

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Rodney Kinsey, Donna Kinsey, and the Rodney M. Kinsey M/P/P Trust, (Claimants) vs. Joseph Erwin, National Financial Services, LLC, Eisner Securities, Inc., Neil Eisner, and Bruce Oakes, (Respondents)

Case Number: 01-01681

Hearing Site: Columbus, Ohio

REPRESENTATION OF PARTIES

Claimants, Rodney Kinsey ("R. Kinsey"), Donna Kinsey ("D. Kinsey"), and the Rodney M. Kinsey M/P/P Trust ("Kinsey Trust"), hereinafter collectively referred to as "Claimants": Thomas B. Ridgley, Esq., and Philip A. Brown, Esq., Vorys, Sater, Seymour and Pease LLP, Columbus, OH.

Respondent, Joseph Erwin ("Erwin"), did not make an appearance in this matter.

Respondent, National Financial Services, LLC ("NFS"): Michael G. Shannon, Esq., Brown Raysman Millstein Felder & Steiner LLP, New York, NY and Robert N. Rapp, Esq., Calfee, Halter & Griswold LLP, Cleveland, OH. (Mr. Shannon was with the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber LLP, New York, NY, when he originally appeared in this matter.)

Respondents, Eisner Securities, Inc. ("ESI"), Neil Eisner ("Eisner"), and Bruce Oakes ("Oakes"): Amanda L. Prebble, Esq., Dinsmore & Shohl LLP, Cincinnati, OH.

CASE INFORMATION

Statement of Claim filed on or about: April 2, 2001.

Amended Statement of Claim filed on or about: January 25, 2002.

R. Kinsey signed the Uniform Submission Agreement: March 24, 2001.

D. Kinsey signed the Uniform Submission Agreement: March 24, 2001.

Kinsey Trust signed the Uniform Submission Agreement: March 24, 2001.

Erwin did not file a Statement of Answer or sign a Uniform Submission Agreement.

Statement of Answer, Crossclaim, and Motion to Dismiss filed by NFS on or about: May 25, 2001.

NFS did not sign a Uniform Submission Agreement.

Statement of Answer and Crossclaim filed by ESI on or about: May 29, 2001.
Reply to NFS' Crossclaim filed by ESI on or about: June 16, 2001.
ESI signed the Uniform Submission Agreement: May 16, 2001.

Statement of Answer and Crossclaim filed by Eisner and Oakes on or about: June 7, 2002.
Eisner signed the Uniform Submission Agreement.
Oakes signed the Uniform Submission Agreement.

CASE SUMMARY

Claimants asserted the following causes of action: failure to supervise; unauthorized transactions; misrepresentations and omissions; violation of Ohio Revised Code Chapter 1707; fraud and deceit; breach of fiduciary duty; conversion; breach of contract; violation of SEC Rule 10b-5; violations of the Exchange Act of 1934; violation of NASD Conduct Rules 2310 and 2340; forgery; and negligence. Claimants' claim involved unspecified financial products.

Unless specifically admitted in its Answer, NFS denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to set forth a basis for recovery from NFS; Claimants' claim as against NFS is barred because, as clearing broker for ESI, NFS owed no fiduciary, supervisory, or other duties to Claimants; based upon the allegations of Claimants, all of Claimants' alleged losses arise solely from the wrongful and criminal activity of others as to which NFS had no involvement or responsibility; Claimants' alleged losses were proximately caused, in whole or in part, by their own conduct and/or negligence in relation to their accounts and/or their failure to mitigate damages; Claimants have not alleged any basis for punitive damages as against NFS; Claimants have not alleged any basis for entitlement to attorneys' fees as a matter of law; no private right of action lies for some of the claims alleged; and at all times NFS did not know of Erwin's alleged misdeeds and, in the exercise of reasonable diligence, could not have known.

In its Crossclaim against Erwin, NFS asserted the following causes of action: indemnification and/or contribution.

