

**Award  
FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Tim Taylor Smith and Phillip John Mottini, Claimants v. Bernard Wayne Bunning,  
Respondent

Bernard Wayne Bunning, Counter-Claimant v. Tim Taylor Smith and Phillip John  
Mottini, Counter-Respondents

Case Number: 05-02206

Hearing Site: San Francisco, California

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Nature of the Dispute: Associated Persons v. Associated Person  
Associated Person v. Associated Persons

**REPRESENTATION OF PARTIES**

For Claimants and Counter-Respondents:

Robin K. Perkins, Esq.  
Palmer, Kazanjian,  
Wohl, Perkins, LLP  
Sacramento, California

For Respondent and Counter-Claimant:

Paul L. Cass, Esq.  
Law Office of Paul L. Cass  
Citrus Heights, California

**CASE INFORMATION**

Statement of Claim filed: April 25, 2005

Answer of Tim Taylor Smith and Phillip John Mottini to Counterclaim of Respondent  
Bernard Wayne Bunning filed: July 8, 2005

Answer of Tim Taylor Smith and Phillip John Mottini to Amended Counterclaim of  
Respondent Bernard Wayne Bunning filed: March 16, 2006

Motion to File First Amended Complaint and First Amended Complaint filed: November  
29, 2006

Claimants Tim Taylor Smith and Phillip John Mottini's Memorandum of Points and  
Authorities in Support of Combined Opposition to Respondent's Motion to Strike,  
Motion to Dismiss and Demurrer filed: March 14, 2006

Declaration of Tim Taylor Smith in Support of Claimants Tim Taylor Smith's and Phillip John Mottini's Combined Opposition to Respondent's Motion to Strike, Motion to Dismiss and Demurrer filed: March 14, 2006

Declaration of Phillip John Mottini in Support of Claimants Tim Taylor Smith's and Phillip John Mottini's Combined Opposition to Respondent's Motion to Strike, Motion to Dismiss and Demurrer filed: March 14, 2006

Claimants' Uniform Submission Agreement signed: April 25, 2005

Statement of Answer and Counterclaim of Respondent Bernard Wayne Bunning filed: July 1, 2005

Respondent Bernard Wayne Bunning's Motion to Dismiss filed: July 1, 2005

Respondent Bernard Wayne Bunning's Motion to Strike Pleadings filed: July 1, 2005

Respondent Bernard Wayne Bunning's Demurrer filed: July 1, 2005

Respondent Bernard Wayne Bunning's Opposition to Smith and Mottini's Motion to Amend Pleading to Add Cause of Action for Breach of Contract filed: December 18, 2006

Declaration of Respondent Bernard Wayne Bunning in Opposition to Motion to Amend Complaint filed: December 18, 2006

Declaration of Paul L. Cass in Opposition to Motion to Amend Complaint filed: December 18, 2006

Respondent Bernard Wayne Bunning's Reply Re: Motion to Strike; Motion to Dismiss & Demurrer filed: March 15, 2006

Respondent Bernard Wayne Bunning's Amended Counterclaim filed: March 15, 2006

Respondent Bernard Wayne Bunning's Uniform Submission Agreement signed: June 30, 2005

### **CASE SUMMARY**

Claimants Tim Taylor Smith and Phillip John Mottini alleged that the parties entered into a non-binding Memorandum of Terms regarding the creation of Valliance Financial Advisors LLC ("Valliance") and further alleged that the parties entered into a written Operating Agreement reflecting ownership percentage in Valliance. Claimants Tim

Taylor Smith and Phillip John Mottini also alleged the following claims with respect to their affiliation with Respondent Bernard Wayne Bunning: 1) Fraudulent Misrepresentation; 2) Breach of Contract; 3) Breach of Fiduciary Duty; 4) Unfair Business Practices; 5) Breach of Implied Covenant; and 6) Breach of Settlement Agreement.

Respondent Bernard Wayne Bunning denied Claimants' allegations and asserted that the Panel should dismiss all of Claimants' claims as not proper for arbitration.

Respondent Bernard Wayne Bunning alleged the following counterclaims: 1) Conversion against Tim Taylor Smith and Phillip John Mottini; 2) Slander Per Se against Tim Taylor Smith and Phillip John Mottini; 3) Breach of Contract against Tim Taylor Smith and Phillip John Mottini; 4) Breach of Fiduciary Duty against Tim Taylor Smith and Phillip John Mottini; 5) Accounting Cal. Corp.C.Sec. 17106 against Valliance Financial Advisors LLC, Tim Taylor Smith and Phillip John Mottini; 6) Permanent Injunction against Tim Taylor Smith and Phillip John Mottini; 7) Judicial Dissolution of LLC, Corp.C.Sec 17351 against Tim Taylor Smith and Phillip John Mottini; 8) Fraud and Misrepresentation against Tim Taylor Smith; 9) Tortious Interference with Contract against Tim Taylor Smith and Phillip John Mottini; 10) Breach of the Implied Covenant of Good Faith & Fair Dealing against Phillip John Mottini and Tim Taylor Smith; 11) B & P Code 17200, et seq Violations against Tim Taylor Smith; 12) Negligent Misrepresentation against Tim Taylor Smith and Phillip John Mottini; and 13) Palming Off / Unfair Competition against Tim Taylor Smith and Phillip John Mottini.

