

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Name of Claimants

Aaron Kaye and Margaret Kaye

and

03-02954  
Phoenix, Arizona

Name of Respondents

Banc One Securities Corp.  
Nancy K. Smith

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Nature of the Dispute: Customer vs. Member and Associated Person.

**REPRESENTATION OF PARTIES**

Aaron Kaye and Margaret Kaye ("Claimants") appeared *pro se*.

Banc One Securities Corp. ("Respondent Banc One") and Nancy K. Smith ("Respondent Smith") (collectively as "Respondents") were represented by Elizabeth A. Jerdonek, Esq., Ulmer & Berne LLP, Cleveland, Ohio.

**CASE INFORMATION**

The Statement of Claim was filed on or about April 2, 2003. Claimants submitted an undated letter received on August 4, 2003, responding to Respondents' Answer. Submission Agreement of Claimants Aaron Kaye and Margaret Kaye was signed on April 16, 2003.

Joint Answer of Banc One Securities Corporation and Nancy K. Smith was filed on or about July 29, 2003. Submission Agreement of Respondent Banc One Securities Corp. was signed on May 22, 2003. Submission Agreement of Respondent Nancy K. Smith was signed on May 20, 2003.

**CASE SUMMARY**

Claimants alleged that Respondent Smith failed to fully inform them of the investment options available to them. It was also alleged that Respondent Smith failed to disclose the nature of the penalties that could be assessed against them in the mutual funds and annuities that were purchased.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated:

Although the Statement of Claim lacks specificity about which investments the Claimants are most dissatisfied with, their allegations appear to be that of general dissatisfaction with the performance of the mutual fund and annuity investment selections that they approved, and dissatisfaction with the explanations of investment risks and options provided by Banc One and Ms. Smith. The evidence will show, however, that Claimants were at all times aware of the risks inherent in market investments in general and inherent in the specific investments they held. The evidence will likewise show that Banc One and Ms. Smith provided Claimants with verbal and written explanations of their investment selections, including thorough disclosures of potential penalties and the ability to switch investment selections within the same fund families.

While it appears that Claimants now fault Ms. Smith for not recommending that they get out of the market as the markets began to decline, the decision to retain investments was ultimately and exclusively theirs. The evidence will conclusively prove that Claimants made this decision independent of Ms. Smith, just as they continue to attempt to chase returns and time the market today.

#### **RELIEF REQUESTED**

Claimants requested an award in the amount of \$90,000.00 in actual damages and \$10,000.00 in punitive damages.

Respondents requested that judgment be rendered in their favor and against Claimants. That the claims asserted against them be dismissed in their entirety and that the Panel recommend the expungment of any and all references to this matter from Ms. Smith's CRD record. Respondents also requested that they be awarded their costs of defending this matter.

#### **OTHER ISSUES CONSIDERED & DECIDED**

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. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with the NASD Dispute Resolution (the "NASD").

#### **AWARD**

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

1. Respondents Banc One Securities Corp. and Nancy K. Smith shall be and hereby are jointly and severally liable for and shall pay to Claimants Aaron Kaye and Margaret Kaye the sum of \$5,422.00 (Five Thousand Four Hundred Twenty Two Dollars and No Cents) as compensatory damages.
2. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees, not specifically awarded or otherwise provided for above.

### **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 = \$225.00

#### **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(s) is Banc One Securities Corp.

Member surcharge	\$	1,100.00
Pre-hearing process fee	\$	750.00
Hearing process fee	\$	1,700.00
Total Member Fees	\$	3,550.00

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

The Arbitration 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:

1 Pre-hearing session(s) with Panel	x	750.00	\$	750.00
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2 Hearing sessions	February 3, 2004	1 session		
		x	750.00	\$ 1,500.00
	July 20, 2004	2 sessions		
	<b>Total Forum Fees</b>			<b>\$ 2,250.00</b>

The Arbitration Panel has assessed \$2,250.00 of the forum fees jointly and severally to Banc One Securities Corp. and Nancy K. Smith.

**Fee Summary**

Claimants, Aaron Kaye and Margaret Kaye shall be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$	225.00
Total Fees	= \$	225.00
<u>Less payments</u>	= \$	-975.00
Balance to be refunded by NASD Dispute Resolution	= \$	- 750.00

Respondent, Banc One Securities Corp., shall be and hereby is liable for:

Member Fees	= \$	3,550.00
Total Fees	= \$	3,550.00
<u>Less payments</u>	= \$	-3,550.00
Balance Due NASD Dispute Resolution	= \$	0.00

Respondents, Banc One Securities Corp. and Nancy K. Smith, shall be and hereby are jointly and severally liable for:

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

**All balances are due to NASD Dispute Resolution**

**ARBITRATION PANEL**

Ronald Edward Hibbing, Esq. - Public Arbitrator, Presiding Chair  
Kathy Irene Zatari, Esq. - Public Arbitrator  
Paul J. Phillips, Jr. - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Ronald Edward Hibbing  
Ronald Edward Hibbing, Esq.  
Public Arbitrator, Presiding Chair

July 28, 2004  
Signature Date

/s/ Kathy Irene Zatari  
Kathy Irene Zatari, Esq.  
Public Arbitrator

July 27, 2004  
Signature Date

/s/ Paul J. Phillips, Jr.  
Paul J. Phillips, Jr.  
Non-Public Arbitrator

July 30, 2004  
Signature Date3

Date of Service: \_\_\_\_\_

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Concurring Arbitrators:

Ronald E. Hibbing  
Ronald Edward Hibbing, Esq.  
Public Arbitrator, Presiding Chair

July 28, 2004  
Signature Date

Kathy Irene Zafari, Esq.  
Public Arbitrator

Signature Date

Paul J. Phillips, Jr.  
Non-Public Arbitrator

Signature Date

Date of Service: \_\_\_\_\_

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Arbitration No. 03-02954  
Award Page 5 of 5

Concurring Arbitrators:

Ronald Edward Hibbing, Esq.  
Public Arbitrator, Presiding Chair

Signature Date

*Kathy Irene Zafari*

*7/27/04*

Kathy Irene Zafari, Esq.  
Public Arbitrator

Signature Date

Paul J. Phillips, Jr.  
Non-Public Arbitrator

Signature Date

Date of Service:

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Concurring Arbitrators:

Ronald Edward Hibbing Esq.  
Public Arbitrator, Presiding Chair

Signature Date

Kathy Irene Zatori, Esq.  
Public Arbitrator

Signature Date

Paul J. Phillips, Jr.  
Non-Public Arbitrator

Signature Date

Date of Service:

7/30/04