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N.A.S.D. REGULATION AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

Chet and Betty Smurzynski  
Chet Smurzynski dba Tico Construction

97-02868

Name of Respondents

Kensington Wells Incorporated  
Alden Capital Markets, Inc.  
Robert Bertsch  
Steven Jaross  
Elias Tacher  
Sal Tacher  
Steven Vornea  
Adam Levy  
Marc Luxenberg  
Robert Thayer  
Alfred Salazar

REPRESENTATION OF PARTIES

For Claimants: Cary S. Lapidus, Esq., San Francisco, California.

For Kensington Wells Incorporated,  
Elias Tacher, Sal Tacher, and Marc Luxenberg: Allison Johnsen, Esq., Lehman & Eilen,  
Uniondale, New York.

For Alden Capital Markets, Inc.: Alfred Salazar, Alden Capital Markets, Inc., Denver, Colorado.

Robert Thayer represented himself, pro se.

Alfred Salazar represented himself, pro se.

Steven Jaross represented himself, pro se.

Steven Vornea represented himself, pro se.

Robert Bertsch represented himself, pro se.

For Adam Levy: Jonathan M. Ettman, Esq., Sichenzia, Ross & Friedman, New York, New York.

**CASE INFORMATION**

Claimants' Statement of Claim was filed on or about June 10, 1997.  
Chet Smurzynski's and Betty Smurzynski's Submission Agreement was signed on June 3, 1997.  
The Submission Agreement for Chet Smurzynski dba Tico Construction was signed on June 19, 1997.  
The Joint Statement of Answer for Kensington Wells Inc., Robert Bertsch, Elias Tacher, Sal Tacher Adam Levy and Marc Luxenberg was filed on or about August 25, 1997.  
Steven Jaross adopted the Joint Answer filed by Kensington Wells, Inc., Robert Bertsch, Elias Tacher, Sal Tacher Adam Levy and Marc Luxenberg on December 18, 1997.  
The Joint Statement of Answer for Alden Capital Markets, Robert Thayer, and Alfred Salazar was filed on or about August 21, 1997.  
Steven Vornea's Statement of Answer was filed on or about September 8, 1997.  
The Submission Agreement for Alden Capital Markets, Inc. was signed on August 21, 1997.  
Sal Tacher's Submission Agreement was signed on November 12, 1997.  
Marc Luxenberg's Submission Agreement was signed on August 12, 1997.  
Robert Thayer's Submission Agreement was signed on August 21, 1997.  
Adam Levy's Submission Agreement was signed on January 2, 1998.

**HEARING INFORMATION**

Pre-hearing conferences were held on:	January 23, 1998	one session;
	February 23, 1998	one session;
	May 15, 1998	one session;
	June 16, 1998	one session;
	July 15, 1998	one session.
The hearing was held in San Francisco on:	August 17, 1998	two sessions;
	August 18, 1998	two sessions;
	August 19, 1998	two sessions;
	August 20, 1998	two sessions;

### CASE SUMMARY

Claimants allege that Kensington Wells Inc., Robert Bertsch, Steven Jaross, Steven Vornea, Elias Tacher, Sal Tacher, Adam Levy and Marc Luxenberg ("Kensington respondents"), engaged in a scheme to defraud the Claimants through various misrepresentations and omissions. Claimants further allege that the Kensington respondents induced Claimants purchase of several stocks in which the markets for these stocks were controlled and manipulated by and for the benefit of the Kensington respondents. Claimants also allege that the Kensington respondents put the Claimants' portfolio at great financial risk by over concentrating purchases in two stocks while making false promises regarding the future of the stocks and offering to guarantee losses by making available future profitable positions in some Initial Private Offerings.

The Claimants allege that Alden Capital Markets, Inc., Robert Bertsch (for his time while employed by Alden), Alfred Salazar and Robert Thayer ("Alden respondents") induced the Claimants to invest in Catalogue Stationers, Inc. in return for a promissory note signed by the company. The Claimants allege that the Alden respondents made material misrepresentations and omissions regarding the financial stability of the company prior to the Claimants' purchase. The Claimants further allege that Catalogue Stationers was never qualified for sale in California by the California Department of Corporations. Additionally, the Claimants allege that the Alden respondents induced Claimants' purchase of Spirit Gaming and ICOS, stocks unsuitable for Claimants' portfolio and one of which was also not qualified for sale in California. Claimants also allege that the Alden respondents failed to execute trades to sell Claimants shares of Spirit Gaming.