Counter-Respondents Tim Taylor Smith and Phillip John Mottini denied Bernard Wayne Bunning's allegations and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants Tim Taylor Smith and Phillip John Mottini requested the following relief in the Statement of Claim:

1. A declaration that all agreements between Smith, Mottini and Bunning and his agents, and all rights and obligations thereunder, are terminated;
2. An order allowing Smith and Mottini to collect and retain all outstanding commissions on Valliance work without deduction;
3. An order directing Bunning and/or Bunning, Borst, Enfield & Klein LLP ("BBEK") to pay monetary damages to Smith and Mottini, including, but not limited to the following: \$100,000.00 to Smith to pay off and reimburse him for the balance currently outstanding on Smith's personal line of credit, which was used to pay for tenant improvements, moving and operating expenses, all relating to Valliance, and the \$10,000.00 Mr. Smith paid out of pocket for the same purposes; an amount in excess of \$50,000.00, according to proof, to offset the expenses and lost profits incurred by Tim Taylor Smith and

Phillip John Mottini;

4. An order directing BBEK to pay off, refinance, or in some other manner remove Smith and Mottini as guarantors on the business line of credit, on which all parties are jointly and severally liable, and which was used to pay for tenant improvements and operating expenses for Valliance;
5. An order directing BBEK to sign over to Smith and Mottini all ownership interest in Valliance;
6. A declaration stating that Smith and Mottini own the rights to the Valliance name; and
7. An order directing BBEK to indemnify Valliance and its members against any claims arising out of advice given to any third party by BBEK or any actions taken by BBEK which affect Valliance or Smith or Mottini personally.

Claimants Tim Taylor Smith and Phillip John Mottini requested the following relief in the First Amended Complaint:

1. A declaration that the parties have settled this action; that the parties agreed to mutual releases with no payment and each side to bear their own attorneys' fees and costs; that Respondent Bunning would be permitted to keep all rights to the "Valliance" name; and, that the settlement agreement between Claimants Smith and Mottini and Respondent Bunning is binding;
2. A declaration that all agreements between Smith, Mottini and Bunning and Bunning's agents, and all rights and obligations thereunder, unless otherwise set forth herein, are terminated;
3. An order allowing Smith and Mottini to collect and retain all outstanding commissions on Valliance work without deduction;
4. An order directing Bunning and/or BBEK to pay monetary damages to Smith and Mottini, including, but not limited to the following: \$100,000.00 to Smith to pay off and reimburse him for the balance currently outstanding on Smith's personal line of credit, which was used to pay for tenant improvements, moving and operating expenses all relating to Valliance, and the \$10,000.00 Mr. Smith paid out of pocket for the same purposes; an amount in excess of \$50,000.00, according to proof, to offset the expenses and lost profits incurred by Tim Taylor Smith and Phillip John Mottini;
5. An order directing BBEK to pay off, refinance, or in some other manner remove Smith and Mottini as guarantors on the business line of credit, on which all parties are jointly and severally liable, and which was used to pay for tenant improvements and operating expenses for Valliance;
6. An order directing BBEK to sign over to Smith and Mottini all ownership interest in Valliance;
7. A declaration stating that Smith and Mottini own the rights to the Valliance name; and
8. An order directing BBEK to indemnify Valliance and its members against any claims arising out of advice given to any third party by BBEK or any actions

taken by BBEK which affect Valliance or Smith or Mottini personally.

Respondent Bernard Wayne Bunning requested:

1. That Claimants' Claim be denied in its entirety and subject to dismissal due to lack of jurisdiction and due to the fact that indispensable parties make FINRA arbitration not appropriate;
2. That attorney fees be assessed against Tim Taylor Smith and Phillip John Mottini;
3. That Bunning be awarded costs; and
4. That the Claimants not be allowed to continue to use the Valliance trade.

Mr. Bunning requested the following relief regarding his Counterclaim:

1. Money damages assessed against Tim Taylor Smith and Phillip John Mottini that exceed \$500,000.00, and according to proof;
2. Costs and attorney fees according to the FINRA rules and regulations, and the CAL code; and
3. Such other and further relief as the Panel deems appropriate.

