

Arbitration

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of
Securities Dealers, Inc.
One East Broward Boulevard
Suite 1000
Ft. Lauderdale, Florida 33301
(305) 522-7391

In the Matter of the Arbitration Between)

Name of Claimant(s))

Patrick McFarland)

Case No. 90-00145

Name of Respondent(s))

Kober Financial Corporation)

Richard M. Gawlick)

Waterhouse Financial Inc.)

John J. Flynn, Jr.)

Michael Albert a/k/a)

Michael Albert Einstein)

William Ebert)

REPRESENTATION

For Claimant, Patrick McFarland ("McFarland"): Steven G. Schember, Esq. of Dykema Gossett.

For Respondents, Kober Financial Corp. ("Kober") and Richard Gawlick ("Gawlick"): S. Lee Terry, Jr., Esq. of Gorsuch, Kirgis, Campbell, et al.

For Respondents, Waterhouse Financial, Inc. ("Waterhouse"), Michael Albert a/k/a Michael Albert Einstein ("Albert") and John Flynn ("Flynn"): Martin W. Albert, Esq. of the Law Offices of Martin W. Albert, Esq.

For Respondent, William Ebert ("Ebert"): Joseph P. Cillo, Esq. of Cillo and Lucas.

CASE INFORMATION

Statement of Claim filed: January 11, 1990 and amended April 13, 1990.
Claimant's Submission Agreement signed: December 12, 1989.

Respondents, Kober and Gawlick's, Statements of Answer filed: March 16, 1990,
Third Party Respondents, Waterhouse, Flynn and Albert's, Statements of Answer
filed on April 4, 1991. Third Party Respondent Ebert's Statement of Answer
filed on June 15, 1990. Respondents' Submission Agreements signed by Richard
Gawlick, on behalf of Kober on February 26, 1990, Gawlick on February 26,
1990, Albert and Flynn on April 16, 1991, Ebert on June 7, 1990, and by
Michael Albert on behalf of Waterhouse on April 16, 1991.

HEARING INFORMATION

On June 24, 1991, in Tampa, Florida, a pre-hearing conference lasting one (1) session was conducted via telephone conference call with an arbitrator.

On April 16 and 17, 1991; August 26, 1991 and January 27, 1992; in Tampa, Florida, hearings lasting eight (8) sessions were conducted.

CASE SUMMARY

Claimant, alleged that Respondents, Kober and Gawlick were liable for: violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934; violations of Chapter 517 of the Florida Statutes; and, violations of Sections 11-501 and 11-703 of the Maryland Securities Act. Claimant alleged: that Respondents' employees, through the use of fabricated financial publications, misrepresented, among other things, the potential investment value of Southnet Corporation stock and thereby induced Claimant into purchasing said stock; and, that Respondents, Kober and Gawlick, were liable for aiding and abetting, and, under the doctrine of respondeat superior.

Respondent, Kober, denied liability and asserted affirmative defenses including that: Waterhouse had full discretion in the conduct of its affairs unless such conduct was known to Kober to violate State or Federal Securities Laws; Waterhouse held an option to purchase a controlling interest in Kober and, therefore, had the power and ability to control Kober; Respondent, Kober, acted in good faith and did not participate in any wrongful acts purported to have been committed by Flynn, Albert, Ebert or Waterhouse; the Southnet stock was validly sold in Florida and Maryland pursuant to a trading exemption; Waterhouse, Flynn, Albert and Ebert were not acting within the scope of their employment and were not agents of Gawlick; Gawlick was not a control person of any of the persons named in the Statement of Claim; Kober acted in accordance with all rules and regulations; the Claims are barred by Statutes of Limitations; Claimant fails to state a claim for relief and the claims are barred by waiver; estoppel and laches.

Respondent, Gawlick, filed a Motion to Dismiss which was granted at the April 17, 1991 hearing.

Respondent, Kober, asserted a Third Party Claim against Waterhouse, Flynn, Albert and Ebert for indemnification.

Third Party Respondent, Ebert, settled the Third Party Claim against him.

Third Party Respondents, Waterhouse, Albert and Flynn, denied liability and asserted affirmative defenses including that Waterhouse conducted their business under supervision from Kober for which Waterhouse paid Kober 20% of their gross commissions; the securities were properly registered in Florida and validly sold in Maryland; Waterhouse sent all promotional materials to Kober's compliance officer; the literature was provided by Southnet Corp., and, Albert and Flynn had no part in writing this literature; and, Albert never owned any shares of Southnet Corp.

