

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Michael D. Chermak

96-05714

Name of Respondent

Kensington Wells, Inc.

CASE SUMMARY

In a case filed with National Association of Securities Dealers Regulation, Inc. on December 24, 1996, claimant Michael Chermak ("claimant"), who appeared Pro Se, alleged that respondent Kensington Wells, Inc. ("KWI") executed trades in his nondiscretionary account without his permission. Claimant further alleged that on May 28, 1996, KWI executed the sale of 100 shares of Toys R Us ("Toys") without his permission. Claimant also alleged that on the same day KWI executed a buy trade for 1,000 shares of Xechem ("Xechem"). Claimant asserted that he became aware of these transactions on September 30, 1996, when a KWI broker called him and attempted to solicit a new trade for him. Claimant further asserted that KWI failed to deliver timely notice and pointed out their continual failure to deliver notice to him. Claimant contended that no discretionary privileges were ever granted to KWI and no changes in his conservative investment outlook was ever given to KWI. Claimant further contended that he immediately objected when he was first informed in September of the two trades made in May.

Claimant also contended that during this period KWI did not mail correspondence to his new address. Claimant alleged that KWI would have the March 1996 and July 1996 quarterly statement and the May 1996 confirmations returned to them by the US mail, since he did not take delivery. Claimant further alleged that KWI executives had informed him that the brokerage supervisor receives the undelivered mail that is returned to KWI and that these supervisors are then responsible for having the individual brokers make the necessary adjustments. Claimant also alleged this did not happen properly in his case, and that the supervisor failed to properly oversee the implementation of this KWI procedure. Claimant asserted that a KWI broker was aware of the returned mail and acted in a deliberate way to sell out his Toys position in order to sell a new IPO, with the hope that this action would go undetected since the mail was not being delivered to him.

Claimant further asserted Xechem is a speculative stock which by its very nature is not suitable for his account. Claimant also asserted that KWI not only failed to inform him of these transactions at the time, but they have continued to fail to inform. Claimant contended that KWI was asked to provide the details of the transactions, who was the broker, what was the commission, how was the ticket marked and where was the Xechem prospectus. Claimant further contended that KWI failed to comply and consequently has made the filing of this matter more difficult.

Respondent KWI through their representative and counsel Timothy Kebbe, Esq., of the law firm Lehman & Eilen, located in Uniondale, New York, denied that the sale of 100 shares of Toys in claimant's account was unauthorized. Respondent maintained that claimant specifically directed that the proceeds from the sale of his Toys stock be used to purchase 1,000 shares of Xechem. Respondent further maintained that written confirmations of all transactions, as well as monthly account statements, were sent to claimant at the address he provided. Respondent also maintained that it has no knowledge that claimant moved, or that any confirmation statements or monthly account statements were returned by mail. Respondent contended that claimant failed to object to the transactions at issue until more than four months elapsed since the confirmations and account statements were mailed to him. Respondent further contended that such inaction strongly suggests that claimant belatedly objected to the transactions only after his investment in Xechem did not to perform as he may have hoped. Respondents also contended that claimant clearly understood the risks associated with the investments he made in the stock market. Respondent maintained that at no time were any transactions made on behalf of claimant without his prior consent. Respondent further maintained that claimant was free to liquidate his investment in Xechem at anytime. Respondent also maintained that KWI at all times acted in good faith in its dealing with claimant.

RELIEF REQUESTED

Claimant Michael Chermak requested \$7,500.00 in damages, and \$75.00 for the filing fee.

Respondent Kensington Wells, Inc. requested that the claims of claimant be dismissed in their entirety and assess all costs against claimant including attorneys' fees, together with such other and further relief deem appropriate.

OTHER ISSUES CONSIDERED & DECIDED

The arbitrator reviewed and considered claimant's Motion to Bar pursuant to Rule 10314 (b)(2)(c). The Motion was denied.

AWARD

Pursuant to Rule 10302 of the Code of Arbitration Procedure, a single Public Arbitrator, Diana Davis, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by claimant Michael Chermak on December 19, 1996 and by respondent Kensington Wells, Inc. on February 26, 1997 as required by Rules 10301 and 10302 of the Code of Arbitration Procedure.

And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent KWI be and hereby is liable and shall pay claimant a sum of \$5,000.00.
2. All other relief requests are denied.
3. The \$150.00 filing fees previously deposited by claimant shall be retained by NASD, Inc. Respondent KWI be and hereby is liable and shall pay claimant the sum of \$150.00 as reimbursement of the filing fees.

AFFIRMATION

I, **Diana G. Davis, Esq.**, do hereby affirm upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.


Diana G. Davis, Esq.

Date of Decision: May 1, 1997