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AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Chad Spencer,

Claimant,

and

No. 96-04393

Michael Saunders, James Konaxis, and Charles Abrey,

Respondents.

REPRESENTATION OF PARTIES

Claimant, Chad Spencer appeared pro se.

Respondents, Michael Saunders, James Konaxis, and Charles Abrey, were represented by Michelle A. Murphy, Esquire of Oppenheimer & Company, Incorporated, located in New York, New York.

CASE INFORMATION

Chad Spencer's Statement of Claim was filed on or about June 23, 1996.

Chad Spencer's Submission Agreement was signed on September 23, 1996.

Michael Saunders, James Konaxis, and Charles Abrey's Statement of Answer was filed on or about February 10, 1997.

The NASD Regulation, Incorporated Office of Dispute Resolution has no record of properly executed submission agreements from Respondents, Michael Saunders, James Konaxis, and Charles Abrey.

HEARING INFORMATION

The hearing was held on: August 12, 1997 for (1) session in Memphis, Tennessee.

CASE SUMMARY

Claimant, Chad Spencer ("Claimant"), brought this action to recover losses allegedly sustained by misrepresentations of commissions and failure to sell stock as instructed on the part of Respondent Mr. Michael Saunders ("Mr. Saunders"), a representative of Oppenheimer & Company, Incorporated ("Oppenheimer"). Claimant also brought this action against Mr. James Konaxis and Charles Abrey of Oppenheimer.

Claimant alleged that he was charged commissions in excess of what was agreed upon between him and Mr. Saunders. According to Claimant, on April 18, 1996, he bought 1,000 shares of Fore Systems, Incorporated ("Fore Systems") stock through Mr. Saunders at \$67.25 per share. Claimant asserted that, contrary to the agreement between him and Mr. Saunders that the commissions on this transaction were to total \$600, he was charged \$801.68 in commissions.

Claimant also alleged that Mr. Saunders failed to follow instructions to sell certain stock. According to Claimant, on May 17, 1996 he bought 2,000 shares of Madge Networks ("Madge") stock for \$32.875 per share on Mr. Saunders' insistence and his statement that an analyst recommended that this stock would be performing good. Claimant stated that he contacted Mr. Saunders several times to voice his concern over the decline in value of this stock and to inquire about selling it, but Mr. Saunders would reassure him that he would not lose money and that the analysts were saying that the stock would go up. Claimant asserted that on June 13, 1996, after the stock continued to drop in price to between \$23 to \$24 per share, he instructed Mr. Saunders to sell the 2,000 shares of Madge stock; according to Claimant, Mr. Saunders requested that he confirm this sale order the following morning. Claimant stated that he called Mr. Saunders the next morning, at which time Mr. Saunders informed him that the stock was looking to open up at about \$24.25 per share, and Claimant informed him that he would talk to him later. According to Claimant, later that morning he contacted Mr. Saunders and was informed that the stock had dropped in price to \$17.00 per share and that none of the 2,000 shares of Madge stock were sold.

Respondents, Mr. Saunders, Mr. James Konaxis, and Mr. Charles Abrey (hereinafter collectively referred to as "Respondents"), denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on their part. Respondents stated that Mr. Saunders agreed to discount the commission on the Fore Systems stock purchase only if the trade was not profitable; according to Respondents, Claimant sold his Fore Systems position for a profit of \$7,440.62. Respondents also contended that Claimant never gave Mr. Saunders a sell order on June 13, 1996 for his shares of Madge stock. Respondents asserted the following affirmative defenses: (1) Claimant fails to state a claim upon which relief can be granted; (2) Claimant authorized, consented to or acquiesced in the execution of each transaction in his account and is therefore equitably estopped from bringing this action; (3) Claimant, by his own actions, has waived any and all claims in the Statement of Claim