RELIEF REQUESTED

Claimant requested damages in the amount of \$65,000.00 plus interest, costs, attorney's fees and punitive damages.

Respondent, Kober, requested dismissal of the claim plus costs and attorney's fees and filed a Third Party Claim requesting indemnification.

Respondents, Flynn, Albert and Waterhouse, requested dismissal of the Third Party Claim.

OTHER ISSUES CONSIDERED & DECIDED

1. Respondent, Gawlick's, Motion to Dismiss was granted at the April 17, 1991 hearing.
2. Third Party Respondent, Ebert, settled Kober's Third Party Claim against him and, therefore, was dismissed, with prejudice.
3. 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 originals remain on file with the NASD.

AWARD

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

1. Respondent, Kober, is found liable and shall pay to the Claimant the amount of \$64,602.50, plus interest at the rate of 10% per annum (from September 29, 1988 to November 14, 1991) in the amount of \$20,194.92 for a total due to the Claimant of \$84,797.42.
2. Respondent, Kober, is also found liable and shall pay to the Claimant the further amount of \$35,000.00 for attorney's fees pursuant to Chapter 517 Florida Statutes. This Panel bases its authority to award attorney's fees on the Federal Arbitration Act and the case law interpreting that Act.
3. Claimant's request for punitive damages is denied.
4. Respondents, Waterhouse, Flynn and Albert, are found liable, jointly and severally, and shall pay to Third Party Claimant, Kober, the amount of \$59,898.71, inclusive of interest.

OTHER COSTS

1. Pursuant to the agreement of the parties, the following amounts were to be paid for arbitrator, Jerry Hamovit's, airfare:

- a) Respondent, Kober \$54.17
- b) Respondents, Albert, Flynn and Waterhouse \$54.17 jointly and severally;
- c) Respondent, Ebert, \$54.17; and,
- d) Claimant, McFarland, \$54.17

2. The parties have paid the following amounts:

- a) Claimant, McFarland, overpaid his hearing session deposit by \$100.00, and, therefore, \$54.17 of that \$100.00 was applied towards the cost of the arbitrator's airfare. The balance of \$45.83 will be addressed in Forum Fees, below.
- b) Respondent, Kober, has paid \$54.17 for its share of the arbitrator's airfare. Respondent, Kober, shall pay to Claimant the \$54.17 previously paid by McFarland for the arbitrator's airfare.
- c) Respondents, Waterhouse, Albert and Flynn, paid \$650.01, \$54.17, of which has been applied towards the arbitrator's airfare. The balance of \$595.84 will be addressed in Forum Fees, below.
- d) Respondent, Ebert, having not paid his share of the arbitrator's airfare prior to his settlement of the Third Party Claim is hereby assessed \$54.17 payable to the National Association of Securities Dealers, Inc.

3. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$5,400.00 (one pre-hearing conference x \$600.00 plus eight sessions x \$600.00 per session). Respondents, Waterhouse, Flynn and Albert, are hereby assessed \$2,700.00, jointly and severally. The NASD shall retain the \$595.84 overpayment, previously deposited by Waterhouse, Flynn and Albert, for the arbitrator's airfare, in partial satisfaction thereof, leaving a balance due to the NASD of \$2,104.16.

2. Respondent, Kober, is hereby assessed \$2,700.00, \$545.83, of which shall be paid directly to Claimant in reimbursement for the \$500.00 hearing session deposit previously deposited by Claimant and the \$45.83 overpayment, leaving a balance due to the NASD of \$2,154.17. The NASD, Inc. shall retain the \$545.83 previously deposited by Claimant. Additionally, Respondent, Kober, is hereby assessed \$500.00, for the past due filing fee for its Third Party Claim.

3. Respondents, Kober, Waterhouse, Flynn and Albert, are also hereby assessed, jointly and severally, \$150.00, to be paid directly to the Claimant for the \$150.00 non-refundable filing fee previously deposited by Claimant.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

/s/
Edwin B. Kagan, Esq.

Public

/s/
Jerry M. Hamovit, Esq.

Public

/s/
Charles R. Newcomer, Jr.

Industry

Date of Decision: June 10, 1992