

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Homer R. Kincaid and Lula M. Kincaid (a/k/a Lulu M. Kincaid) (Claimants) v. Noel Belmonte, Kimberly Carrella, John Kawas, Kimberly Jean Misaraca, Howard Braff, Michael Davison, RBC Dain Rauscher, and Kimberly Securities, Inc. (Respondents)

Case Number: 03-05163

Hearing Site: Columbus, Ohio

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Nature of the Dispute: Customers vs. Members and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimants Homer R. Kincaid ("H. Kincaid") and Lula M. Kincaid a/k/a Lulu M. Kincaid ("L. Kincaid") hereinafter collectively referred to as "Claimants": Timothy Feil, Esq., Finkelstein & Feil, LLP, Garden City, NY.

Respondent Michael Davison ("Davison") appeared *pro se*. Previously represented by: Thomas J. Hanrahan, Esq., New York, NY.

Respondent Howard Braff ("Braff") appeared *pro se*.

Respondent RBC Dain Rauscher ("RBC"): Jennifer Stagen, Esq., Carrington Coleman Sloman & Blumenthal, L.L.P., Dallas, TX.

Respondent John Kawas ("Kawas") did not enter an appearance in this matter.

Respondent Kimberly Jean Misaraca f/k/a Kimberly Carrella ("Misaraca") did not enter an appearance in this matter.

Respondent Noel Belmonte ("Belmonte") did not enter an appearance in this matter.

Respondent Kimberly Securities, Inc. ("Kimberly Securities") did not enter an appearance in this matter.

**CASE INFORMATION**

Statement of Claim filed on or about: July 14, 2003.

Claimants signed the Uniform Submission Agreement: August 14, 2003.

Statement of Answer, Cross-Claim, and Motion to Dismiss filed by Respondent Davison on or about: January 14, 2004.

Respondent Davison did not sign the Uniform Submission Agreement.

Statement of Answer filed by Respondent Braff on or about: September 27, 2003.

Respondent Braff signed the Uniform Submission Agreement: October 11, 2003.

Statement of Answer filed by Respondent RBC on or about: November 3, 2003.

Respondent RBC signed the Uniform Submission Agreement: September 22, 2003.

Respondent Kawas did not file a Statement of Answer or sign the Uniform Submission Agreement.

Respondent Misaraca did not file a Statement of Answer or sign the Uniform Submission Agreement.

Respondent Belmonte did not file a Statement of Answer or sign the Uniform Submission Agreement.

Respondent Kimberly Securities did not file a Statement of Answer or sign the Uniform Submission Agreement.

#### **CASE SUMMARY**

Claimants asserted the following causes of action: purchase and sale of unsuitable securities; Section 10(b) and Rule 10b-5 violations; misrepresentation and fraud; unauthorized trading/failure to execute; breach of fiduciary duty; violation of General Business Law Sec. 349; and failure to supervise/control person liability. The causes of action relate to unspecified securities.

Unless specifically admitted in his Answer, Respondent Davison denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In his Cross-Claim, Respondent Davison asserted the following cause of action: indemnification.

Unless specifically admitted in his Answer, Respondent Braff denied the allegations made in the Statement of Claim.

Unless specifically admitted in its Answer, Respondent RBC denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$100,000.00; interest; costs, expenses, and disbursements, including attorneys' fees; punitive damages; and such other relief that the Panel deems just and proper.

Respondent Davison requested dismissal from the Statement of Claim and indemnification from the other Respondents should he be found liable.

Respondent RBC requested that the Panel award that Claimants receive no recovery against Respondent RBC, and that any forum fees or other fees be assessed against parties other than RBC.

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

By letter dated October 10, 2003, Claimants notified NASD Dispute Resolution that they withdrew their claims against Respondent Kawas as he was named in error.

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that Respondents Misaraca, Belmonte, and Kimberly Securities have been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without said Respondents present (note: Respondent Belmonte participated at the hearing via telephone), in accordance with the NASD Code of Arbitration Procedure (the "Code").

Respondents Misaraca, Belmonte, and Kimberly Securities did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and are bound by the determination of the Panel on all issues submitted.

