

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Jay R. Rice, Claimant vs. Benjamin & Jerold Brokerage, Inc. and Jerold A. Kopf, Respondents.

Case Number: 00-00040

Hearing Site: Salt Lake City, Utah

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**REPRESENTATION OF PARTIES**

Claimant, Jay R. Rice, hereinafter referred to as "Claimant": Randall R. Heiner, Esq., Salt Lake City, Utah

Respondents, Benjamin & Jerold Brokerage, Inc. ("B&J") and Jerold A. Kopf, hereinafter referred to as "Respondents": Christopher M. Burky, Esq., Neal, Gerber & Eisenberg, Chicago, Illinois

**CASE INFORMATION**

Statement of Claim filed on or about: January 5, 2000

Claimant, Jay R. Rice, signed the Uniform Submission Agreement: January 5, 2000

Joint Statement of Answer filed by Respondents, B&J and Kopf, on or about: March 2, 2000

Respondent, B&J, signed the Uniform Submission Agreement: March 2, 2000

Respondent, Kopf, signed the Uniform Submission Agreement: March 2, 2000

**CASE SUMMARY**

Claimant alleged that the above-referenced dispute arises out of Respondents' mishandling of Mr. Rice's account. Claimant further alleged that Respondents sold securities in Mr. Rice's account to meet a margin call, without his authorization or consent. Claimant further alleged that even if Respondents did obtain consent, they sold far in excess of what was needed to cover any margin maintenance call. Claimant further alleged that as a result of the improper liquidation, Mr. Rice suffered compensatory damages of between \$25,000 and \$30,000. Claimant further alleged the following claims: 1) breach of fiduciary duty; 2) negligence; 3) violation of Utah Code Ann. Section 61-1-22(1,2) for the unauthorized sale of securities; 4) controlling person liability pursuant to Utah Code Ann. Section 61-1-22(4), against Kopf; 5) breach of contract; 6) liability against B&J under respondeat superior; and 7) attorney fees pursuant to Utah Code Ann. Section 61-1-22(2).

Respondents denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondents alleged that Mr. Rice cannot shift his margin risks to Respondents. Respondents further alleged that Mr. Rice knowingly exceeded his margin limits, he refused to deposit additional funds, and so securities were liquidated.

### **RELIEF REQUESTED**

Claimant requested an award against Respondents, jointly and severally, as follows:

1. Compensatory damages of \$21,968.75;
2. Attorney fees;
3. Pre-judgment interest at the legal rate;
4. Post-judgment interest until the award is paid;
5. Costs, expenses and disbursements, reimbursement of filing fees and forum fees; and
6. Such other further or different relief as the tribunal may deem just and equitable.

Respondents requested:

1. Dismissal of Claimant's claims;
2. Attorneys' fees and costs; and
3. Such further relief as is deemed just under the circumstances.

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

None.

### **AWARD**

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

1. The Arbitrator holds Benjamin & Jerold Brokerage, Inc. and Jerold A. Kopf jointly and severally liable for unauthorized trading. Within seven (7) days of this order, either party may file a brief to alter or amend the ruling on attorney's fees based on New York law. However, all other determinations made in this Award shall be timely complied with in accordance with Rule 10330 of the NASD Dispute Resolution, Inc. ("NASD-DR") Code of Arbitration Procedure ("Code").

The Respondents' allegation that the Claimant's margin calls were or were likely to fall below minimum margin call requirements and thereby justified stock liquidation, were not supported by the evidence. There were no facts in evidence, as related to the customer agreement that justified the Respondent liquidating the Claimant's holdings. It appeared to this arbitrator that the Respondents might have overreacted to the plunges occurring at that time in the market place. Any agreement by the Claimant to sell the stocks in dispute appears to have come from unnecessary inducement by the Respondent. Evidence indicated that the Claimant was a professional broker in dealing with options and margin calls. He was able and intended to meet all of the related margin calls within the required time period. In this situation, the preemptive judgement and action taken by the Respondent was not necessary.

During these hectic market place conditions, according to the Claimant's testimony, there was more than one phone conversation concerning sales authorizations of the Claimant's holdings. The Respondent was unaware of any other phone conversations. The Respondent was able to recover only one conversation tape between the parties, but testified that all telephone conversations were taped. Since the Respondent could not produce any of the other alleged taped conversations, except the one which both parties allege support their arguments, the arbitrator has appropriately valued the one recorded conversation. This was entered into as parties joint exhibit 1.

Although the Respondent did not reference specific contractual language that recognizes timeliness for claims of unauthorized trading, the arbitrator has mitigated the damages with reasonableness based on the Claimant's slow response to object to the unauthorized trades combined with his own trading record.

Accordingly, Respondents are jointly and severally liable for and shall pay to Claimant the sum of \$12,312.50 plus interest at the rate of 12% per annum from October 18, 1999 until payment of this Award.

2. Respondents are jointly and severally liable for and shall pay to Claimant the sum of \$125.00 as reimbursement for Claimant's filing fee.

3. The parties shall each bear their respective costs including attorney's fees.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD-DR will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$125.00

#### **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 firm is a party.

Member surcharge = \$400.00

#### **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 x \$450.00	= \$450.00
Pre-hearing conference:	September 18, 2000 1 session
Four (4) Hearing sessions x \$450.00	= \$1,800.00
Hearing Dates:	February 20, 2001 2 sessions
	February 21, 2001 2 sessions
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Total Forum Fees	= \$2,250.00

1. The Panel has assessed the \$2,250.00 in forum fees to Respondents, jointly and severally.

**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.

The parties did not incur administrative costs.

**Fee Summary**

1. Claimant is liable for:

Initial Filing Fee	= \$125.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$125.00
<u>Less payments</u>	= \$575.00
Balance (Refund)	= \$450.00

2. Respondent B&J is solely liable for:

Member Fees	= \$400.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$400.00
<u>Less payments</u>	= \$400.00
Balance Due NASD-DR	= \$ 0.00

3. Respondents B&J and Kopf are jointly and severally liable for:

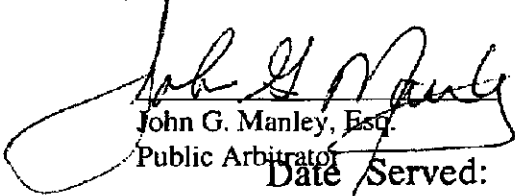
Forum Fees	= \$2,250.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$2,250.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD-DR	= \$2,250.00

NASD Dispute Resolution, Inc.  
Arbitration No. 00-00040  
Award Page 5 of 5

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All balances are due to NASD Dispute Resolution, Inc. and are payable within 30 days of the service date of this Award.

Presiding Arbitrator's Signature

  
John G. Manley, Esq.  
Public Arbitrator

3-22-01  
Signature Date

Date Served:

MAR 28 2001

Date of Service (For NASD office use only)