

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Gregory R. Miller

Claimant

and

Case No.
90-02020

Kidder Peabody & Co., Inc., Donald
Wood and Hugh T. Carney, III

Respondents

REPRESENTATION OF PARTIES

Claimant Gregory R. Miller was represented by Thomas M. Newmark, Esq. of Gallop, Johnson & Newman, St. Louis, Missouri. Respondents Kidder Peabody & Co., Inc., Donald Wood and Hugh T. Carney, III were represented by Jerome F. Raskas, Esq. of Raskas, Ruthmeyer, Pomerantz, Wynne, Garavaglia & Susman, St. Louis, Missouri.

CASE SUMMARY

In a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on or about July 23, 1990, Claimant Gregory R. Miller ("Miller") alleged that Respondents Kidder Peabody & Co., Inc. ("Kidder Peabody"), Donald Wood ("Wood") and Hugh T. Carney, III ("Carney") caused losses to be sustained in Miller's account with Kidder Peabody in excess of \$250,000. Miller alleged that Kidder Peabody, Wood and Carney engaged in illegal, fraudulent and unethical conduct including forgery of Miller's signature, unauthorized trading, failure to execute orders, breach of fiduciary duty, failure to supervise and violations of the Missouri Securities Laws. Miller alleged that Wood engaged in unauthorized purchases and sales of equity securities. Miller also alleged that Wood mishandled his account by failing to enter authorized trades into or out of the Franklin Tax Free Trust Insured Tax Free Income Fund and missed the market to Miller's financial detriment. Miller alleged that Carney also failed to execute an order to transfer from the Franklin Short Term Tax Free Fund into Franklin's Long-Term Tax Free Fund. Miller alleged that Carney and Kidder Peabody failed to adequately supervise Wood and failed to respond to matters of public record which reflected adversely upon Wood's character and

PROCEDURAL MATTERS

On June 19 and 20, 1991 and continuing on July 15 and 16, 1991 in St. Louis, Missouri during a hearing lasting a total of nine (9) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on July 11, 1990 by Claimant Gregory R. Miller, on September 19, 1990 by Leo Schmid on behalf of Respondent Kidder Peabody & Co., Inc., on September 19, 1990 by Respondent Donald E. Wood and on September 19, 1990 by Respondent Hugh T. Carney, III.

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.

AWARD

The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has decided in full and final resolution of all issues submitted for determination as follows:

1. Kidder Peabody, Carney and Wood are jointly and severally liable for and shall pay to Miller the sum of \$91,994.00;
2. Interest in the amount of \$8,279.00 is awarded on this sum;
3. Miller's claim for punitive damages shall be and is hereby denied and dismissed in its entirety;
4. Kidder Peabody, Carney and Wood are jointly and severally liable for and shall pay to Miller the sum of \$40,000 as reasonable attorney fees. In making this award of attorney fees to Miller, the panel considered the authority for such an award to be set forth in the Missouri Securities Law;
5. The parties shall each bear their own costs and expenses other than those enumerated above; and
6. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by Claimant Gregory Miller. Miller is assessed and shall pay to the NASD additional forum fees of \$2925.00. Respondents Kidder Peabody, Carney and Wood are jointly

suitability for employment in a position of fiduciary responsibility.

In a Statement of Answer filed with on the NASD on September 20, 1990 Kidder Peabody, Wood & Carney alleged that Miller suffered no losses except those due to his own actions and adverse market activity other than the \$5,000 loan Miller allegedly made to Wood. It was alleged that Miller gave Wood time and price discretion to act on Miller's behalf when Miller was unavailable. Wood alleged that Miller gave Wood the authority to sign Miller's name on account documents to open a Kidder Peabody Premium account. Wood alleged that he understood that Miller would forward to Kidder Peabody executed copies of those agreements and that these copies would be substituted for the copies that Wood had signed. Carney and Kidder Peabody denied any responsibility for damages relating to losses from the alleged loan to Wood.

Kidder Peabody, Carney and Wood also denied that orders were not executed timely. Miller allegedly knew that switching between funds in the Franklin Fund family could only be made if certificates were provided to Franklin at the time of the switches. The time period could be up to seven days and Miller was aware of this. As to the allegations of unauthorized trades, phone records show that Wood and Miller engaged in numerous phone calls which indicated contact between Miller and Wood.

Miller filed an amended claim on May 20, 1991 which also included allegations of churning and violations of the federal securities laws.

The amended claim was answered on June 7, 1991 by Kidder Peabody, Carney and Wood in which the allegations were again denied as set forth above.

RELIEF REQUESTED

Miller requested damages of \$113,279.46 for losses from unauthorized trades, \$48,186 in margin interest, \$69,978.33 for failure to enter trades, \$5,000.00 for the loan made to Wood and costs of the action including reasonable attorney's fees. Kidder Peabody, Wood and Carney requested dismissal of the claim at Miller's cost. Miller's amended claim asked for punitive damages. Wood, Carney and Kidder Peabody requested dismissal of the amended claim too.

OTHER ISSUES

Prior to hearing on the merits of the claim, the Chairman of the panel participated in 2 single session pre-hearing conferences with counsel and resolved certain discovery issues. Additionally the panel allowed the claim to be amended prior to hearing pursuant to Section 39(b) of the NASD Code.

and severally assessed and shall pay to the NASD
additional forum fees of \$3675.00.

Panel Members Concurring

Dated: October 28, 1991

/S/ William B. Gillespie
Presiding Chair
Public Arbitrator

Dated: October 28, 1991

/S/ Joseph W. Twombly
Public Arbitrator

Dated: October 28, 1991

/S/ Mark A. Yarwood
Industry Arbitrator

Date Served by NASD: November 21, 1991