Respondent Davison did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code, and having answered the claim, is bound by the determination of the Panel on all issues submitted.

By letters dated February 6, 2003 and March 13, 2003, Respondent Braff requested that he be allowed to testify telephonically. After due consideration, the Panel granted his request.

After a telephonic pre-hearing conference on January 26, 2005, the Panel granted the Motions to Dismiss of Respondents Davison and Braff.

On or about March 10, 2005, Claimants notified NASD Dispute Resolution that they settled their claims with Respondent RBC.

At the hearings, Claimants requested a reasoned Award. After due deliberation, the Panel granted this request.

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.

### **ARBITRATORS' FINDINGS**

Claimants asserted a claim against several parties for: (1) breach of contract; (2) breach of duty; (3) negligence; (4) fraud and deceit; (5) breach of fiduciary duty; (6) violation of the Securities and Exchange Act, Section 10(b)5 and ESC Rule I Ob-5; (7) violation of the rules of the National Association of Securities Dealers, Inc. and the New York Stock Exchange; (8) unauthorized trading; (9) churning; (10) Section 349 of the New York General Business Law; and (11) failure to supervise and control liability. These claims arose out of the Claimant's relationship with Kimberly Securities, Inc., Noel Belmonte and Kimberly Jean Misaraca f/k/a/ Kimberly Carrella. A hearing was held on March 14 and 15, 2005 in Columbus, Ohio. The Claimants were present in person and represented by counsel. Mr. Belmonte did not participate in the discovery conference, but was present at the hearing by telephone. Kimberly Carrella was not present. The Claimants have requested a reasoned award.

Kimberly Carrella was the President of Kimberly Securities, Inc., and was involved in all but one of the transactions with Mr. Kincaid. Mr. Belmonte was a "cold caller" for Kimberly Carrella and was involved in the first transaction with Mr. Kincaid. Noel Belmonte and Kimberly Carrella shared the commissions from this account throughout its history. Both names appeared upon the monthly statements and many of the confirmation statements.

Mr. Belmonte made a "cold call" to Homer Kincaid in March of 2002. After a few conversations by telephone, Mr. Kincaid agreed to make a trade through Kimberly Securities. Mr. Belmonte "guaranteed" him that he would not lose any money on this transaction. An account in the name of "Homer R. Kincaid, Lula M. Kincaid JTENWROS" (Personal Account) was established in early April of 2002. The initial transaction was the purchase of 25 shares of Engineered Support Systems at \$49.19 per share for a total of \$1,258.25. Mr. Kincaid sent his own personal check for this amount. There were subsequent discussions between Mr. Belmonte and Mr. Kincaid. Mr. Kincaid stated that he wanted to set up an IRA in which he would roll over his existing IRA at Prudential Securities. On May 8 and 20, Kimberly Securities, Inc. received \$97,321.25 which was the proceeds of Mr. Kincaid's IRA with Prudential Securities. These monies were deposited in the Personal Account, not an IRA account. Both the testimony of Noel Belmonte and Homer Kincaid was consistent in that Mr. Kincaid indicated he wished the money from the Prudential Securities to be placed in an IRA account at Kimberly Securities. Exhibit 3 was an Account Transfer form which indicated that the monies were to be transferred to an IRA account at RBC Dain Rauscher, Inc., the clearinghouse for Kimberly Securities, Inc. Exhibit 2B was a Custodial Retirement Account form which was signed by Homer Kincaid and indicated that an IRA account was to be established. Exhibits 4A and 4B were two Correspondent New Account forms that indicated the account was to be an IRA account. These exhibits were signed by Mr. Kincaid and were initialed by Kimberly Carrella. Exhibit 7 was a letter dated April 11, 2002 addressed to Homer Kincaid from Kimberly Carrella which set dates in the first sentence:

"I enjoyed our telephone conversation this morning and would like to take this opportunity to thank you for opening your new IRA account here at Kimberly Securities."

