

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Quick & Reilly, Inc.,

Claimant

v.

98-365

Dennis Sawinski,

Respondent / Third-Party Claimant

v.

Brad Michael Nirenberg and
D.L. Cromwell Investments, Inc.,

Third Party Respondents

REPRESENTATION OF PARTIES

Claimant Quick & Reilly, Inc. ("Q&R") was represented by Miles D. Hart, Esq., of Hertz Schram & Saretsky, P.C., located in Bloomfield, Michigan.

Respondent/Third-Party Claimant Dennis Sawinski ("Sawinski") was represented by Eric Richards, Esq., of Mika, Meyers, Beckett & Jones PLC, located in Grand Rapids, Michigan.

Third-Party Respondent Brad Michael Nirenberg ("Nirenberg") did not appear.

Third-Party Respondent D.L. Cromwell Investments, Inc. ("Cromwell") was represented by Gary E. Lehman, Esq., of Broad & Cassel, located in Miami, Florida.

CASE INFORMATION

The Statement of Claim was filed on or about January 30, 1998. Submission Agreement of Claimant was signed on May 6, 1998.

The Statement of Answer was filed by Respondent/ Third-Party Claimant Sawinski on or about July 22, 1998. Submission Agreement of Respondent/ Third-Party Claimant Sawinski was signed on July 24, 1998.

The Third-Party Claim was filed by Sawinski on or about July 22, 1998.

Statement of Answer was filed by Third-Party Respondent Nirenberg on or about November 5, 1998. Submission Agreement of Respondent Nirenberg was signed on November 6, 1998.

Statement of Answer was filed by Third-Party Respondent Cromwell on or about September 17, 1999. Submission Agreement of Respondent Cromwell was signed on September 16, 1999.

Cross Claim was filed by Third-Party Respondent Cromwell on or about September 17, 1998.

HEARING INFORMATION

Hearing sessions by telephone with three panel members were held:

October 13, 1998, for two (2) sessions,

November 17, 1998, for (1) session,

December 1, 1998, for one (1) session

The hearing was held in Southfield Michigan, on:

June 29, 1999, for a total of one (1) session.

CASE SUMMARY

Claimant Q&R alleged that Sawinski breached his contract with Q&R by failing to pay a debit balance in his margin account. Q&R further alleged that Sawinski was unjustly enriched by failing to pay the debit balance. Furthermore, Q&R claimed that Sawinski's fraudulent actions caused Q&R to incur a debt.

Respondent Sawinski filed a Third Party Claim against Nirenberg and D.L. Cromwell. Sawinski stated that Nirenberg perpetrated a fraud against Sawinski. Sawinski asserted that after a cold call, Nirenberg advised him to open an account at Strategic Resource Management (SRM), rather than D.L. Cromwell, Nirenberg's employer, and to purchase shares of "IRT," which Sawinski purchased. Sawinski stated that approximately six months after his initial purchase of "IRT," Nirenberg advised him to transfer his account to Dean Witter Reynolds and to purchase additional "IRT" shares on margin, which Sawinski also did. Sawinski alleged that Nirenberg next advised Sawinski to transfer his account to Q&R, which Sawinski also did. Sawinski stated that after a sudden drop in the price of "IRT," Q&R, he was unable to make the margin call and Q&R liquidated the account, resulting in a negative margin balance. Sawinski stated that he was the victim of stock fraud perpetrated by Nirenberg. Sawinski further alleged that "IRT" was unsuitable for him and that D.L. Cromwell was vicariously liable for the fraudulent activities of Nirenberg under a theory of respondeat superior.

Third Party Respondent, Nirenberg, denied that he acted improperly in his dealings with Sawinski. Nirenberg asserted that Sawinski never purchased securities from Nirenberg, nor was sold "IRT" by

Nirenberg. Nirenberg asserted several affirmative defenses, including: assumption of the risk, ratification, estoppel, and failure to state a cause of action upon which relief can be granted.

Third Party Respondent, D.L. Cromwell, stated that Sawinski did not allege any wrongdoing against Cromwell. Cromwell alleged that it strictly prohibited its registered representatives from engaging in the solicitation or sale of securities other than through Cromwell. Cromwell further stated that that Nirenberg never disclosed to Cromwell the conduct alleged in the Third Party Claim and that it was therefore not possible for Cromwell to discover. Cromwell also averred that Sawinski did not allege that Nirenberg was acting in the scope of his employment with Cromwell, along with other affirmative defenses.

