

**Award**  
**NASD Regulation, Inc.**

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In the Matter of the Arbitration Between

**Names of Claimants**

Randall Sears and Cathy Sears

Case No. 99-01322

**Names of Respondents**

Brad Nirenberg  
Jack Skidell  
Paul Brusca  
D.L. Cromwell Investments, Inc.  
Strategic Resource Management, Inc.

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**REPRESENTATION OF PARTIES**

For Randall Sears and Cathy Sears ("Claimants"): Stephen D. Spivey, Esq. of the Law Offices of Stephen D. Spivey, Esq., Ocala, Florida.

For Respondent Jack Skidell ("Skidell"): Gary Ettelman, Esq. of the Law Offices of Ettelman & Hochheiser, P.C., Garden City, New York.

For Respondent D.L. Cromwell Investments, Inc. ("Cromwell"): Andrew Fulton, IV, Esq. of the Law Offices of Cooney, Ward, Leshner & Damon, P.A., West Palm Beach, Florida.

Respondents Brad Nirenberg ("Nirenberg"), Paul Brusca ("Brusca") and Strategic Resource Management, Inc. ("Strategic") did not appear.

**CASE INFORMATION**

Statement of Claim filed on or about: March 15, 1999.

Claimants signed the Uniform Submission Agreement on: February 7, 1999.

Statement of Answer filed by Respondent Cromwell on or about: May 14, 1999.

Respondent Cromwell signed the Uniform Submission Agreement on: April 6, 1999.

Statement of Answer filed by Respondent Skidell on or about: October 13, 1999.

Respondent Skidell signed the Uniform Submission Agreement on: October 29, 1999.

Respondents Nirenberg, Brusca and Strategic did not file Statements of Answer or executed Uniform Submission Agreements.

**CASE SUMMARY**

Claimants sought recovery against the various Respondents under theories related to violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Florida

Securities and Investor Protection Act, the NASD Rules of Practice, common law fraud, negligence, negligent supervision and unsuitability.

Unless specifically admitted in its Answer, Respondent Cromwell denied the allegations made in the Statement of Claim and asserted the following defenses: 1) Respondent Cromwell is not liable for trades which occurred with another firm; 2) Respondent Cromwell is not liable for trades which occurred while Respondent Nirenberg acted within the course and scope of his duties with another firm; 3) Respondent Cromwell is not liable for conduct which occurred outside the scope of any employment relationship with Respondent Cromwell; 4) Claimants failed to state a claim upon which relief may be granted; 5) Claimants are barred from recovery by the statute of limitations and laches; 6) the NASD rules do not give rise to private causes of action; 7) Claimants are barred from recovery because they knew and assumed the risks of investing in the stock market and IRT Industries, Inc. ("IRTG") stock; 8) Claimants are barred from recovery by waiver and estoppel; 9) Claimants were experienced investors; 10) the risks of investing in the IRTG stock were fully and accurately disclosed; 11) Respondents performed appropriate due diligence regarding the IRTG stock; 12) the IRTG stock was suitable in light of Claimants' financial status and stated investment objectives; 13) Claimants' negligence should bar or reduce recovery by their proportionate share of fault; 14) Claimants failed to mitigate their damages; 15) Claimants' damages were the result of the negligence of third parties for which Respondent Cromwell had no control; 16) Respondent Cromwell is entitled to a set-off for amounts paid by Respondents in this matter or any third party in settlement; 17) Claimants ratified all trades; 18) Respondent Cromwell is entitled to a set-off for amounts received by Claimants in liquidating the IRTG stock; 19) Respondent Cromwell is entitled to a set-off for the residual value of the IRTG stock which Claimants possess; 20) Claimants caused all or part of their damages by misstating their investment objectives and financial condition to Respondents; and 21) Respondents are entitled to a set-off for profits earned on Claimants' account.

Unless specifically admitted in his Answer, Respondent Skidell denied the allegations made in the Statement of Claim relating to Respondent Skidell. As to all other allegations made in the Statement of Claim, Respondent Skidell asserted lack of knowledge or information sufficient to respond to the Statement of Claim. Respondent Skidell further asserted the following defenses: 1) Claimants were sophisticated investors and had full knowledge of the risks associated with the transactions; 2) Claimants failed to state a claim against Respondent Skidell upon which relief may be granted; and 3) Respondent Skidell did not owe or breach any duty to Claimants.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$57,192.00, interest, costs and attorney's fees.