The evidence shows that no IRA account was ever established and all the transactions that followed were in the Personal Account. Mr. Belmonte testified that most accounts at Kimberly Securities, whether IRA or personal, were created as personal accounts. Mr. Belmonte further testified that most of the Kimberly Securities' accounts were opened with an investment

objective of "speculation." By the end of May, the money was invested in securities which had been approved by Mr. Kincaid, to wit: 500 shares of Engineered Support System; 500 shares of Herley Industries, Inc.; 500 shares of Lockheed Martin Corp.; and 250 shares of Northrop Grumman Corp. On June 24, Kimberly Securities, acting through Kimberly Carrella, sold the positions of Engineered Support Systems and Herley. In July of 2002, the activity picked up substantially. Regular purchases were made of PMC-Cierra (3,000 shares) and 230 puts of Tyco International. The total amount of the regular purchases was \$105,271.50. In addition, purchases were made to cover the short position in Expedia, Qlogic Corp., Tyco and Omnicom Group, Inc. The purchases to cover the short sales were \$514,283.14. The total sales in the month of July were \$547,838.42. The July statement shows that the market value of the account had slipped to \$64,350.00.

When Mr. Kincaid received the statements for July he immediately called to reach both Ms. Kimberly Carrella and Noel Belmonte. He was informed by the receptionist that Kimberly Securities no longer was in business and that another firm was handling their business. The end of August statement showed that the account had deteriorated to \$32,192.97. An examination of the August account does not seem to yield a coherent correlation with the July statement. Mr. Kincaid removed the remaining assets from this account.

Exhibit 8 was the expert's report of Michael Dugan. According to his calculations, the annualized turnover rate by market value was 35.17 and by equity value 26.48. Even assuming a "speculation," this was an excessive amount of trading. In searching for a reason for this excessive trading, the expert witness Michael Dugan testified that from April through October there was \$26,035.84 in commissions taken from an account that had an initial value of approximately \$98,000. Most of these commissions occurred in July of 2002 shortly before Kimberly Securities went out of business in the first part of August, 2002. The arbitrators found this scienter to conclude that, when coupled with the excessive trading, "churning" had occurred.

All of the trades in July and August of 2002 were not authorized by Mr. Kincaid. The testimony of Mr. Kincaid establishes the trades were unauthorized. These unauthorized trades, when coupled with the \$26,035 of commissions, establishes an intent to use the unauthorized trading to generate commissions before the collapse of Kimberly Securities, Inc. The conduct of Kimberly Carrella, Noel Belmonte, and Kimberly Securities, Inc. constitutes fraud and deceit on the Claimants.

Based upon the evidence and the testimony of the expert Dugan, the market-adjusted loss sustained by the Claimant was \$51,000. From that, the \$25,000 payment by RBC Dain Rauscher, Inc. was deducted, leaving a compensatory loss of \$26,000.

The sum of \$4,503.37 and costs of litigation are assessed against the remaining Respondents as is \$10,000.00 in attorney fees directly attributed to establishing the fraud and deceit by the Respondents.

All forum fees are assessed against the Respondents jointly and severally.

The arbitrators find clear and convincing evidence that the Respondents engaged in fraudulent conduct which damaged the Claimants. In such cases, reasonable attorney fees can be awarded at the discretion of the arbitrators. *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992); *Beto v. Stewart*, 213 W.Va. 355, 582 S.E.2d 802 (2003).

The arbitrators examined the opinions of various West Virginia court rulings on punitive damages. See, *Garnes v. Fleming Landfill*, 168 W.Va. 646, 413 S.E.2d 897, syllabus points 3 and 4; *TXO Production Corp. v. Alliance Resources*, 187 W.Va. 457, 419 S.E.2d 870 (1992), syllabus point 15; *Alkin v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122

(1996), syllabus point 6. The Respondents' conduct is found to be reprehensible. The Respondents clearly knew their conduct was fraudulent and would harm the Claimants. The only defense offered by any of the Respondents was that the Kincaids were wrong to entrust \$100,000 to a "cold caller." The Claimants were not only financially vulnerable but were unsophisticated.

In addition, \$26,000.00 in punitive damages are jointly and severally assessed against Kimberly Carrella, Noel Belmonte and Kimberly Securities, Inc.

The total amount that is jointly and severally assessed against the three remaining Respondents, Kimberly Carrella, Noel Belmonte and Kimberly Securities, Inc. is \$66,503.37 plus all forum fees.

