

**Award
NASD Regulation, Inc.**

In the Matter of the Arbitration Between:

Gino S. Vassalle (Claimant) vs. Tom O'Connor and William P. Larkman (Respondents).

Case Number: 99-00621

Hearing Site: Chicago, Illinois

REPRESENTATION OF PARTIES

Claimant Gino S. Vassalle referred to as ("Claimant"): Steele Williams, Esq., Groener, Schieb, & Williams, Sarasota, Florida.

Respondents Tom O'Connor ("O'Connor") and William P. Larkman ("Larkman"): Curtis M. Jacobs, Esq., Indianapolis, Indiana.

CASE INFORMATION

Statement of Claim filed on or about: February 11, 1999

Claimant signed the Uniform Submission Agreement: February 03, 1999

Statement of Answer filed by Respondent O'Connor on or about: June 11, 1999

Respondent O'Connor signed the Uniform Submission Agreement: June 01, 1999

Respondent Larkman signed the Uniform Submission Agreement: June 11, 1999

CASE SUMMARY/FACTS

In April 1996 Claimant met Respondent, a broker with First of America Brokerage Service, Inc., in person and delivered to him stock certificates for 52 shares of Yale Express System, Inc. and for 600 shares of Smith International, Inc. Claimant informed Respondent that Yale was bankrupt and that he would like to sell the stock. The discussion concluded with the understanding that the two stocks would be sold at a future date. This was an "inherited account" for Respondent because Claimant had first opened his account at First of America Brokerage with a previous broker there.

In April 1998 Claimant called Respondent to say that he was moving to Florida and that he wanted Yale stock sold so that he could use the loss to offset gains from a contemplated sale of Smith stock. In Claimant's six-page Statement of Claim he states, "I requested Mr. O'Connor to sell my Yale Express stock so I could sell my Smith Int'l stock to offset my gains." In his testimony he said that he told Respondent to sell Yale

and Smith "as a package." Within the week he got a card from Respondent that Yale was worthless and could not be sold.

Claimant then took a trip to California. In July 1998 Claimant noticed no money was going into his checking account from his First of America brokerage account. In reviewing his statements from First of America, Claimant says he noticed no bond purchase was noted thereon nor was there anything thereon to indicate a sale of Smith stock. Nor had Claimant received any confirmations concerning sales of any stocks. In July 1998 Claimant called from California and talked to a lady at NatCity Investments, Inc., successor to the business of First of American Brokerage Service, and said he was going to close his account. Immediately after that call was concluded, Respondent himself called Claimant, and they talked about a bond purchase. There was no discussion of a sale of Smith stock because it was to be a package with a sale of Yale stock, and Claimant was under the impression that Yale could not be sold because it was worthless.

Respondent then left the employ of NatCity Investments, and Claimant was referred to Mr. Shawn Craig. In December 1998 Claimant asked Craig to sell his 52 shares of Yale stock, which was done at \$.001 per share for gross proceeds of \$.01. In January 1999 Claimant placed an order to sell his 600 shares of Smith stock, which was done at \$25 per share for gross proceeds of \$15,000. Claimant contends that had Smith stock been sold in April 1998, when he says that he asked for it to be sold, he could have realized \$36,000 from the sale.

Respondent contends that he never received at any time a firm order from Claimant to sell Claimant's Smith stock, nor was any confirmation of such sale ever sent to Claimant.

RELIEF REQUESTED

Claimant seeks as damages (1) the sum of \$21,000 representing the difference between the actual \$15,000 sale proceeds of Smith stock received in January 1999 and the \$36,000 amount that would have been realized had the stock been sold in April 1998, and (2) punitive damages of \$25,000.

AWARD

I herewith enter my Award in favor of the Respondent.

At the hearing, Claimant contended that he should have been viewed as a relatively unsophisticated, inexperienced investor and that Respondent should have counseled him more thoroughly. He further contends that Respondent misled him when he said that Yale stock could not be sold because it was worthless when, in fact, a subsequent broker with the firm did sell the stock for Respondent for \$.01 in December 1998. Claimant contends that had he not been misled as to the unsaleability of Yale

stock, he could have insisted that it be sold back in April 1998, could have realized his tax objective of getting a loss, and would then have given an express order that his Smith stock be sold at an advantageous price.

As to the degree of Claimant's sophistication as an investor, it appears from the testimony that when Claimant and Respondent first met in 1996, Claimant owned the Yale and Smith stocks and certain unit investment trusts. At that time Claimant was interested in a moderate-growth objective, and Respondent purchased three mutual funds for his account. By April 1998 Claimant had accumulated additional cash and was interested in a better yield, so he and Respondent in a telephone call discussed bonds and their yields. It was during this conversation that Claimant said he wanted to sell his Yale stock so that he could use the loss to offset the gain from a sale of his Smith stock, and that the two stocks were to be sold as a package.

Regardless of how one might classify Claimant as sophisticated or not on other investment questions, Claimant appears to have had a pretty good understanding of offsetting capital gains with losses on the sale of stocks, and I cannot find that Respondent was under a duty to somehow go deeper into that question with Claimant.

Claimant further contends that he was "misled" by Respondent when Respondent told him in April 1998 that Yale stock was worthless and therefore could not be sold. Such a misrepresentation, contends Claimant, resulted in Claimant's not giving an express order to sell his Smith stock at a time when it would have brought an advantageous price.