The Kensington respondents deny the allegations set forth in the Statement of Claim. They specifically argue that the Claimants were sophisticated investors who are complaining about their losses while overlooking profits made in their account. They further argue that the Claimants received a prospectus prior to each purchase setting forth the risk involved with each investment.

The Alden respondents deny the allegations set forth in the Statement of Claim. They specifically argue that the Claimants did their own research and due diligence on the Catalogue Stationers note and negotiated directly with the company. The Alden respondents further argue that the note was not a "security" which fell within the meaning of the California Corporations Code or federal securities laws. They also argue that Spirit Gaming Group and ICOS were suitable for the Claimants based on their assets and sophistication. Lastly, the Alden respondents argue that all sell orders placed by the Claimants were executed promptly by the Alden respondents.

Respondent Steven Vornea denies the claims asserted in the Statement of Claim. He specifically argues that he did not participate in the management or the direct supervision of the Claimants' account. He also further argues that he did not have responsibility concerning setting policy at Kensington Wells Inc.

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**RELIEF REQUESTED**

Claimants requested an award in the amount of \$1,000,000 plus interest and lost opportunity damages. The Claimants also requested attorneys' fees and unspecified exemplary damages.

The respondents requested that all claims be dismissed. Respondent Vornea requested an award of costs and attorneys' fees.

**OTHER ISSUES CONSIDERED & DECIDED**

Upon review of the file and the representations made by/on behalf of the Claimants, the undersigned arbitrators have determined that respondents Robert Bertsch, Steven Jaross, Elias Tacher, Steven Vornea, and Alfred Salazar failed to file properly notarized Uniform Submission Agreements with NASD Regulation, Inc. pursuant to Rule 10314(b). The undersigned arbitrators have determined upon review of the file and the representations made by/on behalf of the Claimants that pursuant to Rule 10101 this matter is eligible for submission to arbitration and further that pursuant to Rule 10301 respondents Robert Bertsch, Steven Jaross, Elias Tacher, Steven Vornea, and Alfred Salazar are required to submit to this arbitration and are bound by all determinations made herein.

All action was stayed and no award was made as to Kensington Wells Incorporated due to the bankruptcy filing by Kensington Wells Incorporated.

Prior to the hearing the Claimants dismissed all claims with prejudice as to Elias Tacher, Sal Tacher, Marc Luxenberg and Adam Levy following settlement agreements reached with each of these respondents.

At the hearing the Claimants withdrew all claims asserted by Chet Smurzynski dba Tico Construction with prejudice. Any award rendered is rendered solely with respect to the joint claims of Chet Smurzynski and Betty Smurzynski, individually. No award is made regarding the claims of Tico Construction. All references to "Claimants" below shall refer solely to Chet Smurzynski and Betty Smurzynski.

The parties agreed to receive conformed copies of the award while the original remains on file with NASD Regulation, Inc., Office of Dispute Resolution.

**AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Each and every claim asserted in the Statement of Claim as to Steven Jaross is dismissed;
2. Each and every claim asserted in the Statement of Claim as to Robert Bertsch with respect to actions taken by Robert Bertsch while employed by Kensington Wells Incorporated is dismissed;
3. Claimants are awarded and Respondent Steven Vornea shall pay to Claimants sanctions at the rate of \$1,000 per day for the willful refusal to comply with this panel's discovery order dated June 22, 1998 for the period July 8, 1998 to August 20, 1998. Total sanctions payable to the Claimants by Respondent Vornea are \$44,000;
4. Claimants are awarded and Respondent Vornea shall pay to Claimants compensatory damages for fraud and defalcation in the amount of \$698,906 less \$78,000 credit for amounts received by Claimants from settlements reached with respondents Sal Tacher, Elias Tacher, Marc Luxenberg and Adam Levy. Net compensatory award to be paid by Respondent Vornea to the Claimants is \$620,906;
5. Claimants are awarded and Respondent Vornea shall pay to Claimants 7% simple interest on \$620,906 for the period of December 16, 1996 to September 16, 1998 in the amount of \$76,060;
6. Claimants are awarded and Respondent Vornea shall pay to Claimants the sum of \$1,000,000 representing punitive damages pursuant to arbitrators' authority under Mastrobuono, et al. v. Shearson Lehman Hutton, Inc., et al. 115 S.Ct. 1212 (1995) and NASD Code of Arbitration Procedure Rule 10330(e). This panel finds that Respondent Vornea's actions constitute egregious and despicable fraud, defalcation, and willful breach of fiduciary duty, in that, as an owner, principal, control person, head trader, and sales manager of Kensington Wells Inc., he promoted and caused Videolan Technologies common stock to be sold to the Claimants in California without disclosing to them: (1) that the stock was not qualified with the California Department of Corporations; (2) that the stock's price was being fraudulently manipulated internally by Kensington Wells for the benefit of Kensington Wells' principals; (3) that Kensington Wells was taking unreasonable commissions in excess of 15% on the sales of the stock to the Claimants; (4) that Videolan had no history of earnings and was completely speculative; (5) that Claimants would not be permitted by Kensington Wells to subsequently sell Videolan stock without purchasing other stocks through Kensington Wells; or (6) that Steven Vornea himself was short-selling the stock;
7. Claimants are awarded and Alden Capital Markets, Alfred Salazar, Robert Thayer and Robert Bertsch shall pay to Claimants, jointly and severally, the sum of \$34,577 representing damages with respect to the negligent breach of fiduciary duty by these respondents in the sales of Spirit Gaming Group, Inc. This determination is contingent upon the Claimants tendering their holdings of Spirit Gaming Group, Inc. to the Respondents within twenty days

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from the service date of this award. The panel further finds that Alden Capital Markets and Alfred Salazar fraudulently breached their fiduciary duty to the Claimants in the sales of Spirit Gaming Group, Inc., in that Salazar, as an owner, principal, control person, and officer of Alden Capital Markets and Spirit Gaming Group, promoted and caused Spirit Gaming Group to be sold to the Claimants in California without disclosing to them: (1) that the stock was not qualified by the California Department of Corporations; (2) that Alden's principals owned substantially all of the stock of Spirit Gaming Group; (3) that Spirit Gaming Group was in default of a substantial loan; or (4) that Spirit Gaming Group had no earnings and was only in the "development" stage;

8. Claimants are awarded and Alden Capital Markets shall pay to Claimants the sum of \$150,000 representing damages with respect to Alden Capital Markets negligent breach of fiduciary duty by failing to supervise the sale of the Catalogue Stationers convertible note. This determination is contingent upon the Claimants tendering their Catalogue Stationers note to the Respondents within twenty days from the service date of this award;
9. Each and every claim asserted by the Claimants with respect to the sale of ICOS is denied;
10. Claimants' requests for costs, attorneys' fees, witness fees and other costs are denied;
11. All other claims asserted by any party are hereby denied;
12. All sides to bear their own costs and expenses.

#### FORUM FEES

There were 8 sessions x \$1,000 plus 5 pre-hearing conferences (2 pre-hearing conferences @ \$300 and 3 pre-hearing conference @ \$1,000 = \$3,600) = \$11,600 in total forum fees. Pursuant to §10332(b) of the NASD Regulation, Inc., Office of Dispute Resolution 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 undersigned panel has assessed the forum fees as follows: Steven Vornea is assessed 25% of the forum fees and shall pay to NASD Regulation, Inc. the sum of \$2,900; Alden Capital Markets, Alfred Salazar, Robert Thayer and Robert Bertsch, jointly and severally, are assessed 25% of the forum fees and shall pay to NASD Regulation, Inc. the sum of \$2,900; and the Claimants Chet and Betty Smurzynski are assessed 50% of the forum fees and shall pay NASD Regulation, Inc. the sum of \$5,800.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. shall retain the non-refundable filing fee in the amount of \$250 and shall credit the Claimants forum fee balance with the hearing session deposit made by the Claimants in the amount of \$1,000.

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Pursuant to Rule 10333 of the Code, Alden Capital Markets has paid to NASD Regulation, Inc. the \$500 member surcharge previously invoiced.

Pursuant to Rule 10333 of the Code, Kensington Wells Inc. shall pay to NASD Regulation, Inc. the \$500 past due member surcharge previously invoiced.

**Fees are payable to the NASD, Regulation, Inc.**

Public / Industry



Charles E. Farnsworth, Esq.

Public

Presiding Chair

Sterling N. Frost

Public

James R. Dickson

Industry

Date Served:

SEP 25 1998