Mr. Bunning requested the following relief regarding his Amended Counterclaim:

1. Money damages assessed against Tim Taylor Smith and Phillip John Mottini and each of them that collectively exceed \$1,000,000.00, and according to proof;
2. Costs and attorney fees according to agreement and statute;
3. An injunction to force Counter-Respondents from using the Valliance trade name;
4. An injunction pursuant to B & P Code 17200 that Smith discontinue misrepresenting himself to the public as a CFP "Certified Financial Planner" as well as he be ordered not to claim to the public claims that he graduated with a BS Degree in Biology / Chemistry from the California State University at Fresno in 1990, and that he worked 8+ years for GE, and an injunction pursuant to B & P Code 17200 that Block stop engaging in dual representation without waivers and conflict letters, such that clients will not be placed at a disadvantage due to the actions and inaction of Block and her law firm;
5. A further order that Tim Taylor Smith notify all customers of Valliance Financial Advisors LLC and his present customer base of the order of the court regarding an order that Tim Taylor Smith not hold himself out as a CFP "Certified Financial Planner" as well as notice that he did not graduate with a BS Degree in Biology / Chemistry from the California State University at Fresno in 1990; and
6. Attorney fees incurred pursuant to Cal.Corp.C.17106(g), and all other applicable California code sections, and FINRA Rules, to both defend the claim by Tim Taylor Smith and Phillip John Mottini as well as prosecute the

- claim by Bernard Wayne Bunning, and costs of the arbitration, including costs of experts, FINRA file fees, and out-of-pocket expenses incurred; and
7. Such other and further relief as the Panel deems appropriate.

Counter-Respondents Tim Taylor Smith and Phillip John Mottini requested that Counter-Claimant's claims be dismissed with prejudice and that Counter-Claimant take nothing thereby; that Counter-Respondents be awarded judgment in their favor and attorneys' fees and costs incurred in this action; and such other relief in Counter-Respondents' favor as the Panel deems just and proper.

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

On or about February 16, 2005, the Panel permitted Respondent Bernard Wayne Bunning to file an Amended Counterclaim.

On or about March 31, 2006, the Panel reviewed and considered the positions of the parties relative to Respondent Bernard Wayne Bunning's Motion to Dismiss, Motion to Strike Pleadings and Demurrer. The Panel denied the Motions.

Respondent filed a motion to revise the damages claim in the Counterclaim. The motion was withdrawn during the pre-hearing conference of June 26, 2006.

Claimants' Motion To File First Amended Complaint was granted on January 6, 2007. On January 15, 2007, at the request of the parties, the Panel ordered the subject matter of the amendment, the claim of breach of an alleged settlement agreement to be heard prior to the hearing on the merits. Following the February 5, 2007 one-day evidentiary hearing, the Panel issued a Draft Partial/Interim Award denying Claimants' claim that there was an enforceable settlement agreement.

In addition there were a number of motions to compel production of documents, and requests to take depositions. To address the motions and requests, fifteen pre-hearing conferences were conducted.

The nine days of the hearing on the merits was held on the following dates: June 25 through June 28, 2007; July 10 and July 11, 2007; October 8 through October 10, 2007. Twenty witnesses were heard and hundreds of pages of documents were introduced into evidence.

Following the testimony of the last scheduled witness: 1. The Claimants moved to amend the Statement of Claim to assert a claim for attorney fees; 2. The Respondent moved to withdraw three claims from his Amended Counter-Claim: Cause of Action Number 2: Slander Per Se, Cause of Action Number 5: Accounting, and Cause of Action Number 7: Judicial Dissolution of Valliance Financial Advisors, LLC. The Panel

directed the parties to prepare briefs on those two motions. Following receipt and review of the briefs the Panel rules as follows:

1. The Panel denies Claimants' request to amend the Statement of Claim to assert a claim for attorneys fees.
2. The Panel denies Respondent's request to withdraw the Second, Fifth, and Seventh Causes of Action in the Amended Counter-Claim because: (1) Respondent voluntarily submitted all causes of action asserted in his Amended Counter-Claim for adjudication by the Panel when he executed the Uniform Submission Agreement, including requests for relief in the Second, Fifth and Seventh Causes of Action; (2) Claimants also agreed to submit to the Panel all claims asserted in both the Statement of Claim and the Amended Counter-Claim; (3) More than two years of litigation and nine days of hearing were expended by the parties addressing and thoroughly litigating the factual and legal issues raised by all the causes of action asserted in the Statement of Claim and Amended Counter-Claim; and (4) The facts at issue in the Second, Fifth, and Seventh Causes of Action in the Amended Counter-Claim are inextricably linked to and intertwined with the facts and legal issues raised in the remainder of the Amended Counter-Claim as well as the Statement of Claim.