However, if there was no misrepresentation and if the Yale stock was in fact worthless and could not be sold, Claimant apparently would not have wanted to sell his Smith stock because he viewed the double sale as a "package" for tax purposes. If that is the case, this would support Respondent's position that he never received an express order to sell Smith stock because "the package" was simply not possible to achieve.

So the question becomes whether the worthlessness of Yale stock was presented to Claimant in good faith by Respondent or was somehow a misrepresentation by Respondent. Respondent did place the order to sell Yale stock but was informed by his people that the stock was worthless and could not be sold. Respondent thereupon immediately sent Claimant a card informing him that the Yale stock was worthless and could not be sold. Worthless stock can be taken as a loss on a tax return only in the year in which it was deemed to be worthless. Accordingly, Respondent might well have assumed that this was why he never received an order from Claimant to sell Smith stock in 1998 inasmuch as Claimant would know that he could not claim an offsetting loss for Yale stock on his 1998 tax return if it had gone worthless in a prior year. Contrary to Claimant's contention, I fail to see any misrepresentation by Respondent on this question in light of Respondent's staff informing him of the stock's worthlessness and his promptly conveying this information to Claimant.

It does seem to be the fact that a subsequent NatCity broker did sell Claimant's 52 shares of Yale stock in December 1998 at a price of \$.001 per share for gross proceeds of \$.01. I am not informed as to the nature of that sale or how it came to pass, and it is certainly not my role as arbitrator to speculate upon such questions. Perhaps as time passed, the stock had been reclassified from "worthless" to some other category in the nature of "possible recovery" or some like category, I do not know. The critical point, in my opinion, is that the Respondent earlier had been told by his people at NatCity that the stock was "worthless," and that is what he passed on to the Claimant. Accordingly, I cannot attribute to him any act of "misrepresentation." Respondent had carried out Claimant's request to place an order for the sale of the Yale stock, had been told by his people that the stock was worthless, and had communicated this to Claimant. I see no misrepresentation here.

I am left with the conclusions (1) that Claimant was well informed about the use of tax losses to offset gains from the sale of stocks; (2) that Respondent, at the time of his communications with Claimant in April 1998, was not guilty of "misrepresenting" or "misleading" Claimant as to the worthlessness of Yale stock; (3) that Claimant would not have wanted to sell his Smith stock if the Yale stock, because of its worthlessness, could not be sold at the same time so that a tax loss for that year could be realized; and (4) that accordingly, Claimant, having been informed by Respondent of the worthlessness of Yale stock, did not give any express order to Respondent to sell the Smith stock.

Accordingly, I find no legal basis for the Claimant's plea that Respondent is responsible for Claimant's loss in not having sold his Smith stock at an advantageous price in April 1998, and I must render my AWARD in favor of the Respondent.

OTHER ISSUES CONSIDERED AND DECIDED

Claimant voluntarily dismissed Respondent Larkman from this case.

At hearing Claimant moved to make Nat City Investments a Respondent per Claimant's letter to NASD dated March 9, 2000. The arbitrator denied Motion on the ground that such letter was not sufficient compliance with rule 10328 of the Code of Arbitration Procedure.

By order of the arbitrator, Respondent O'Connor shall reimburse Claimant half of the filing fee, a total of \$60.00.

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.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$120.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firms are First of America Brokerage Service, Inc. and Nat City Investments, Inc.

Member surcharge = \$800.00

Adjournment Fees

Adjournments requested during these proceedings:

February 10, 2000, adjournment by Claimant Vassalle: = \$ 300.00

By order of the arbitrator this fee will be split equally between Claimant and Respondent O'Connor.

Forum Fees and Assessments

The Arbitrator assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator, including a pre-hearing conference with the arbitrator, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$300.00 = \$300.00
Pre-hearing conference: November 29, 2000 1 session

One (1) Hearing session x \$300.00 = \$300.00
Hearing Date: June 09, 2000 1 session

Total Forum Fees = \$600.00

1. The Arbitrator has assessed \$300.00 of the forum fees to Claimant
2. The Arbitrator has assessed \$300.00 of the forum fees to Respondent O'Connor.

Fee Summary

1. Claimant shall be and hereby is solely liable for:

Initial Filing Fee	= \$ 120.00
Adjournment Fee	= \$ 150.00
<u>Forum Fees</u>	<u>= \$ 300.00</u>
Total Fees	= \$ 870.00
<u>Less payments</u>	<u>= \$ 520.00</u>
Balance Due NASD Regulation, Inc.	= \$(350.00)

2. First of America Brokerage Services, Inc. shall be and hereby is solely liable for:

<u>Member Fees</u>	= \$ 800.00
Total Fees	= \$ 800.00
<u>Less payments</u>	<u>= \$ 1,400.00</u>
Balance Due NASD Regulation, Inc.	= \$ (600.00)

3. Nat City Investments, Inc. shall be and hereby is solely liable for:


<u>Member Fees</u>	= \$ 800.00
Total Fees	= \$ 800.00
<u>Less payments</u>	<u>= \$ 800.00</u>
Balance Due NASD Regulation, Inc.	= \$ 0.00

4. Respondent O'Connor shall be and hereby is solely liable for:

Adjournment Fee	= \$ 150.00
<u>Forum Fees</u>	<u>= \$ 300.00</u>
Total Fees	= \$ 450.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Regulation, Inc.	= \$ 450.00

All balances are due to NASD Regulation, Inc.

Concurring Arbitrator's Signature


Theodore M. Utchen
Public Arbitrator, Presiding Chair

7-17-2000
Signature Date

Date of Service (For NASD office use only)