Unless specifically admitted in their Answer, Eisner and Oakes denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants' claims are barred, in whole or in part, by the statute of limitations; Claimants' Statement of Claim fails, in whole or in part, to state a claim against Eisner or Oakes upon which relief can be granted; Claimants are knowledgeable and sophisticated investors, and have so represented themselves to the Panel; Claimants' claims are barred by the defenses of waiver, estoppel, *in pari delicto*, and unclean hands; Claimants' claims against Eisner and Oakes are barred in whole or in part because neither Eisner nor Oakes owed or owe a duty to Claimants; Claimants' claims are

barred by their own authorization and ratification of the acts of Erwin; Claimants assumed the risk of any and all losses which they may have incurred; Eisner and Oakes acted at all times in good faith and had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of Erwin is alleged to exist; Eisner and Oakes acted at all times in good faith and did not directly or indirectly induce any act or acts committed by Erwin and did not know and, in the exercise of reasonable care could not have known of any of Erwin's misconduct; Eisner and Oakes did not have the power or ability to control Erwin's wrongful and criminal conduct upon which Claimants assert their claims against Eisner and Oakes; Erwin's acts were committed for his own benefit and were beyond the scope of his actual or apparent authority or affiliation with ESI and for which ESI, Eisner, and Oakes received no benefit; Claimants have not alleged any underlying violation of 15 U.S.C. section 77(k), 15 U.S.C. section 77(1), 15 U.S.C. section 78(j)(b), or 15 U.S.C. section 78(h) to invoke liability under 15 U.S.C. section 78(t)(a) or 15 U.S.C. section 77(o); Claimants' claims are barred or must be reduced by their failure to mitigate damages; Claimants' losses were caused or contributed to by their own actions and/or by the actions of others over which Eisner and Oakes had no control and for whom Eisner and Oakes are not legally responsible; Claimants' losses were caused by intervening events over which Eisner and Oakes had no control and for whom Eisner and Oakes are not responsible; Claimants' claims are not actionable on the basis that they lack a private right of action; Claimants have not alleged any basis for punitive damages against Eisner and Oakes; Claimants have not alleged any basis for entitlement to attorneys' fees with respect to their claims against Eisner or Erwin as a matter of law; and Claimants' claims fail because they have failed to join a necessary and/or indispensable party.

In its Answer and Crossclaim against Erwin, ESI asserted the following causes of action: breach of fiduciary duty; accounting/constructive fraud; fraudulent concealment; fraud; breach of contract; conversion; unjust enrichment; contribution and indemnification.

In their Crossclaim against NFS and Erwin, Eisner and Oakes asserted the following causes of action: indemnification and/or contribution.

RELIEF REQUESTED

Claimants requested compensatory damages in the amount of \$4,400,000.00, plus prejudgment interest, statutory interest, attorneys' fees, costs, and punitive damages.

NFS requested that all claims against it be dismissed, with prejudice, and that all costs and forum fees be assessed against Claimants.

In its Crossclaim against Erwin, NFS requested indemnification and/or contribution as to any award in favor of Claimants, as well as indemnification of all NFS' costs and attorneys' fees incurred herein.

In its Answer and Crossclaim, ESI requested an Award:

- a. Against Erwin on its Crossclaim for contribution and indemnification which may be assessed with relation to Claimants' claims; and in an amount to be proven, together with interest at the highest rate allowed by law;
- b. Compelling Erwin to account for all monies, property and any thing of value received from respondent during the time he carried out his activities;
- c. Awarding ESI its costs and reasonable attorney fees incurred herein;
- d. Awarding ESI punitive damages; and
- e. For such other and further relief as the Panel may deem appropriate.

In their Answer and Crossclaim, Eisner and Oakes requested an Award:

- a. Against NFS and Erwin on its Crossclaim for indemnification and/or contribution as to any Award in favor of Claimants;
- b. Dismissing Claimants' Amended Statement of Claim against Eisner and Oakes in its entirety;
- c. Awarding Eisner and Oakes their costs and reasonable attorneys' fees incurred herein; and
- d. For any other and further relief as the Panel may deem appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that Erwin has been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without Erwin present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

Erwin and NFS did not file with NASD 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.

On October 30, 2001, the United States District Court for the Eastern District of Missouri entered an Order granting the application of the Securities Investor Protection Corporation ("SIPC"), Inc. under the Securities Investor Protection Act ("SIPA"). Pursuant to the Court's Order, all matters concerning ESI were indefinitely stayed.