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

### **HISTORY AND ANALYSIS**

The Respondent, Bernard Bunning (Bunning), was involved with a number of businesses; a partner of an accounting firm Bunning Borst Enfield & Klein, LLP (BBEK), an owner of a number of companies (Bunning Companies) (originally under various Ares names and later the Valliance names) offering different kinds of financial and real estate services and an owner of what has been described as an umbrella organization, Tax & Financial Professional Center, Inc. (TFPC) which provided marketing services on a fee basis for the other entities. <sup>1</sup>

A TFPC brochure states that it provides most of the financial services a business or individual may need including management & tax advisory services, legal services, mergers and acquisition, real estate services employee benefits, insurance services mortgage loan services, computer IT services, retirement and wealth management services. The plan was that individuals and businesses coming to TFPC as customers or clients would be referred to the specific Bunning company that could provide the

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<sup>1</sup> During the relevant times in question, the accounting firm changed its name several times due to the fact that there were partnership changes. For simplicity sake, the abbreviation BBK will be used for the partnerships.

specific service. The concept was that by having the umbrella organization, TPFC, all of the other companies would benefit, would have lower marketing costs, and would share in mutual referrals of services to the entities appropriately licensed for such services.

The clear and overwhelming evidence is that Bunning was a significant or major owner of, and for practical purposes controlled, the Bunning Companies and was fully authorized to act on their behalf. He decided to have a new company to expand the financial services of the Bunning Companies. The new company was Valliance Financial Advisors, LLC (VFA), which is a focal point in this arbitration. That company was created for the prospective new business between the Complainants and Respondent. Mr. Bunning desired to expand the securities business that was in Ares Capital Management, Inc. and incorporate other financial services relating to financial advising, insurance and securities. His plan was to bring in a business or persons with an existing client base and with the licenses that would allow most if not all financial services to be provided.

One such business came to his attention. It was run by the Claimants, Tim Taylor Smith (Smith) and Phillip John Mottini (Mottini). Mr. Smith and Mr. Mottini held a number of licenses under NASD/FINRA rules. Mr. Bunning also held one or more licenses under NASD/FINRA rules.

After a number of meetings between the Claimants, Bunning and what has been often referred to as the Bunning group members which included BBEK and TFPC (The Bunning Group), a Memorandum of Terms (MOT) also referred to as the Memorandum of Understanding (MOU) was executed. The MOT is undated, however it is undisputed that the MOT was executed in the fall of 2004. Significantly, the only parties to the MOT are Tim Smith and Ares Capital Advisors, Inc. (Ares) Mr. Bunning signed the document on behalf of Ares. The MOU covered a number of items regarding the future business relationship. A new company was to be established and the assets of Smith and Ares were to be contributed to the new company to be formed. The division of Gross Dealer Commissions (GDC) was presented under the category of Allocation of Profits. Significantly, The MOT expressly stated it is non-binding.

On October 22, 2004 Articles of Organization were filed with the California Secretary of State for the new company named Valliance Capital Advisors, LLC (VFA).

Smith and Mottini's lease was ending around this time and they either had to renew it or move to another facility. Even though negotiations were ongoing, Bunning encouraged Smith & Mottini to move into existing space in the Bunning Group facility at the Sunrise address in Citrus Hills, CA. In that facility all of the Bunning Companies were resident. There was vacant space for the new tenants. Tenant improvements were discussed to allow for a separate entrance for the new company and furniture and furnishings for the employees of the new company. A witness for Bunning, Mr. Borst a former partner of



BBEK, testified improvements were being made for over a year before Claimants arrived. Further, the evidence to support mitigation of damages regarding the space after the Claimants left was insufficient.

The Claimants moved in late November or early December. Business commenced.

It was Bunning's view that TFPC would employ all of the staff, provide IT services and most other services for the new company. Employees were to be leased employees to the new company. No testimonial evidence or document establishing specific terms for a leasing arrangement were produced. Similarly he planned for any costs fronted by any of the Bunning Group to be repaid by the new company. No testimonial evidence or documents were produced to evidence an agreement of specific terms for these expenses. Although Bunning asserts that he and his son, Michael Bunning, owned the VFA trade name, there was no evidence of a written agreement between the Bunnings and VFA which permitted VFA to use the trade name VFA.

On December 10, 2004 Ilene Block, Esq. delivered two unexecuted documents to the Sunrise address: 2 The documents were the Operating Agreement of Valliance Capital Advisors, LLC (Agreement) and Minutes of Organizational Meeting of Members of Valliance Capital Advisors (Minutes). Ms. Block testified that at a meeting she witnessed three of the four signatures on the Operating agreement. Those signatures were from Tim Smith, Phil Mottini and Michael Bunning (Bunning's son). The fourth signature section was for Mr. Bunning. Mr. Bunning did not attend the meeting and the evidence established he did not sign this version of the Agreement. At the meeting there was no discussion of the contents of the Minutes. The Agreement contained no exhibits although there are provisions in the Agreement that state the members and the respective ownership interests and capital contributions were to be listed in the exhibits.

