schmitz: Committed fraud and misrepresentations; violated Section 10(b) of the Securities and Exchange Act and Rule 10b-5; committed breach of contract; was unduly enriched; converted monies; is subject to promissory estoppel; and breached the third party beneficiary contract.

Claimants Jurgensmeyer and Schmitz

In their Consolidated and Amended Statement of claim, Claimants alleged that Respondents Cantella, CMC, Vincent Cantella, Corulla, Caruso, Horn, Powers, and Wolf: Violated state and federal securities laws; aided and abetted in the violations; were liability, and Cantella had the burden of proof; used deceptive and manipulative devices; committed fraud and misrepresentation; conspired to violate securities laws and commit fraud; were negligent; breached their fiduciary duty; and violated NASD Rules.

In their Answer and Counterclaim to the Consolidated and Amended Statement of Claim, Cantella, Vincent Cantella and Powers asserted the following defenses: The Statement of Claim failed to state a claim against Cantella for which relief can be granted; if the Claimant suffered the damages complained of, such damages were caused by persons or entities for whom Cantella is not legally responsible; Claimant cannot recover or his recovery must be reduced because Claimant failed to mitigate his damages, if any; as clearing broker, Cantella cannot be held responsible for the actions of the other Respondents; as clearing broker only, Cantella owes

no fiduciary duty to the Claimant; Claimant cannot recover or his recovery must be reduced because if the Claimant suffered the damages complained of, such damages were caused in whole or in part by the negligence of the Claimant; Claimant cannot recover against Respondent Powers individually, because he was acting within the scope of his employment; Claimant cannot recover against Respondent Vincent Cantella individually because Claimant has not contended that Cantella's corporate veil should be pierced, nor has Claimant made any allegations to support such a contention; Claimant is estopped from recovery because he has perpetrated fraud on Cantella, breached his contract with Cantella, converted monies belonging to Cantella, and violated the Securities and Exchange Act as a result of his intentional failure to pay Cantella for the purchase of approximately \$1.5 million worth of stock, as fully alleged in Cantella's counterclaim.

In their counterclaim, Cantella, Vincent Cantella and Powers alleged that Claimant Schmitz: Committed fraud and misrepresentations; violated Section 10(b) of the Securities and Exchange Act and Rule 10b-5; committed breach of contract; was unduly enriched; converted monies; is subject to promissory estoppel; and breached the third party beneficiary contract.

To the Counterclaim, Schmitz answered by incorporating his Amended and Substituted Statement of Claim and further answered that the check was signed under duress and that the transaction represented by the check was fraudulent; and that Cantella's recovery is barred by its own conduct and that Cantella failed to mitigate its damages

RELIEF REQUESTED

Claimant Jurgensmeyer

In his Statement of Claim, Claimant Jurgensmeyer requested an award against the Respondents for: The amount of the uncompleted sale of Auxer Industries stock in the amount of \$975,000; the unauthorized sale of Antares Industries stock at a loss of \$108,750; damages for the amount that Claimant's invested assets would now be worth had they been suitably managed in accordance with the Claimant's investment objectives, and/or interest as provided by statute; punitive damages to punish Respondents and to deter others from similar misconduct; Claimant's costs and expenses, including attorney's fees; and such other relief as the panel deems just and proper.

In their Answer, Respondents Cantella and Powers asked that this tribunal find in Cantella's favor and dismiss with prejudice the Claimant's claims and award Cantella costs and attorneys' fees for defending this action.

Claimant Schmitz

In his Statement of Claim, Claimant Schmitz requested an award jointly and severally

against all Respondents for: Compensatory damages in the amount of \$265,000 plus damages from Cantella for its abuse of process; damages for the amount that Claimant's invested assets would now be worth had they been suitably managed in accordance with Claimant's investment objectives, and/or interest from the date of investment as provided by law; punitive damages in an amount to punish Respondents and to deter others from similar conduct; Claimant's costs and expenses, including attorneys' fees; and such other equitable relief as the panel deems just and proper.

In their Answer and Counterclaim, Respondents Cantella, Vincent Cantella, and Powers asked that the panel find in Cantella's favor and dismiss with prejudice the Claimant's claims and award Cantella costs and attorneys' fees for defending the action; and award Cantella damages against Schmitz under the counts of the Counterclaim in the amount of \$1,554,200.00, plus interest, incidental and consequential damages, costs and attorneys' fees, and such other damages as shall be provided at the hearing.