RELIEF REQUESTED

Claimant requested an award in the amount of \$75,000.00, interest, costs and attorney fees.

Sawinski requested that the claims asserted against them be denied in their entirety and that he be awarded his costs and attorneys' fees. Sawinski also requested indemnification from Nirenberg and D.L. Cromwell for any award granted by the panel in favor of Claimant Quick & Reilly, plus additional damages for investment losses.

Nirenberg requested that the claims asserted against him be denied in their entirety and that he be awarded costs, expenses and other further relief.

D.L. Cromwell requested that the claims asserted against them be denied in its entirety and that they be awarded their costs and attorneys' fees. D.L. Cromwell also requested indemnification and/or contribution from Nirenberg to the extent Cromwell were to be found liable to Sawinski.

OTHER ISSUES CONSIDERED & DECIDED

Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrators have determined that Third Party Respondent Nirenberg has been properly served with the Statement of Claim pursuant to Rule 10302 and Rule 10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that Nirenberg had received due notice of the hearing as required under Rule 10315 of the Code and that arbitration of the matter would proceed pursuant to Rule 10318 of the Code.

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 (the "NASD").

Claimant Quick & Reilly Inc.'s Motion for Bifurcation and Motion for Summary Judgment were denied. Third Party Respondent Cromwell's Motion to Dismiss was denied.

All claims, except Sawinski's Third Party Claim against Nirenberg, were withdrawn or settled prior to hearing and were not adjudicated by the arbitration panel.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1.) That other than forum fees and attorney's fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter;
- 2.) That any relief not specifically enumerated is hereby denied with prejudice;
- 3.) Brad Michael Nirenberg is liable to and shall pay Dennis Sawinski the sum of \$67,400.00 in compensatory damages;
- 4.) Brad Michael Nirenberg is liable to and shall pay Dennis Sawinski interest pursuant to MCLA 600.6013, said interest beginning to accrue at the date of this Award;
- 5.) Brad Michael Nirenberg is liable to and shall pay Dennis Sawinski \$600.00 as reimbursement for Sawinski's Hearing Session Deposit.

FORUM FEES

Forum fees are calculated at the rate of \$600.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There were five (5) sessions x \$600.00 = \$ 3,000.00 in forum fees. Pursuant to Rule 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 Rule 10332(c) of the Code, the NASD shall **retain** Quick & Reilly, Inc.'s, and D.L. Cromwell's non-refundable filing fees in the amount of \$500.00 per party and shall **retain** as forum fees the hearing session deposits in the amount of \$600.00 each previously deposited with the NASD by Quick & Reilly, Inc., and D.L. Cromwell.

Pursuant to Rule 10332(c) of the Code, the NASD shall **retain** Dennis Sawinski's non-refundable filing fee in the amount of \$250.00.

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Pursuant to Rule 10332(c) of the Code, Dennis Sawinski shall pay the NASD the hearing session deposit in the amount of \$600.00 previously invoiced.

Pursuant to Rule 10332(c) of the Code, Brad Michael Nirenberg shall pay the NASD forum fees in the amount of \$1200.00.

OTHER FEES

Pursuant to Rule 10333 of the Code, Respondent Quick & Reilly, Inc. has paid to the NASD the member surcharge in the amount of \$1000.00 previously invoiced.

Pursuant to Rule 10333 of the Code, Respondent Quick & Reilly, Inc. has paid to the NASD the process fees in the total amount of \$1600.00 previously invoiced and is owing to and shall pay the NASD an additional \$500.00 in processing fees per the current invoice.

Pursuant to Rule 10333 of the Code, Respondent D.L. Cromwell Investments, Inc. has paid to the NASD the member surcharge in the amount of \$1000.00 previously invoiced.

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The NASD shall retain postponement fees in the amount of \$600.00 previously deposited by Third Party Respondent D.L. Cromwell Investments, Inc. Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

Jeffry Bauer, Esq.
Public Arbitrator, Presiding Chair

Richard E. Michel, Ph.D.
Public Arbitrator

Norman A. Samson
Industry Arbitrator

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NASD REGULATION

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Public Arbitrator, Presiding Chair



Richard E. Michel, Ph.D.
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Dated:

July 21, 1999


Jeffry Bauer, Esq.
Public Arbitrator, Presiding Chair

Richard E. Michel, Ph.D.
Public Arbitrator

Norman A. Samson
Industry Arbitrator