Respondent Cromwell requested that the undersigned arbitrators (the "Panel") deny the claims, award costs and attorney's fees in favor of Respondent Cromwell, and grant such other relief the Panel deemed just and proper.

Respondent Skidell requested dismissal of the Statement of Claim and an award of costs and attorney's fees in his favor.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The evidentiary hearing in this matter occurred May 9, 2000. Claimants Randall Sears and Cathy Sears, (along with their counsel, Stephen D. Spivey) appeared at the final hearing. Respondent Cromwell, through its president, Lloyd Beirne, and its counsel, Andrew Fulton, IV, also appeared. Respondents Nirenberg, Skidell, Brusca, and Strategic did not appear or participate.

Upon review of the file and the representations made by/on behalf of the Claimants, the Panel determined that Respondents Nirenberg, Brusca and Strategic have been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without said Respondents present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

Respondents Nirenberg, Brusca and Strategic did not file with the NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to the Code and are bound by the determination of the Panel on all issues submitted.

Because Claimants announced at the hearing that they had reached resolution with Respondent Skidell, and thus were not proceeding forward as the case related to Mr. Skidell, the Panel makes no determination with respect to those claims against Mr. Skidell. Claimants subsequently dismissed Mr. Skidell from this arbitration.

The parties present at the evidentiary hearing have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **SUMMARY OF RULINGS**

The Panel is aware that arbitration awards typically do not include the Panel's reasoning, and that there is no requirement for the Panel to discuss its reasoning in rendering an award. However, the Panel has determined to honor the parties' request in explaining its reasoning, in part to assist a subsequent determination as it relates to the possible award of attorney's fees.

It does not appear from the record presented that any of the securities involved were a new issue. The Securities Act of 1933 is inapplicable and the Panel finds in favor of Respondents on all theories of recovery related to a violation of the Securities Act of 1933.

The Panel finds there was an insufficient showing of intentional or reckless fraud, misrepresentation or misconduct and thus finds in favor of Respondents for any theory of actions related to a violation of Rule 10(b)-5 or the Securities Exchange Act of 1934, common law fraud or common law misrepresentation.

The Panel finds, however, that Respondent Cromwell was negligent in its supervision of Respondent Brad Nirenberg, that Respondent Nirenberg, in concert with Respondents Brusca and Strategic, while Nirenberg was in the employ of Respondent Cromwell, recommended securities unsuitable for Claimants. The Panel thus finds in favor of Claimants and against Respondents Cromwell, Nirenberg, Brusca and Strategic for theories of recovery relating to negligence, negligent supervision, unsuitability, and violation of the Florida Securities and Investor Protection Act.

The NASD Rules of Fair Practice do not contain a private right of action and thus the Panel finds in favor of Respondents based on allegations of a *per se* violation of those rules. However, the Panel may and did use those rules in determining the standards by which to measure Respondents' performance of the duties owed by Respondents to Claimants.

Because the parties did not stipulate to a determination of attorney's fees by this tribunal, the Panel defers to a court of competent jurisdiction the determination of the entitlement to and amount of any award of attorney's fees.

### FACT FINDINGS

Claimants met while they were both attending night school to complete their high school education, and both received their diplomas in 1975. Claimants also married in 1975. Randall Sears had been a construction and equipment operator for several years prior to their marriage and continued to work in that capacity until 1990. During that time, it appears the Claimants only investments were in a mutual fund, which they had to cash in once they had children. Randall Sears was seriously injured in 1990, in a work related action, damaging his neck and spine. He required two or more surgeries, which ultimately ended in fusing of his spine. In about 1995, Randall Sears received a substantial workers compensation award, a portion of which was used to purchase an annuity, and the remainder of which represented his sole source for investment funds.

Claimants opened one investment account at Barron Chase Securities, Inc. in mid-1995. That account was closed in the latter part of 1998. It appears the securities in that account were unremarkable. Claimants were not experienced investors.