### AWARD

After considering the pleadings, and 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. Respondents Misaraca, Belmonte, and Kimberly Securities are jointly and severally liable for and shall pay Claimants compensatory damages in the amount of \$26,000.00.
2. Respondents Misaraca, Belmonte, and Kimberly Securities are jointly and severally liable for and shall pay Claimants punitive damages in the amount of \$26,000.00.

As cited above in the "Arbitrators' Findings" section, the Panel awarded punitive damages based on the following case law: *Garnes v. Fleming Landfill*, 168 W.Va. 646, 413 S.E.2d 897, syllabus points 3 and 4; *TXO Production Corp. v. Alliance Resources*, 187 W.Va. 457, 419 S.E.2d 870 (1992), syllabus point 15; *Alkin v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996), syllabus point 6.

3. Respondents Misaraca, Belmonte, and Kimberly Securities are jointly and severally liable for and shall pay Claimants attorneys' fees directly attributed to establishing the fraud and deceit by the Respondents in the amount of \$10,000.00.

As cited above in the "Arbitrators' Findings" section, the Panel awarded attorneys' fees based on the following case law *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992); *Beto v. Stewart*, 213 W.Va. 355, 582 S.E.2d 802 (2003).

4. Respondents Misaraca, Belmonte, and Kimberly Securities are jointly and severally liable for and shall pay Claimants the amount of \$4,503.37 for the costs of litigation.
5. Any and all relief not specifically addressed herein is 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	= \$225.00
Davison's Cross-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 that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, RBC Dain Rauscher, Inc. is a party.

Member surcharge	= \$1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$1,700.00

### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A 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:

Two (2) Pre-hearing sessions with Panel @ \$750.00	= \$1,500.00
Pre-hearing conferences:	
April 26, 2004	1 session
January 26, 2005	1 session
Four (4) Hearing sessions @ \$750.00	= \$3,000.00
Hearing Dates:	
March 15, 2005	2 sessions
March 16, 2005	2 sessions
Total Forum Fees	= \$4,500.00

1. The Panel has assessed \$4,500.00 of the forum fees jointly and severally against Respondents Misaraca, Belmonte, and Kimberly Securities.

### **Fee Summary**

1. Claimants are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 225.00
<u>Total Fees</u>	= \$ 225.00
<u>Less payments</u>	= \$1,000.00
Refund Due Claimants	= \$ 775.00

2. Respondent RBC is solely 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

3. Respondent Davison is solely liable for:

<u>Cross-Claim Filing Fee</u>	= \$ 225.00
<u>Total Fees</u>	= \$ 225.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 225.00

4. Respondents Misaraca, Belmonte, and Kimberly Securities are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 4,500.00
<u>Total Fees</u>	= \$ 4,500.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 4,500.00

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



**ARBITRATION PANEL**

Jason C. Blackford, Esq.	-	Public Arbitrator, Presiding Chairperson
James Patrick Graven, J.D.	-	Public Arbitrator
Ross Tulman	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Jason C. Blackford, Esq.

Public Arbitrator, Presiding Chairperson

April 13, 2005  
\_\_\_\_\_  
Signature Date

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James Patrick Graven, J.D.  
Public Arbitrator

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

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Ross Tulman  
Non-Public Arbitrator

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

April 8, 2005  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**


Jason C. Blackford, Esq.	-	Public Arbitrator, Presiding Chairperson
James Patrick Graven, J.D.	-	Public Arbitrator
Ross Tulman	-	Non-Public Arbitrator

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\_\_\_\_\_  
Jason C. Blackford, Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

  
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James Patrick Graven, J.D.  
Public Arbitrator

4-1-2005  
\_\_\_\_\_  
Signature Date

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Ross Tulman  
Non-Public Arbitrator

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

April 8, 2005  
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Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

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Jason C. Blackford, Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

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James Patrick Graven, J.D.  
Public Arbitrator

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Signature Date

  
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Ross Tulman  
Non-Public Arbitrator

4/2/05  
\_\_\_\_\_  
Signature Date

April 8, 2005  
Date of Service (For NASD Dispute Resolution use only)