Claimants Jurgensmeyer and Schmitz

In their Consolidated and Amended Statement of Claim, Claimants requested an award jointly and severally against all Respondents for: Compensatory damages in the amount of \$265,000.00 plus damages from Cantella and CMC for their abuse of process, and compensatory damages for Mr. Jurgensmeyer in the sum of \$1,083,750; damages for the amount that Claimants' invested assets would now be worth had they been suitably managed in accordance with Claimants' investment objectives, and/or interest from the date of investment as provided by law; punitive damages in an amount to punish Respondents and to deter others from similar conduct; Claimants' costs and expenses, including attorneys' fees; and such other equitable relief as the panel deems just and proper.

In their Answer and Counterclaim, Respondents Cantella, Vincent Cantella, and Powers asked that the panel find in Cantella's favor and dismiss with prejudice the Claimants' claims and award Cantella costs and attorneys' fees for defending the action; award Cantella damages against Schmitz under the counts of the Counterclaim in the amount of \$1,554,200.00, plus interest, incidental and consequential damages, costs and attorneys' fees and such other damages as shall be provided at the hearing; and expunge all references to this matter from the CRDs of Vincent Cantella and Gerald Powers.

OTHER ISSUES CONSIDERED & DECIDED

Claimant Jurgensmeyer

Claimant filed a Motion to Bar Respondents Vision, Caruso, and Corulla on November 4, 1996. Cantella filed a response to Jurgensmeyer's Motion to Bar on January 16, 1996.

Claimant and Respondents filed a joint motion for postponement on February 9, 1997. The motion was granted by the panel on or about February 28, 1997.

Claimant filed a Motion to Compel Production of Documents and Information from Cantella on January 21, 1997. Respondents Cantella and Powers filed their opposition to Claimant's Motion to Compel Documents and Information on February 10, 1997. Claimant filed his reply in Support of His Motion to Compel on March 4, 1997.

Claimant filed a Motion for leave to file his Amended statement of Claim on April 14, 1997.

Claimant filed his Second Motion to Compel Production of Documents from Cantella on April 14, 1997.

Claimant filed a Motion to Compel Production of Documents from Respondents Wolf and Corulla on April 14, 1997.

Respondents filed a Motion to Compel Production of Documents from Claimant Jurgensmeyer on April 29, 1997. Claimant filed his response to Respondents' Motion to Compel on May 2, 1997.

Claimant filed his Third Motion to Compel Production from Cantella on June 25, 1997.

On June 25, 1997, Claimant Jurgensmeyer filed his notice of participation of expert witness Geraldine Genco in the June 30, 1997 pre-hearing conference. Respondents Cantella and Powers filed their objection to Claimant's expert witness's participation in the pre-hearing conference on June 26, 1997. On June 26, 1997, Respondents Wolf and Corulla also filed their objection to Claimant's expert witness's participation in the pre-hearing conference. On June 27, 1997, Claimant filed a response to Respondents' objections to Claimant's expert witness's participation in the pre-hearing conference. On June 27, 1997, Claimant Schmitz filed his motion concurring with the participation of Claimant's expert witness in the pre-hearing conference.

Claimant Schmitz

Claimant Schmitz filed a Motion to Compel Cantella to produce documents and information on February 6, 1997. Respondent Cantella filed a resistance to the motion on March 3, 1997. Claimant Schmitz filed his reply to the resistance to the motion on March 12, 1997.

Claimants Jurgensmeyer and Schmitz

Claimants filed a Motion to Consolidate on or about January 1997. Respondents Cantella,

Vincent Cantella, and Powers filed an opposition to the motion on January 27, 1997. Claimants filed their reply to Respondents' resistance on February 4, 1997. Respondents Wolf and Corulla filed their Memorandum in Opposition to the motion on February 4, 1997. Claimants filed a supplemental Reply in Support of their motion on April 23, 1997.

Respondents Cantella and Powers filed a Motion to Strike the Affidavit of Paul Caruso offered in support of Claimant's Supplement Reply in support of the Motion to Consolidate. Claimants filed their joint response on May 2, 1997.

A pre-hearing conference was held June 30, 1997 with the panel. After consideration of the pending motions and arguments, the panel granted the Motion to Consolidate, conditioned upon Schmitz's dismissal of Vision; ordered a general agreement as to confidentiality be entered into between the parties; and ruled on various outstanding motion to compel filed by Claimants and Respondents.

Claimants filed a Motion for Leave to File An Amended and Consolidated Statement of Claim on November 6, 1997. Cantella and Powers filed their Opposition to Claimant's motion for leave to file an amended and consolidated statement of Claim on December 10, 1997. On December 19, 1997, Claimants filed a Reply in support of their motion. On or about January 9, 1998, the panel granted Claimants' motion. Claimants filed their Amended and Consolidated Statement of Claim on January 9, 1998.