Claimants also opened an investment account with Hunter International Securities, Inc. ("Hunter"), in August, 1995. Although Respondent Nirenberg was employed by Hunter at the time, it does not appear he was the registered representative who dealt with Claimants while their account was at Hunter. The new account application for the Hunter account lists the objectives of long term growth and speculation, shows Randall Sears as disabled and reflects annual income of approximately \$35,000.00. Both Claimants testified that was substantially in excess of Mrs. Sears working income or of the family income, even after inclusion of Mr. Sears' disability income. The new account application was not signed by either Claimant.

In September, 1995, Claimants opened an account with VTR Capital, Inc. That account was closed at the end of May, 1996, under circumstances to be discussed below.

A few months after Claimants opened their account at Hunter, Hunter ceased operations. Although the record was not entirely clear as to its nature, termination of Hunter's operations was related to regulatory concerns. Robb, Peck, McCooey Clearing Corporation ("Robb Peck") was the clearing agent for both Hunter and Respondent Cromwell. Robb Peck approached Cromwell to take over roughly 2000 Hunter accounts, among which number were included Claimants' account. Cromwell did so, and in conjunction with acquiring the Hunter accounts, opened an account for Claimants in November, 1995. Cromwell also engaged Respondent Nirenberg, and one other registered representative, who were hired from Hunter to service these former Hunter accounts. Because Nirenberg had an "adverse" CRD, all his tickets had to be personally approved by Lloyd Beirne, Cromwell's president. Cromwell's compliance manual disallowed dual registrations, inappropriate outside activity and personal dealings between registered representatives and customers. To monitor compliance, Cromwell's compliance manual required tickets to be signed by a principal (although in Nirenberg's case they had to be signed by Mr. Beirne as president) and there was a quarterly compliance review and an annual performance and compliance review done for all employees at the same time. The Panel was provided with only one written annual review, done a few months after Nirenberg joined Cromwell. Mr. Beirne testified quarterly reviews were done for Nirenberg, albeit verbally, and the Panel was presented sparse indication of the contents or results of such review.

Nirenberg began calling Randall Sears at about the time the Hunter accounts were transferred to Cromwell. Nirenberg quickly learned that Randall Sears was disabled, that he was depressed and that he was taking anti-depressants. According to the testimony of Dr. Ann Tyson, Randall Sears' psychiatrist had been treating Randall Sears from March, 1993 through the date of the hearing. He suffered from severe depression. He has had and continues to have memory and concentration deficiencies. He is and has been receptive, docile and highly suggestible. She also testified, and the Panel finds, that Mr. Sears' mental and emotional condition would be apparent to even an untrained person. Mrs. Sears indicated that Nirenberg called frequently, and held lengthy conversations with Randall Sears. Because Mr. Sears was unable to work, was isolated, and was depressed, he came to see Nirenberg as a friend and trusted him.

The Cromwell account displayed no significant activity from the time it was opened, in November of 1995, on transfer from Hunter, until a trade on May 26, 1996. That May, 1996, trade was an acquisition of Halstead Energy, which was a security suggested by Nirenberg. Following that first trade, Nirenberg called Randall Sears five to seven times per week and talked extensively. Other trades followed. Apparently Nirenberg, at or about the same time, began to urge the acquisition of IRTG. Nirenberg persuaded Randall Sears to close his account with VTR Capital, Inc. and transfer the account to Respondent Strategic. Nominally, the registered representative for Claimants' account at Strategic was Paul Brusca. However, Randall Sears never spoke with Mr. Brusca or anyone else at Strategic. All of his dealings in that account were solely through Nirenberg. Two such accounts were, in fact, opened, one joint account for Mr. and Mrs. Sears and one account for Mr. Sears. Mr. Sears purchased IRTG through the joint account at Strategic. IRTG was totally unsuited for Claimants, given their respective earning ability, their resources and Randall Sears' physical and mental condition. The account at Strategic remained open for roughly 6 months, at which point the then holdings, including the 3500 shares of IRTG, were transferred to Claimants' account at Cromwell.