Mr. Michael Bunning signed the Minutes as the Secretary of the Meeting. In paragraph 11 of the Minutes, there is a section listing the names and percentage ownership of the members and blank sections for the amount of contribution for each member. Four members are indicated with their respective ownership interests: Bernard Bunning 43%, Tim Smith 43%, Michael Bunning 7% and Phil Mottini 7%. The Minutes did have exhibit pages attached but all were blank. Among other things, the exhibits were to contain a form of Certificate of Membership Agreement, schedule of cash contributions, and schedules of other contributions.

On December 23, 2004 there was a second operating Agreement and a second Minutes document presented around for signature. The evidence is undisputed that

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2 Ilene Block testified regarding these events on Dec. 10, 2004. We are advised there is a dispute pending in the Superior Court as to whether or not Ms. Block was the attorney solely for the Claimants or not. This Panel did not address that issue.

there was no meeting. There is dispute over whether the Claimants believed the documents they signed contained the same language as the former documents. The Claimants testified they were told new signatures were needed following correction of non-consequential changes.

Two significant changes were made in the Agreement. In Article 2, ownership of the name Valliance is designated to be owned by Bunning and his son Michael. The second change is that a new member, BBEK, is designated on the signature page. The Minutes were also changed to include BBEK as a member. The Claimants testify there was no agreement to add BBEK. Mr. Mottini testified he was asked to sign the minutes as a formality and it was represented that they were the same as the previous Minutes. No meeting was held.

In contrast to the testimony of Respondent's expert Joseph Merydith who opined there were no changes made to the pages of the Agreement, Michael Bunning testified he made changes.

As in the first instance, there were no exhibits to the Agreement and the exhibits to the Minutes were blank. It is also noted that both versions of the Agreement state the agreement is made on (not as of) November 22, 2004 and the Minutes state the meeting was held on November 22, 2004. Neither occurred on the date indicated.

No evidence or exhibits showing capital contributions and ownership interests were ever produced. No documents regarding the merger or transfer of assets from Smith or Ares were produced. No testimony supporting the actual transfer of assets was produced.

Thus, for VFA, there never was agreement on the issues of who owned the company, the percentages of ownership, the split of profits, the operation of the company including leases, employee agreements, a budget, or on the ownership of the name Valliance. There were no ownership certificates. The documents, even if valid, were mere shells without substance.

The material terms of an agreement between Bunning on one hand and Smith and Mottini were never reached. Clearly, there was no meeting of the minds to enter a binding agreement. Although a document was signed, there is no supportable evidence to establish it as a binding agreement.<sup>3</sup> There is conflicting evidence, furthermore, among various signed Agreements relating to the formation and structure of VFA, as

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<sup>3</sup> Mr. Bunning testified a number of times that the percentage split contained in MOT was binding on Smith in favor of Bunning. This assertion fails on two points. First, Bunning was not a signatory of the MOT and second the document specifically states it is non-binding.

discussed above.

From the inception of the parties' relationship negotiations were on going. The push to have a signed Agreement was necessitated by the requirement of the bank for an executed Agreement and Minutes in order to obtain a line of credit for VFA. After receiving the documents, the line of credit was issued and drawn upon. Thereafter, Smith and Bunning entered into a rather informal, orally agreed-upon business relationship whereby clients would be sold additional securities and insurance products and resulting commissions would be shared in some unspecified and variable manner.

Billing and back billing for services to VFA were on going and variable. TFPC charges for rent and other services varied exponentially. Back up for charges were not produced at the time. Negotiations for the split of commissions were ongoing and never resolved. The distinction between commissions and prospective profit was vague and conflicting.

It was the belief of the parties that to comply with NASD (now FINRA) rules and regulations, a Broker Dealer was required to make the transactions. Ares had done business with QA-3, a Broker Dealer, and it was engaged by Smith to be his Broker Dealer. The parties agreed that all securities generated by the business would be submitted with Smith as the Broker-of-Record with one account in order to get a higher payout from QA-3. The plan was the commissions would be split by agreement, which was never finalized. Commissions were paid but there were on going disputes regarding allocation and distribution.

Ares, Bunning and others in the Bunning companies referred clients to Smith and Mottini, some new clients came in and Smith and Mottini serviced their preexisting clients.