On March 20, 2003, Claimants settled their claims against the estate of ESI with SIPC in the amount of \$504,817.80. The Panel reviewed Claimants' SIPC settlement in consideration of the Award. The release and assignment executed by the parties specifically retained and reserved all rights of Claimants to pursue any and all claims asserted by Claimants in this arbitration against Erwin, Eisner, Oakes, and NFS.

Prior to the hearings in this matter, the Panel denied, without prejudice, NFS' Motion to Dismiss, and subsequently deferred ruling on NFS' Renewed Motion to Dismiss or Alternatively for Summary Judgment until after Claimants had completed presentation of their case in chief.

Prior to the hearings in this matter, the Panel dismissed Claimants' derivative claims against Eisner and Oakes pursuant to Section 20(a) of the Securities Exchange Act of 1934, based upon an asserted violation of section 10(b) of said Act on the basis of the applicable statute of limitations. The Panel also dismissed all claims asserted based upon Ohio Revised Code Section 1707.44.

Eisner made a motion for a directed verdict on November 21, 2002. The Panel granted the motion on November 22, 2002 dismissing Eisner from these proceedings.

Oakes made a motion for a directed verdict at the close of Claimants' case in chief on November 21, 2002. On November 22, 2002, the Panel ruled that it declined to enter a ruling at that time and would defer ruling until the close of all of the evidence.

The Crossclaim of Respondent Oakes against NFS was voluntarily dismissed on March 20, 2003.

The Panel was notified on or about April 17, 2003 that Claimants and Oakes entered into a settlement agreement on or about April 3, 2003.

NFS made a motion for dismissal, summary judgment, and for a directed verdict at the close of Claimants' case in chief on November 21 and 22, 2002. On November 22, 2002, the Panel ruled that it declined to enter a ruling at that time and would defer ruling until the close of all of the evidence.

On March 26, 2003, NFS made a motion to dismiss after the close of its own case in chief. The Panel ruled that it declined to enter a ruling at that time and would defer ruling until the close of all of the evidence, as the Panel wanted to hear the parties' closing arguments prior to making a determination.

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

AWARD

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

1. Erwin is liable to Claimants in the sum of \$504,817.80 as compensatory damages. However, the Panel has determined that the amount of \$504,817.80 is the amount of Claimants' SIPC settlement regarding ESI, and it is not the intent of the Panel that Claimants should recover this amount twice. Therefore, Claimants may not recover or collect the sum of \$504,817.80 in compensatory damages from Erwin.
2. Erwin is solely liable for and shall pay to Claimants the sum of \$500,000.00 as punitive damages. The Panel awarded punitive damages based upon its finding that Erwin's actions towards Claimants were malicious, constituted egregious fraud and gross and reckless indifference to the rights of Claimants, and were intentional acts of conversion and theft.
3. Claimants' claims against NFS are hereby dismissed in their entirety.
4. The Panel recommends the expungement of all reference to the above-captioned matter from Respondent Eisner's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Eisner must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
5. The Crossclaims filed by NFS, and Eisner are hereby dismissed.
6. All other requests for relief are hereby denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 600.00
Crossclaim filing fee (NFS)	= \$ 2,000.00
Crossclaim filing fee (Eisner/Oakes)	= \$ 600.00
Crossclaim filing fee (ESI)	= \$ 2,000.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, National Financial Services, LLC and Eisner Securities, Inc., were parties.

Member surcharge	= \$ 2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 4,500.00

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 arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$450.00	= \$ 450.00
Pre-hearing conference: September 20, 2002	1 session

Five (5) Pre-hearing sessions with Panel x \$1,200.00	= \$ 6,000.00
Pre-hearing conferences: October 25, 2001	1 session
April 10, 2002	1 session
August 30, 2002	1 session
September 30, 2002	1 session
October 9, 2002	1 session

Twenty (20) Hearing sessions x \$1,200.00	= \$24,000.00
Hearing Dates: November 18, 2002	2 sessions
November 19, 2002	2 sessions
November 20, 2002	2 sessions
November 21, 2002	3 sessions
November 22, 2002	1 session
March 17, 2003	2 sessions
March 18, 2003	2 sessions
March 19, 2003	2 sessions
March 20, 2003	2 sessions
March 21, 2003	2 sessions

Total Forum Fees	= \$30,450.00
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The Panel has assessed one-third of the forum fee for the April 10, 2002 pre-hearing conference against Claimants jointly and severally; one-third against NFS; and one-third against Eisner & Oakes jointly and severally.