Cromwell made no inquiry of Respondents concerning these securities and especially concerning the suitability of any of the transferred securities to Sears' needs. Apparently Cromwell relied on the new account statements furnished from Hunter. Despite knowledge of the regulatory or other problems which Hunter had faced, and despite the adverse CRD for Mr. Nirenberg, Cromwell made no effort to verify any of the information on Sears' new account application or to monitor Nirenberg's dealings with his customers, including Sears.

In about February of 1997, Nirenberg's son experienced medical difficulties and Nirenberg was in the office at Cromwell only infrequently thereafter. Nirenberg remained in contact with Claimants, however, during the early part of 1997. He indicated to Claimants he was planning to leave Cromwell and go to work for Colin-Winthrop & Co., Inc. ("Colin-Winthrop"). Nirenberg advised Claimants to open an account with Colin-Winthrop, using Jack Skidell as their representative. A new account application was taken for the Colin-Winthrop account on February 21, 1997. That new account application indicated annual income of \$55,000.00, which both Claimants testified was vastly in excess of anything they had ever earned or were capable of earning. Claimants immediately acquired 2000 additional shares of IRTG, for which they were given the share certificates, and they withdrew the 3500 shares from their account at Cromwell, also receiving share certificates. At some point during early 1997, Nirenberg also indicated to Claimants he was going to work for IRT Investor Relations. Additionally, through a transaction not entirely clear, the 2000 shares of IRTG which Claimants acquired through Colin-Winthrop, and for which they received certificates, was matched with an additional 2000 shares and all of those share certificates were ultimately re-deposited in the Colin-Winthrop account. Claimants also acquired 5,000 additional shares of IRTG at Colin-Winthrop, but after Mr. Sears knew Nirenberg was leaving Cromwell and possibly after he had in fact done so.

### **DISCUSSION OF APPLICABLE LAW**

#### **The Securities Act of 1933:**

The Securities Act of 1933 [15 USC §77a-77bbbb(1982)] regulates new issues. Section 12(2) of the "33 Act" provides a civil remedy for the buyer against the seller of a new issue for fraud or misrepresentation, including omissions. Because none of the securities in dispute were initial public offerings, the '33 Act is inapplicable. Section 12 does not apply to transactions in the secondary market. *Gustafson v Alloyd Co.*, 115 S. Ct. 1061 (1995). As a consequence, Claimants can prevail against no Respondent in this action for violations of the Securities Act of 1933.

#### **The Securities Exchange Act of 1934:**

Rule 10(b)-5 [17 CFR §240.10(b)-5], promulgated under section 10(b) of the Securities Exchange Act of 1934, provides a criminal or administrative remedy against any person who commits fraud in connection with the purchase of any security. Although the section contains no civil remedies, federal courts have implied one and have established a body of court made law defining the remedy. See *Huddleston v. Herman & McLean*, 640 F.2d 534 (5th Cir. 1981); *Bruschia v. Brown*, 876 F.2d 1526, 1528 (11th Cir. 1989); *Robbins v. Koger Properties, Inc.*,

116 F.3d 1441 (11th Cir. 1997).

Under the '34 Act, Claimants alleging fraud must establish that:

1. Respondents made a false representation of material fact or omitted to state a material fact;
2. Respondents' misrepresentation or omission was in connection with the purchase or sale of a security;
3. Respondents' misrepresentation or omission was purposeful, made with scienter and made with the intent that claimant rely upon it; Scienter may be established by proof of misconduct which is knowing or, at a minimum, is extremely reckless in that it reflects an extreme departure from the standards of ordinary care. *Huddleston v. Herman & McLean*, 640 F.2d 534 (5th Cir. 1981).
4. Claimants justifiably relied upon Respondents' misrepresentation or omission;
5. Claimants acted with due diligence, care and good faith to protect their interest; and,
6. the damages Claimants allegedly suffered are the proximate result of the misrepresentation or omission of Respondents.

*Ernst & Ernst v Hochfelder*, 425 U.S. 185 (1976); *Thompson v Smith, Barney, Harris, Upham & Co., Inc.*, 789 F.2d 1413 (11th Cir. 1983).