Smith and Bunning assert the other deceived them by false representations. Smith was accused of falsifying his resume by stating he was a certified financial planner when he is not. He was also accused of having one million dollars worth of business and it was asserted he did not. Bunning was accused of not having an operating license for BBEK and being the managing partner of an accounting firm without a California license. All of these alleged misrepresentations could have been discovered by the allegedly aggrieved party in the exercise of reasonable diligence. Further, the credible evidence is that none of the misrepresentation or material omission claims by Smith or Bunning against each other were shown to have been relied upon or resulted in damages to the other.

Serious disputes were ongoing from the inception in December through March 2005. On March 27, 2005 BBEK, on letterhead of BBEK, gave notice to Smith, as President of VFA, of the commencement of "the wind down phase". Shortly thereafter the Claimants

moved out. The communication was signed by the partners of BBEK and individually by Bunning and his wife Lesley. There was no evidence regarding why Lesley Bunning signed in her individual capacity.

The Panel also finds significant the uncontradicted evidence that prior to the "wind down" communication, Bunning was attempting to create a new business, which if created would compete with VFA. However, it appears that no such competing entity was actually created by Bunning prior to the "wind down" communication.

The Claimants moved into new facilities and continued to operate under the VFA name for well over a year. Respondent claims there was significant injury to all of the Bunning Companies because of confusion of the public and clients because of the use of the Valliance name by Claimants. No credible evidence was produced to support that claim.

Bunning also claimed injury based on loss of the profit from the revenue stream generated from his clients and those of Valliance Capital Management, Inc. (formerly Ares Capital Management, Inc.) which he claimed were transferred to VFA, and new clients generated during the period of operation at the Sunrise address. The evidence established that Bunning, directly or indirectly, contacted a number of these clients but not all. Those contacted ultimately remained with Bunning and Valliance Capital Management, Inc. and a newly hired individual who held a Series 24 license. Smith asserted that individual was hired away from VFA wrongly to compete with VFA. For unexplained reasons, many of the clients who went with Claimants, who were not former clients of Claimants, were not contacted by Bunning or the Bunning Companies.

One of this group of clients, Bergh, was referred to VFA by Mr. Borst, who himself was in the process of leaving BBEK and was negotiating with Bunning regarding his departure. The credible evidence established a payment by Borst to BBEK, in a settlement agreement that included Bunning himself, equal to 25% of the of the commission generated by the Bergh transaction. For all practical purposes, this sum was the same amount Bunning claims in lost profits regarding this client.

Bunning claims are couched in terms of profits from the revenue stream of these clients. However, the entire revenue stream is claimed. There was no evidence of a net revenue stream. As far as profits of VFA, the tax return filed by Bunning for 2005 shows a substantial loss. Evidence of a profit was not introduced. All of the putative owners of VFA claimed substantial losses from their claimed interest in VFA on their State and Federal income tax returns.

Bunning also claims he should be reimbursed approximately \$41,000 for monies paid to US Bank to zero out the VFA line of credit. The evidence does not show any payment by Bunning on the VFA line of credit. Instead, the evidence presented by Bunning shows, a check paid to US Bank in the approximate amount of \$41,000 was drawn on

an account in the name of Valliance Wealth Management LLC, another Bunning company. Bunning claims the draw-downs from the line of credit were for VFA's benefit and at its control. The evidence shows the draw-downs were controlled through TFPC and indirectly by Bunning. The charges for the costs for loaned employees, rent, build out expenses and most other charges were created by TFPC and there were no written agreements between VFA and TFPC setting forth terms. Although accountings were demanded, none were produced during the relationship.

Early on in the relationship, Smith loaned VFA \$35,000 which was consumed in operations. He was obligated on the line of credit. His claim for damages is based in part on Mr. Mottini's analysis of a balance sheet prepared by Michael Bunning in an attempt to settle the claims of the parties. This part of the claim rests on the division of assets as represented on the balance sheet. The document was prepared for settlement purposes, it was admittedly incomplete and full back up to support the Claimants specific damages based on that document was not produced. However, evidence was produced establishing loan to the joint business relationship and the pay off of a substantial portion of the line of credit for VFA.

The panel found from the evidence that Bunning controlled all of the Bunning Companies and their mixed and overlapping relationships were involved with VFA and Claimants. For two examples of control and mixed business entities there is a letter signed by Bunning on TPFC letterhead that directs the Claimants to not make withdrawals from the line of credit of VFA; and a Memo dated March 27, 2005 on the letterhead of BBEK states in part, "The partners of Bunning, Borst, Enfield & Klein, LLP... Mr. Bernard Bunning and Lesley Bunning are giving Mr. Smith, Mr. Mottini and Mr. Michael Bunning official notice that we are entering into the wind down phase of our business relationship effective immediately."

