

AWARD**NASD REGULATION, INC., OFFICE OF DISPUTE RESOLUTION**

In the matter of the Arbitration Between

Name of Claimant(s)

Albert Jeung
Russell Mark Jeung

Arbitration
No. 96-03999

Name of Respondent(s)

Quick & Reilly, Inc.
Nace Nickel

REPRESENTATION

For Claimants: Richard Sacks and Irwin Stein, Investors Recovery Service, Novato, California

For Respondents: Dean Urbanski and Christopher McSherry, Quick & Reilly, Inc., New York, New York

CASE INFORMATION

Statement of Claim filed: September 5, 1996

Claimants' Submission Agreements signed as follows:

Albert Jeung: September 5, 1996
Russell Mark Jeung: August 4, 1997

Joint Statement of Answer filed by Respondents: November 13, 1996

Respondents' Submission Agreements signed as follows:

Quick & Reilly, Inc.: November 13, 1996
Nace Nickel: November 7, 1996

HEARING INFORMATION

Pre-Hearing Conference Date(s)/Session(s):

May 6, 1997 (one session)

August 18, 1997 (one session)

Hearing Date(s)/Session(s): August 22, 1997 (one session)

Hearing Location: San Francisco, California

CASE SUMMARY

Claimant, Albert A. Jeung manages a number of investment accounts for family members including his adult son, Russell Jeung. Russell Jeung opened an account with Quick & Reilly's San Francisco office on July 29, 1991 and Albert A. Jeung was given trading authority over the account in August 2, 1991. On February 9, 1996, Albert Jeung placed a number of trades with Quick & Reilly through a broker, Brian Neville, with whom he had not previously dealt.

In placing his requests for transactions in Russell's account on February 9, 1996, Claimant testified that he ordered the purchase of 200 shares of Digital Equipment, Preferred Series A; that Brian quoted the price of 74 7/8 to him only after the shares were entered; that from the price he realized that the purchase had been made for Digital Equipment Corp. (DEC) and not the preferred issue; that he told Brian that he did not want the common stock; that Brian's response was that it was too late, that the sale had already gone through; that Jeung told Brian there were not sufficient funds in the account to make the purchase; that Jeung accepted Brian's suggestion to place the trade in the margin account.

The Respondents' testimony was that all orders taken by Brian on that date were repeated to Jeung before being transmitted and all executions were confirmed as soon as the trade was completed; that Jeung objected to the Digital Equipment (DEC) purchase after the trade was executed; that Brian told Jeung that he could "bust the trade"; that Jeung decided to keep the common stock and ordered that the trade be put in a margin account because due to the difference in price between the common and preferred there were insufficient funds in the account to cover the trade.

On February 16, 1996 and again on March 19, 1996 Jeung made oral complaints about an error in the Digital Equipment transaction to David Harley (2/16) and to Nace Nickel (3/19). Respondent's testimony was that Jeung had accepted the trade at the time and was unhappy because the price had subsequently gone down. Claimant did not at any time, in writing, request that the purchase be canceled although he was advised by Respondent Nickel to do so and the monthly statement contained language that "it was conclusive unless objected to in writing within ten days". Claimant testified that he failed to do so because he knew that the error could not be resolved with Respondents and he would ultimately have to seek legal recourse. Digital Equipment (DEC) traded in the same range for several days after the purchase. Before and after the purchase in question, Jeung received duplicate copies of the monthly statements of the Russell Jeung account. The monthly statement for the month ending 3/29/96 reflected a fair market value for Digital Equipment (DEC) of \$12,000. In July, Jeung complained to Respondent Nace Nickel about the margin account interest charge. The margin account had not been set up as sweep account as it should have been. An adjustment of the interest charges was made and Claimant testified that he was satisfied with the correction of the error.

The parties agreed that Albert Jeung was a sophisticated investor.

RELIEF REQUESTED

Claimant seeks rescission of the purchase of Digital Equipment (DEC); credit for interest paid on the margin account; reasonable rate of return on the original investment, costs of litigation including attorney fees and punitive damages. The claim also alleges that Claimant was harmed as a result of a conspiracy of the manager and staff of Respondent, Quick & Reilly. Respondent denies all allegations and requests that the claims be dismissed.

OTHER ISSUES CONSIDERED AND DECIDED

None.

FINDINGS

It is established law that a broker who makes trades without

the prior consent of the customer breaches his common law agency duty to his customer. The evidence established that there was an error at the initiation of the Digital Equipment transaction either by the customer's failure to specify the preferred issue or by the broker's failure to receive approval for the transaction prior to execution. The preponderance of the evidence is that there was broker error. However, this does not resolve the matter since there remains an issue of whether Claimant accepted or consented to the purchase subsequent to the execution of the trade and there are a number of factors that support such a finding. Whether one accepts Claimant's or Respondent's testimony regarding the margin account, the preponderance of evidence is that at the very least, Jeung agreed to the use of the margin account to fund the purchase. There is a fundamental inconsistency in objecting to the trade and at the same time agreeing to a method for its funding. Furthermore, Jeung's testimony that he was satisfied with the resolution of his margin interest complaint which involved recrediting some interest payments to the account, is consistent with consent to the trade. Whether or not Jeung sent written notice of the alleged unauthorized transaction is not controlling to this decision. However, once he knew that the trade would not be canceled, an obligation arose on Jeung's part to take reasonable steps to mitigate any losses. This he failed to do. Accordingly, the arbitrator finds by the preponderance of the evidence that both parties were at fault and that rescission, under this circumstance is not an appropriate remedy. Once Jeung knew in March that the trade would not be canceled and failed to notify the Respondent of his intention to seek legal recourse, the responsibility for any additional losses lay with Jeung.

The arbitrator further finds that no credible evidence was introduced to support the allegations of conspiracy or the request for punitive damages.

AWARD

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

1. Respondents are jointly and severally liable for and shall pay to Claimant the sum of \$3,071.44.

2. All claims for rescission, reasonable rate of return on the original investment, costs of litigation including attorney fees and punitive damages are hereby denied and dismissed.

3. The parties shall each bear their respective costs including attorney's fees.

FORUM FEES

Pursuant to Section 10332(c) of the Code of Arbitration Procedure, the following forum fees are assessed: NASD Regulation, Inc. shall retain Claimants' hearing session deposit in the amount of \$300.00. Forum fees shall be split between the parties and are calculated as follows:

Two pre-hearing sessions @ \$300.00/session	=	\$600.00
One hearing session @ \$300.00/session	=	<u>\$300.00</u>
Total fees assessed	=	\$900.00

Claimants' share (50%)	=	\$450.00
Credit for hearing deposit	=	\$300.00
Balance due	=	\$150.00

Respondents' share, jointly and severally (50%)	=	\$450.00
Balance due	=	\$450.00

Fees are payable to NASD Regulation, Inc.

PRESIDING ARBITRATOR

Name _____ Public / Industry

Helen B. Culiner, Esq.

Public Arbitrator

Presiding Arbitrator's Signature

Helen B. Culiner

Date of Decision: 8/29/97