The evidence does not satisfy the Panel that there was any affirmative misrepresentation. Nor can the Panel find, from the evidence presented, a knowing *or reckless* (emphasis supplied) omission or misrepresentation.

A Rule 10(b)-5 claim can also be based on unsuitability. *Zaretsky v E.F. Hutton & Company, Inc.*, 509 F.Supp. 68, 75 (S.D.N.Y. 1981). The elements of a Rule 10(b)-5 unsuitability claim are:

1. Actual recommendation by broker;
2. Failure to warn when broker has reason to believe customer is unaware of risks and where customer may have the right to expect such warning;
3. At the time Respondents effectuated these transactions, they knew the investments were unsuitable for Claimants; or,
4. They made these recommendations with a reckless disregard for their suitability.

Numerous factors are to be considered in determining whether an investment is suitable for an investor. These factors include, but are not limited to, the customer's investment objectives, financial circumstances, financial needs, age, family, health, the nature and character of the customer's securities accounts, the ability to bear the risk of loss, and the potential for reward. *Clark v John Lamula Investors, Inc.*, 583 F.2d 598, 600 (2d Cir. 1978). Essentially:

1. Does customer understand transaction and risk;
2. Can customer bear risk;
3. Is recommendation consistent with investment objectives.

All investments present some risk of loss. A securities broker does not in any way insure or guarantee the success of any investment. The fact that Claimants may have earned a greater return utilizing other investment vehicles does not automatically mean that the transactions recommended by Respondents were unsuitable or that Respondents are liable in any way. *Van Allen v Dominic and Dominic, Inc.*, 441 F.Supp 389, 400 (S.D.N.Y. 1976), *aff'd*, 560 F.2d 547 (2d Cir. 1977).

Under any analysis, Halstead Energy and IRTG were unsuitable investments for persons in Claimants' situation. It is equally clear that these investments were recommended to Claimants by Nirenberg, whether they were acquired at Cromwell or acquired through Claimants' account at Strategic for which Brusca was the registered representative. The central question, of course, is whether those recommendations were made with knowledge of their unsuitability or with reckless disregard for their suitability. While the Panel concedes it is a close question, and due to the non-participation of Nirenberg, Brusca or Strategic, and Claimants' difficulty in providing evidence on the question, the Panel is compelled to find that the scienter requirement (actual knowledge or reckless disregard) is not satisfied.

#### **Common Law Fraud:**

The elements of a cause of action for common law fraud or misrepresentation are similar to those for statutory fraud under the Securities Exchange Act. *Boim v. National Data Products, Inc.*, 932 F.Supp 1402 (M.D. Fla. 1996); *See Hi-Was Motor Company v International Harvester Company*, 398 Mich. 330 (1976); *Disner v Westinghouse Electric Corp.*, 726 F.2d 1106 (6th Cir. 1984); *Tucker v. Mariani*, 655 So.2d 221 (Fla. 1st DCA 1995). Because the Panel finds no evidence of an omission of a material fact or any false statement or representation, Claimants cannot obtain recovery under a common law fraud or misrepresentation theory.

#### **NASD Rules of Fair Practice and New York Stock Exchange Rules:**

Although federal courts are divided, individual investors probably do not have a private right of action under self regulatory organization rules. *Verifone Securities Litigation*, 11 F.3d 865 (9th Cir. 1993); *RWI v. ASE*, 1996 WL 381781 (S.D.N.Y. 1996), *see Liskey v Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983); *Lantz v Private Satellite Television, Inc.*, (E.D. Mich.,



1993); *Craighead v E.F. Hutton & Col*, 899 F.2d 485 (6th Cir. 1990). However, failure to live up to these prevailing industry standards may be a factor in deciding if a member engaged in a course of conduct which amounts to negligence, breach of a fiduciary duty or statutory fraud. *Mauriber v. Shearson/American Express*, 546 F.Supp. 391 (S.D.N.Y. 1982); *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318 (5th Cir. 1981). Thus, Claimants cannot recover under any theory which involves violation of these rules *per se*. However, as noted below, the Panel can and does apply those rules in determining the standards for measurement of performance by Respondents of their duties to Claimants.