The Panel finds that the relationship of the Claimants and Respondent was never formalized and the critical and material elements of an agreement were never agreed upon. In part, the relationship was convoluted to facilitate a higher commission payout by QA3. All of the securities commissions generated by all of the parties and the registered representatives were paid by the Broker Dealer QA-3 to Smith's personal account and transferred to the VFA account or the payment of commission splits and non-agreed upon and agreed upon expenses. The only sources of revenue were commissions and fees and the division of these remained unresolved. At best what occurred was a loose relationship of separate entities overlapping and competing interests resulting in semi-chaos until it fell apart. There was no credible evidence that the business relationship between Claimants and Respondent was ever structured or operated as a genuine, profit-making legal entity or that it had the capability of doing so. To the extent that VFA was a legal entity, it was never operated as a true business enterprise and was, instead, merely a shell created to funnel commissions generated by

the business venture between Claimants and Respondent.

### **AWARD**

After considering the pleadings, arbitration briefs, testimony, and evidence presented at the hearing, and the post-hearing briefs, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. This Award incorporates the contents of the above Statement of Decision.
2. The previous Award dated March 12, 2007 (a partial award in this matter) denying the claims of an alleged settlement agreement is confirmed and made part of this final Award .
3. The Panel finds that there was an oral contract between Claimants and Respondent and that Respondent breached that contract by failing to reimburse Claimant Tim Smith for costs advanced to build out office space for the business enterprise and the partial pay off the VFA line of credit. Accordingly, Respondent is liable to and shall pay Claimant Tim Taylor Smith damages in the amount of \$42,500.00.
4. In the course of this arbitration, Claimants were repeatedly required to seek an order from the Panel compelling the production of documents requested from Respondent. At the hearing, Respondent's son, Michael Bunning, testified to a significant number of relevant and discoverable documents regarding the matters at issue in this claim. Respondent ultimately produced those records after six days of hearing. Bunning explained that these documents had not been produced previously because they were not in his possession or under his control. The Panel finds that this explanation completely lacks credibility and that Respondent's failure to produce these records was willful and caused an unnecessary delay in the proceedings. Further, the Panel finds that other relevant and discoverable records under the control of the TFPC's IT officer were intentionally not produced despite a request for their production by Claimants, and that the IT officer was acting at the direction and under the control of Bunning. The Panel finds that Respondent's failure to produce these records was willful and caused an unnecessary delay in the proceedings. The Panel therefore sanctions Respondent in the amount of \$10,000.00 for his willful failure to produce discoverable documents and abuse of the discovery process. This sum is payable to Claimants.
5. The Panel denies and dismisses with prejudice all other causes of action and requests for relief in Claimants' Statement of Claim.

6. The Panel denies and dismisses with prejudice every cause of action and requests for relief in Respondent's Amended Counterclaim.
7. Except as mentioned in paragraph 4 above, each party shall bear his own costs, including attorney's fees.
8. All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	=	\$300.00
Counterclaim filing fee	=	\$375.00

#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, QA3 Financial Corp. employed the respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy in this matter and the following fees are assessed:

Member Surcharge	=	\$ 1,700.00
Pre-Hearing Process Fee	=	\$ 750.00
<u>Hearing Process Fee</u>	=	<u>\$ 4,000.00</u>
Total Member Fees	=	\$ 6,450.00

#### **Adjournment Fees**

The following adjournment fees are assessed:

The Panel granted Respondent Bernard Wayne Bunning's request to postpone the July 10-12 and July 27-28, 2006, hearing dates and waived the \$1,125.00 postponement fee.

The Panel granted Claimants Tim Taylor Smith and Phillip John Mottini's request to postpone the November 27-30 and December 1, 2006, hearing dates. The Panel assessed the \$1,125.00 postponement fee as follows: \$562.50 jointly and severally to Claimants Tim Taylor Smith and Phillip John Mottini; and \$562.50 to Respondent Bernard Wayne Bunning.

**Forum Fees and Assessments**

The Panel assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A 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:

(8) Pre-hearing conference sessions with a single arbitrator  
@ \$450.00/session = \$3,600.00

Pre-hearing conferences: April 12, 2006 1 session  
May 1, 2006 1 session  
May 19, 2006 1 session  
November 6, 2006 1 session  
November 7, 2006 1 session  
November 11, 2006 1 session  
May 18, 2007 1 session  
June 22, 2007 1 session

(7) Pre-hearing conference sessions with the Panel  
@ \$1,200.00/session = \$8,400.00

Pre-hearing conferences: October 13, 2005 1 session  
February 16, 2006 1 session  
March 31, 2006 1 session  
June 26, 2006 1 session  
January 15, 2007 1 session  
February 13, 2007 1 session  
October 2, 2007 1 session

(20) Hearing sessions @ \$1,200.00/session = \$24,000.00

Hearing Dates: February 5, 2007 2 sessions  
June 25, 2007 2 sessions  
June 26, 2007 2 sessions  
June 27, 2007 2 sessions  
June 28, 2007 2 sessions  
July 10, 2007 2 sessions  
July 11, 2007 2 sessions  
October 8, 2007 2 sessions  
October 9, 2007 2 sessions  
October 10, 2007 2 sessions

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**Total Forum Fees = \$36,000.00**

The Panel assessed the \$36,000.00 in forum fees to Respondent Bernard Wayne Bunning.



**Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and other requests.

Claimants Tim Taylor Smith and Phillip John Mottini requested copies of audio transcripts = \$375.00

Respondent Bernard Wayne Bunning requested copies of audio transcripts = \$645.00

**Fee Summary**

1. Claimants Tim Taylor Smith and Phillip John Mottini are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 300.00
Adjournment Fee	= \$ 562.50
<u>Administrative Costs</u>	<u>= \$ 375.00</u>
Total Fees	= \$ 1,237.50
<u>Less payments by Tim Taylor Smith</u>	<u>= \$( 2,362.50)</u>
<b>Refund Due Claimants</b>	<b>= \$( 1,125.00)</b>
  
2. QA3 Financial Corp. is charged with the following fees and costs:

Member Fees	= \$ 6,450.00
<u>Less payments</u>	<u>= \$( 6,450.00)</u>
<b>Balance Due FINRA Dispute Resolution</b>	<b>= \$ 0.00</b>
  
3. Respondent Bernard Wayne Bunning is charged with the following fees and costs:

Counterclaim Filing Fee	= \$ 375.00
Adjournment Fee	= \$ 562.50
Administrative Costs	= \$ 645.00
<u>Forum Fees</u>	<u>= \$ 36,000.00</u>
Total Fees	= \$ 37,582.50
<u>Less payments</u>	<u>= \$( 2,782.50)</u>
<b>Balance Due FINRA Dispute Resolution</b>	<b>= \$ 34,800.00</b>

All balances are payable to FINRA Dispute Resolution and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

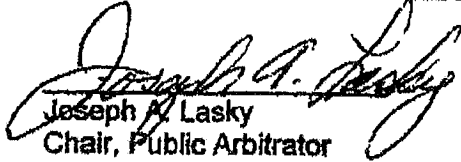
FINRA Dispute Resolution  
Arbitration No. 05-02206  
Award Page 18 of 18

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Joseph A. Lasky -  
Robert A. Bleicher -  
Gerald Joseph Wilfley -

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
Joseph A. Lasky  
Chair, Public Arbitrator

12/6/2007  
Signature Date

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Robert A. Bleicher  
Public Arbitrator

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Signature Date

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Gerald Joseph Wilfley  
Non-Public Arbitrator

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Signature Date

12/7/07  
Date of Service

Joseph A. Lasky -  
Robert A. Bleicher -  
Gerald Joseph Wilfley -

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Joseph A. Lasky  
Chair, Public Arbitrator

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



\_\_\_\_\_  
Robert A. Bleicher  
Public Arbitrator

\_\_\_\_\_  
12/5/07

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

\_\_\_\_\_  
Gerald Joseph Wilfley  
Non-Public Arbitrator

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

\_\_\_\_\_  
12/7/07  
\_\_\_\_\_  
Date of Service

Less payments = \$( 6,450.00)  
**Balance Due FINRA Dispute Resolution** = \$ 0.00

3. Respondent Bernard Wayne Bunning is charged with the following fees and costs:

Counterclaim Filing Fee = \$ 375.00  
Adjournment Fee = \$ 562.50  
Administrative Costs = \$ 645.00  
Forum Fees = \$ 36,000.00  
Total Fees = \$ 37,582.50  
Less payments = \$( 2,782.50)  
**Balance Due FINRA Dispute Resolution** = \$ 34,800.00

All balances are payable to FINRA Dispute Resolution and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Joseph A. Lasky - Public Arbitrator, Presiding Chair  
Robert A. Bleicher - Public Arbitrator  
Gerald Joseph Wilfley - Non-Public Arbitrator

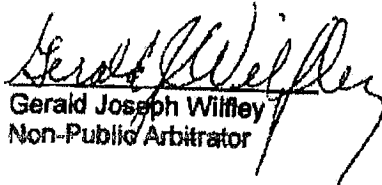
**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Joseph A. Lasky  
Chair, Public Arbitrator

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

\_\_\_\_\_  
Robert A. Bleicher  
Public Arbitrator

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

  
Gerald Joseph Wilfley  
Non-Public Arbitrator

12-6-07  
Signature Date

12/7/07  
Date of Service