Claimants filed a Motion to Compel on April 16, 1998. Claimants and Respondents reached accommodations on the discovery in question, and Claimants' motion was not forwarded to the panel chairman for action.

After consideration of the file, it was determined that Respondent Horn was not properly served and notified of the hearing in this matter. Respondents Caruso and Horn did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration or Answer to the Claims, but Respondent Caruso is required to submit to arbitration pursuant to Rule 10301 of the Code and is bound by the determination of the arbitration panel on all issues submitted. The panel found, without objection on the part of Claimant Schmitz, that the panel did not have jurisdiction with respect to Respondent Horn and that no award shall be made with respect to Respondent Horn.

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(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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:

Claimant Jurgensmeyer

Respondents Christopher Wolf and Paul Caruso are jointly and severally liable for, and shall pay to Claimant Robert Jurgensmeyer:

- 1) \$532,881 in compensation for Claimant's losses pursuant to Mo. Rev. Stat. Section 409.411;
- 2) \$106,284 in interest at the rate of 8% from the date of investment as provided by Mo. Rev. Stat. Section 409.411;
- 3) \$55,608 for Claimant's attorney's fees and costs pursuant to Mo. Rev. Stat. Section 409.411.

4) The panel further orders an award of punitive damages in favor of Claimant as follows: panel finds \$100,000 against Respondent Christopher Wolf and \$0 against Respondent Paul Caruso.

The panel specifically finds that Respondent Christopher Wolf, engaged in acts of fraud and other misconduct in violation of the Missouri Securities Act and the common law.

Claimant Daniel Schmitz, Executor of the Estate of Morris Schmitz

Respondents Christopher Wolf and Paul Caruso are jointly and severally liable for, and shall pay to Claimant Daniel Schmitz, Executor of the Estate of Morris Schmitz:

- 1) \$264,985 in compensation for Claimant's losses pursuant to Iowa Code Sections 502.501 and .502;
- 2) \$69,189 interest at the legal rate of 10% from the date of the investment as provided by Iowa Code Sections 502.501 and .502;
- 3) \$59,316 for Claimant's attorneys' fees and costs.

The panel further enters an award of punitive damages in favor of Claimant as follows: \$50,000 against Respondent Christopher Wolf, and \$0 against Respondent Paul Caruso.

The panel specifically finds that Respondent Christopher Wolf, engaged in acts of fraud and other misconduct in violation of the Iowa Securities Act and the common law.

Claimants Jurgensmeyer and Schmitz

Any claims brought against the individual Respondents, Vincent M. Cantella, and Gerald H. Powers are hereby ordered to be expunged from the records of the National Association of Securities Dealers, Inc. (NASD) by the NASD and are hereafter to be treated as if they were never brought. Such records shall include all reference to these claims in the Central Record Depository (CRD) reporting sections entitled "Incidents and Occurrences".

OTHER COSTS

Each party shall bear its own costs and expenses associated with this arbitration, except as set forth more fully above in the Award in this matter.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference with a single arbitrator, if any. There were two (2) pre-hearing sessions, one with one arbitrator x \$300 and one with the panel x \$1,000 = \$1,300 in pre-hearing costs. There were seven (7) hearing sessions x \$1,000 = \$7,000 in forum fees. The total forum fees therefore are \$8,300. Pursuant to Rule 10332(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Jurgensmeyer.

Pursuant to Rule 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Schmitz.

Pursuant to Rule 10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$500 previously paid by Cantella & Company, Inc for each arbitration.

The forum fees in the amount of \$8,300 are assessed as follows:

1. 1/3 to Claimants Robert Jurgensmeyer & Daniel Schmitz, Executor of the Estate of Morris Schmitz, jointly.
2. 1/3 to Cantella & Company, Inc.

3. 1/3 to Christopher Wolf and Paul Caruso jointly.
4. Claimant Jurgensmeyer shall have a credit against his share of the costs in the amount of \$1,000 previously deposited.
5. Claimant Schmitz shall have a credit against his share of the costs in the amount of \$750 previously deposited.

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

Dated:

Richard K. Zerr
Richard K. Zerr
Public Arbitrator, Presiding Chair

/s/

July 28, 1998

Arthur F. Dewsberry
Arthur F. Dewsberry
Public Arbitrator

/s/

July 29, 1998

Lewis R. Mills
Lewis R. Mills
Industry Arbitrator

/s/

August 5, 1998