**Breach of fiduciary duty, failure to supervise and negligence:**

It is without dispute that a registered representative and a broker dealer owe a fiduciary duty to their clients, and that a cause of action exists for breach of that duty which proximately causes damages to Claimants. *Gochenauer v. A. G. Edwards & Sons, Inc.*, 810 F.2d 1042 (11th Cir. 1987). For non-discretionary accounts, there is only a limited fiduciary duty, *First of Michigan Corporation v Swick*, 894 F.Supp. 298 (E.D. Mich. 1995), and the broker's general duty of care and loyalty to a securities' investor is limited by the scope of the broker's relationship with the client. *Leib v Merrill Lynch, Prince, Fenner, Smith*, 461 F.Supp. 951 (E.D. Mich. 1978). Duties, nevertheless, do exist. Among those duties are to recommend a stock only after studying it sufficiently to become informed as to its nature, price and financial prognosis and to inform the customer of the risks involved in purchasing or selling a particular security. *Leib supra* at 953. *Gochenauer supra*.

NYSE Rule 405(2) requires a member organization to supervise diligently every account handled by a registered representative of that member organization. NASD Rule of Conduct 3010(a) contains a similar requirement. In point of fact, Respondent Cromwell was specifically required to exert extra efforts to supervise Nirenberg's activity. A cause of action for negligent supervision can be found where the employer knew or should have known of harmful or dangerous propensities on the part of its employee. *M.V. v. Gulf Ridge Counsel of Boy Scouts*, 529 So.2d 1248 (Fla. 2d DCA 1988); *Garcia v. Duffy*, 492 So.2d 435 (Fla. 2d DCA 1986); *Stephenson v. School Board of Polk County*, 467 So.2d 1112 (Fla. 2d DCA 1985). Cromwell had actual knowledge of such propensities on the part of Nirenberg, should have exerted significant extra efforts to supervise his dealings with his accounts and failed to do so. There is no evidence of any supervisory efforts by Strategic.

NASD Rule of Fair Practice 2310 (former Rule of Fair Practice Article III, Section 2) requires a member to have a reasonable basis to believe its recommendation is suitable on the basis of facts disclosed by the customer. A member organization's fiduciary duty to its client has to be measured by that rule. Nirenberg, Cromwell, Brusca and Strategic were all seriously deficient in that regard.

**Florida Securities and Investor Protection Act:**

State securities laws operate in conjunction with federal laws; federal laws do not supersede state laws. *E.F. Hutton and Company vs. Rousseff*, 537 So.2d 978 (Fla. 1989); 15 USC §77p,

78bb(a). Section 517.301, Fla. Stat., is similar in language to Rule 10(b)-5. Courts have not created a civil right of action under Section 517.301 because companion Section 517.211, which has a similar effect to Section 12(2) of the '33 Act, creates a civil right of action. Section 517.241 provides additional remedies.

The elements of a statutory fraud action under Chapter 517 are enumerated in *Commodities Futures Trading Commission vs. American Metals Exchange Corporation*, 775 F.Supp. 767 (D.N.J. 1991); *Rousseff supra*; *Kashner Davidson Securities Corp. v. DesRosiers*, 689 So.2d 1106 (Fla. 2d DCA 1997). They are:

1. Misrepresentation or omission
2. of information material to the sales transaction
3. upon which the purchasers reasonably relied
4. that proximately caused the purchaser injury.
5. Scienter - the anti-fraud provisions of the Florida Securities and Investor Protection Act, proscribing any practice which would "operate as a fraud or deceit", require mere proof of negligence rather than intent. Florida Statutes §517.301(1)(a); *Messer vs. E.F. Hutton and Company, Inc.*, 833 F.2d 909 (CA 11 [Fla.] 1987), rather than the "reckless disregard" requirement of Rule 10(b)-5. *In re: Checkers Securities Litigation*, 858 F.Supp. 1168 (M.D. Fla. 1994).

Although the conduct of Nirenberg, Cromwell, Brusca and Strategic fails to satisfy the actual knowledge or reckless disregard requirements for fraud under the Securities Exchange Act of 1934 or under the common law, their conduct does satisfy the negligence scienter requirement for violations of the Florida Securities and Investor Protection Act.