by continuing to pursue the investment strategy after acquiring actual knowledge of the nature of that strategy and the risks attendant thereto; (4) Claimant, by failing to timely object to the transactions complained about, has ratified each and every transaction and is barred from recovery herein; (5) Claimant is barred from any recovery for failure to exercise that degree of diligence required in the handling and monitoring of his securities transactions; (6) Claimant was fully aware of the onset of risks inherent in pursuing the trading strategy utilized and voluntarily assumed such risk, which was the sole and proximate cause of his alleged damages; (7) Claimant is barred from recovering from Oppenheimer under the doctrines of ratification, estoppel, waiver, and laches; (8) Claimant is barred by the doctrines of unclean hands and *in pari delicto* due to his misrepresentations as to the facts contained in the Oppenheimer new account documents relating to his investment experience, financial status, investment objectives, and understanding of the risks associated with trading securities; (9) Claimant failed to act with due diligence to mitigate his damages after he knew or should have known of the alleged acts or omissions of which he now complains, and to the extent that Claimant's damages were sustained after such time, Claimant is barred from recovering such damages; (10) by failing to exercise the degree of care over his affairs and investments that an ordinary, prudent investor would exercise, any losses sustained by Claimant were proximately caused by his own conduct and negligence in relation to the transactions complained of, and therefore he is precluded from recovery herein; (11) Claimant is barred from recovery for having failed to notify Oppenheimer of any complaint; (12) Claimant's statutory securities fraud claims are barred because his broker did not act with the requisite scienter; (13) and, as to Claimant's claims are barred by the applicable statutes of limitations; (14) Claimant's demand for judgment includes an award of punitive damages, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and (15) the panel is without jurisdiction to award attorneys' fees.

RELIEF REQUESTED

Claimant, Chad Saunders, requested an award for compensatory damages in the amount of \$30,000

OTHER ISSUES CONSIDERED AND DECIDED

Respondents, Michael Saunders, James Konaxis, and Charles Abrey, did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration, but are required to submit to arbitration pursuant to § 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing, and are bound by the determination of the arbitration panel on all issues submitted.

On or about February 4, 1997, Respondents James Konaxis and Charles Abrey moved to dismiss the Statement of Claim based on Claimant Chad Spencer's failure to state a cause of action against the parties. Claimant Chad Spencer did not submit any response to this motion.

On or about April 2, 1997, Respondents, Michael Saunders, James Konaxis, and Charles Abrey, moved, pursuant to § 10321 of the Code, to compel production of documents. Claimant Chad Spencer did not submit any response to this motion. On July 10, 1997, the panel granted the motion and directed that the documents subject to the motion should be produced to Respondents, Michael Saunders, James Konaxis, and Charles Abrey, within ten (10) days of July 10, 1997.

Michael Saunders, James Konaxis, and Charles Abrey, moved for postponement of the hearing of this matter scheduled for the 24 and 25 of April 1997. On April 11, 1997, after considering this motion and Claimant Chad Spencer's response, the panel of arbitrators granted the motion.

On August 12, 1997, Respondents raised two (2) motions prior to the start of the hearing. The arbitrators heard argument from the parties on the following motions: Claimant's failure to produce a document or witness list, failure to respond to discovery requests, and failure to produce documents pursuant to the panel's order; and Respondents Konaxis' and Abrey's Motion for Summary Judgement. Konaxis and Abrey also requested that the panel expunge their record with the NASD. After deliberation, the arbitrators held the issue of non production of discovery in abeyance, and dismissed Konaxis and Abrey as respondents from this arbitration. The arbitrators also ordered the expungement of Konaxis' and Abrey's records with the NASD.

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 the 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:

1. Claimant's claims made against Respondents Konaxis and Abrey are, and each of them, denied with prejudice. Further, the NASD is Ordered to expunge Respondents Konaxis' and Abrey's records of this arbitration.
2. Other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there was one (1) hearing session

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x \$400 = \$400 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (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 § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee of \$100 and shall retain as forum fees the hearing session deposit of \$400 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Chad Spencer.

Pursuant to § 10333 of the Code, Oppenheimer & Company, Incorporated is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge of \$200.

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

Concurring Arbitrators' Signatures

Jack F. Marlow

/s/

August 26, 1997

Jack F. Marlow, Esquire

Dated:

Chairperson

Public Arbitrator

Donald J. Aho

/s/

August 27, 1997

Donald J. Aho

Dated:

Panelist

Public Arbitrator

Richard D. Bingham

/s/

August 27, 1997

Richard D. Bingham

Dated:

Panelist

Industry Arbitrator