The Panel has assessed one-half of the forum fee for the October 9, 2002 pre-hearing conference against Claimants jointly and severally; and one-half against Eisner & Oakes jointly and severally.

The Panel has assessed all other forum fees against NFS.

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.

1. NFS, requested tapes, \$30.00.

Fee Summary

1. Claimants are jointly and severally liable for:

Forum Fees	= \$ 1,000.00
<u>Initial Filing Fee</u>	= \$ 600.00
Total Fees	= \$ 1,600.00
<u>Less payments</u>	= \$ 1,800.00
Refund Due Claimants	= \$ 200.00

2. NFS is solely liable for:

Crossclaim Filing Fee	= \$ 2,000.00
Member Fees	= \$ 7,600.00
Forum Fees	= \$28,450.00
<u>Administrative Costs</u>	= \$ 30.00
Total Fees	= \$38,080.00
<u>Less payments</u>	= \$ 9,100.00
Balance Due NASD Dispute Resolution	= \$28,980.00

3. ESI is solely liable for:

Crossclaim Filing Fee	= \$ 2,000.00
<u>Member Fees</u>	= \$ 3,100.00
Total Fees	= \$ 5,100.00
<u>Less payments</u>	= \$ 3,600.00
Balance Due NASD Dispute Resolution	= \$ 1,500.00

4. Eisner and Oakes are jointly and severally liable for:

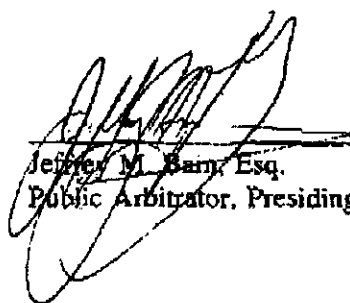
Forum Fees	= \$ 1,000.00
<u>Crossclaim Filing Fee</u>	<u>= \$ 600.00</u>
Total Fees	= \$ 1,600.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$ 1,600.00

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

ARBITRATION PANEL

Jeffrey M. Bain, Esq.	-	Public Arbitrator, Presiding Chair
Frank C. Fogl, Jr., Esq.	-	Public Arbitrator
Peter L. Pointer	-	Non-Public Arbitrator

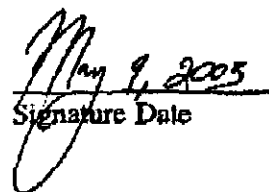
Concurring Arbitrators' Signatures



Jeffrey M. Bain, Esq.
Public Arbitrator, Presiding Chair

Frank C. Fogl, Jr., Esq.
Public Arbitrator

Peter L. Pointer
Non-Public Arbitrator



Signature Date

Signature Date

Signature Date

May 13, 2003

Date of Service (For NASD Dispute Resolution use only)

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ARBITRATION PANEL

Jeffrey M. Bain, Esq.	-	Public Arbitrator, Presiding Chair
Frank C. Fogl, Jr., Esq.	-	Public Arbitrator
Peter L. Pointer	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Jeffrey M. Bain, Esq.
Public Arbitrator, Presiding Chair

Signature Date



Frank C. Fogl, Jr., Esq.
Public Arbitrator

May 9, 2003

Signature Date

Peter L. Pointer
Non-Public Arbitrator

Signature Date

May 13, 2003

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Jeffrey M. Bain, Esq.	-	Public Arbitrator, Presiding Chair
Frank C. Fogl, Jr., Esq.	-	Public Arbitrator
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Public Arbitrator, Presiding Chair

Signature Date

Frank C. Fogl, Jr., Esq.
Public Arbitrator

Signature Date

Peter L. Pointer

Peter L. Pointer
Non-Public Arbitrator

5-8-03
Signature Date

May 13, 2003

Date of Service (For NASD Dispute Resolution use only)