As noted above, the evidence presented does not permit a finding of either a material omission or material misrepresentation. At first blush, therefore, a fraud claim under Florida law also appears unavailable. However, recommending an unsuitable investment is also a violation of the Florida Securities and Investor Protection Act. Specifically, making unsuitable trades constitutes statutory fraud, rather than a mere technical violation. *Newsome vs. Dean Witter Reynolds, Inc.*, 558 So.2d 1076 (Fla. 1st DCA 1990). The Newsome court held that §517.301(1), Florida Statutes, "denominates that all covered and prohibitive acts, in the very title, are 'fraudulent transactions'".

As noted above, it is clear that Halstead Energy, which Nirenberg recommended and which Claimants purchased through Cromwell, was an unsuitable investment. It is equally clear that the securities purchased at Strategic, including specifically IRTG, were unsuitable for Claimants. Nirenberg, while in the employ of Cromwell, was the active agent to induce those purchases at Strategic, but Brusca was the assigned registered representative and also bears responsibility for the recommendation. Lastly, the Panel is satisfied that the recommendation was negligent in its

failure to consider Claimants' condition, and in the case of Cromwell, to monitor its employee's actions.

In non-discretionary accounts, such as Claimants' account at Cromwell, the customer ultimately decides whether to purchase or not to purchase any security. Thus, the unsuitability issue really turns on whether the customer was advised of the risks, and whether those warnings were adequate under the circumstances. Mr. Nirenberg did not appear or testify, and thus the Panel has no evidence concerning any warning he might have given. Given Mr. Sears' mental and emotional condition, it is doubtful any warning, when joined with a recommendation (no matter how guarded), would be sufficiently strong. Considering the Sears' financial condition and Mr. Sears' physical disability and mental condition, the securities simply should not have been recommended.

As noted before, just prior to his departure from Cromwell, Nirenberg induced Randall Sears to open an account with Colin-Winthrop, and to acquire 2000 additional shares of IRTG. Nirenberg is therefore liable for those unsuitable recommendations. Cromwell had lost the ability to monitor Mr. Nirenberg's activities by this point, because he was only in the office infrequently during the last few months of his employment. Moreover, Mr. Sears knew of Nirenberg's reduced work schedule, and that he was leaving Cromwell, supposedly to join Colin-Winthrop. Given those circumstances, the Panel finds that Cromwell is not liable to Claimants for any losses suffered by them for trades at Colin-Winthrop, or any losses suffered for securities acquired while they held an account with Cromwell after those securities left the Cromwell account.

#### **Attorney's Fees**

Under the Federal Arbitration Act, federal arbitrators are entitled to pass on the propriety of attorney's fees in light of the broad power of arbitrators to fashion appropriate remedies. Florida Statute §682.11 also provides that attorney's fees for arbitration are recoverable, but only in the trial court upon a motion for confirmation or enforcement of the award. *Lee v. Smith Barney Harris Upman & Company*, 626 So.2d 969 (Fla. 2d DCA 1993). Only where the parties have stipulated in advance that fees are arbitrable, may the arbitrators enter ruling. *Cassedy v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 761 So.2d 143 (Fla. 1st DCA 2000) suggests that Uniform Submission Agreements in NASD arbitrations may constitute such an agreement for the issue to be decided in arbitration, and questions the conventional "wisdom" that courts are better able than arbitrators to determine an appropriate award of attorney's fees. Conversely, *Barron Chase Securities, Inc. v. Moser*, 745 So.2d 965 (Fla. 2d DCA 1999) commends instead the procedure this Panel chose to adopt. The Panel has enunciated the legal theories upon which its ruling is based, and will defer to the courts the determination of an appropriate award of attorney's fees.

#### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues

submitted for determination as follows:

1. The Panel awards damages in favor of Claimants against Respondents Brad Nirenberg and D.L. Cromwell Investments, Inc., jointly and severally, in the amount of \$16,176.09.
2. The Panel awards damages in favor of Claimants against Respondents Brad Nirenberg, Paul Brusca, and Strategic Resource Management, Inc., jointly and severally, in the amount of \$32,841.99.
3. The Panel awards damages in favor of Claimants against Respondent Brad Nirenberg, in the amount of \$7,010.54.
4. Respondents Brad Nirenberg, D.L. Cromwell Investments, Inc., Paul Brusca and Strategic Resource Management, Inc. are jointly and severally liable and shall pay Claimants the sum of \$150.00 representing reimbursement of the claim filing fee.
5. The Panel defers, to a court of competent jurisdiction, for determination of the entitlement to and amount of a reasonable attorney's fee.
6. All other requests for relief not specifically addressed herein are denied.

#### **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	= \$150.00
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##### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firms, Respondents Cromwell and Strategic, are parties.

Member surcharge	= \$1,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$1,500.00

##### **Adjournment Fees**

There were no adjournments requested during these proceedings.

##### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), 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: February 4, 2000 1 session

Two (2) Pre-hearing sessions with Panel x \$500.00 = \$1,000.00  
Pre-hearing conferences: January 10, 2000 1 session  
February 28, 2000 1 session

Two (2) Hearing sessions x \$500.00 = \$1,000.00  
Hearing Dates: May 9, 2000 2 sessions

Total Forum Fees = \$2,300.00

The Panel has assessed the total forum fees in the amount of \$2,300.00 jointly and severally to Respondents Nirenberg, Cromwell, Brusca and Strategic.

#### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during these proceedings.

#### **Fee Summary**

Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$150.00
Total Fees	= \$150.00
<u>Less payments</u>	<u>= \$150.00</u>
Balance Due NASD Regulation, Inc.	= \$0.00

Respondent Cromwell be and hereby is solely liable for:

Member Fees	= \$3,100.00
Total Fees	= \$3,100.00
<u>Less payments</u>	<u>= \$3,100.00</u>
Balance Due NASD Regulation, Inc.	= \$0.00

Respondent Strategic be and hereby is solely liable for:

Member Fees	= \$3,100.00
Total Fees	= \$3,100.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Regulation, Inc.	= \$3,100.00

Respondents Cromwell, Strategic, Brusca and Nirenberg be and hereby are jointly and severally liable for:

Forum Fees	= \$2,300.00
Total Fees	= \$2,300.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$2,300.00

All balances are due and payable to NASD Regulation, Inc.

**Concurring Arbitrators' Signatures**

/S/  
Langfred W. White, Esq., Presiding Chair  
Public Arbitrator

                      
Signature Date

/S/  
Hal S. Holtsinger  
Public Arbitrator

                      
Signature Date

/S/  
Fred V. McCrindle  
Industry Arbitrator

                      
Signature Date

June 12, 2000  
Date of Service (For NASD office use only)

Respondents Cromwell, Strategic, Brusca and Nirenberg be and hereby are jointly and severally liable for:

Forum Fees	= \$2,300.00
Total Fees	= \$2,300.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Regulation, Inc.	= \$2,300.00

All balances are due and payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures

Langfred W. White  
Langfred W. White, Esq., Presiding Chair  
Public Arbitrator

9 JUNE 2000  
Signature Date

\_\_\_\_\_  
Hal S. Holtsinger  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Fred V. McCrindle  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

Respondents Cronwell, Strategic, Brusca and Nirenberg be and hereby are jointly and severally liable for:

Forum Fees	= \$2,300.00
Total Fees	= \$2,300.00
Less payments	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$2,300.00

All balances are due and payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures

Langfred W. White, Esq., Presiding Chair  
Public Arbitrator

Signature Date

Hal S. Holtsinger  
Hal S. Holtsinger  
Public Arbitrator

6-9-2000  
Signature Date

Fred V. McCrindle  
Industry Arbitrator

Signature Date



Respondents Cromwell, Strategic, Broder and Nirenberg be and hereby are jointly and severally liable for:

Forum Fees	= \$2,300.00
Total Fees	= \$2,300.00
Less Payments	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$2,300.00

All balances are due and payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures

Langfred W. White, Esq., Presiding Chair  
Public Arbitrator

Signature Date

Hal S. Hotsinger  
Public Arbitrator

Signature Date

  
Fred V. McCrindle  
Industry Arbitrator

05/09/00  
Signature Date