

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Robert & LaVergne Benza

No. 90-03391

Name of Respondents

Thomas Kurk  
Long Grove Trading Company  
Kavanaugh Securities, Inc.

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REPRESENTATION

For Claimant: Robert Benza Jr.

For Respondent Thomas Kurk: Thomas Kurk appeared pro se.

For Respondent Long Grove Trading Company: Thomas A. Hopkins.

For Respondent Kavanaugh Securities, Inc.: Christopher J. Barbar, Esq. and Kevin Davis, Esq. of Adler Kaplan & Begy.

CASE INFORMATION

Statement of Claim filed: November 30, 1990.

Claimant's Submission Agreement signed on: February 28, 1991.

Statement of Answer filed by Respondent Long Grove Trading Company on: April 5, 1991.

Respondent Long Grove Trading Company's Submission Agreement signed on: March 26, 1991 by Thomas Hopkins, President.

Statement of Answer and Counterclaim filed by Respondent Kavanaugh Securities, Inc. on: May 17, 1991.

Respondent Kavanaugh Securities, Inc.'s Submission Agreement signed on: April 30, 1991 by Christopher J. Barber, Esq.

Statement of Answer filed by Respondent Thomas Kurk on: December 17, 1991.

Respondent Thomas Kurk did not file a Submission Agreement.

### HEARING INFORMATION

Pre-Hearing Conference: November 13, 1991. 1 session with the panel.

Hearing Dates/Sessions: December 17, 1991. 2 sessions.

December 27, 1991. 3 sessions.

December 30, 1991. 1 session.

Hearing Location: Chicago, Illinois.

### CASE SUMMARY

Claimants Robert and LaVergne Benza ("Claimants") alleged misrepresentation of financial investment opportunities, breach of fiduciary duty, imprudent management of their investment portfolio by Respondent Thomas Kurk ("Kurk"), and failure to adequately supervise Kurk's activities by Kavanaugh Securities, Inc. ("KSI"). At all relevant times hereto, Kurk had been employed by KSI.

Claimants alleged a limited knowledge of investing and were holding most of their assets in safe and fairly liquid investments. After a number of meetings with Kurk, the Claimants invested in the following limited partnerships: North Orlando, 1 unit; Angeles Income Properties LTD IV, 20 units; IRE, 10 units; Balcor '86, 10 units; and Balcor III, 88 units. The Claimants agreed to commit to these investments after being advised and counseled by Kurk that the investments being made were absolutely safe and would provide tax sheltered income. The investments were illiquid, carried a large degree of risk, and were long-term in nature. The Claimants also alleged that the Investment Questionnaire required to invest in the North Orlando Limited Partnership had been filled out fraudulently, and that the only reason Kurk counseled the Claimants to invest in the limited partnerships listed above was the high commissions he received from their sale.

For his Statement of Answer, Kurk denied all allegations contained in the Statement of Claim.

For Respondent Long Grove Trading Company's ("LGTC") Statement of Answer, LGTC denied all allegations contained in the Statement of Claim, and further alleged that the investments and activities of Kurk complained of in Claimants' Statement of Claim occurred after Kurk had left employment with LGTC.

In its Statement of Answer, KSI denied each and every allegation contained in the Statement of Claim. In addition, KSI stated the following affirmative defenses:

1. The Claimants fail to state a claim upon which relief may be granted.
2. The Claimants are barred from pursuing their claims by the applicable statutes of limitations and the statute of frauds.

3. The Claimants are barred from pursuing their claims by the equitable doctrines of laches, estoppel, and unclean hands.

4. The Claimants failed to mitigate damages, if any.

In its Counterclaim, KSI alleged breach of contract by the Claimants. The basis for the allegation lies in the fact that the Claimants had signed a subscription agreement and had warranted that the Claimants had fully understood the high degree of risk involved, that the information contained in the investor questionnaire was complete and accurate, and that the unit had substantial restrictions on transferrability. The breach allegedly occurred when the Claimants filed their Statement of Claim alleging not understanding the high degree of risk involved, and that the information in the questionnaire was false. Due to the breach, KSI alleged realizing a loss.

In their Answer to the KSI's Counterclaim, the Claimants denied each and every allegation contained therein, and reasserted their allegations originally set forth in their Statement of Claim.

#### RELIEF REQUESTED

Claimants requested that the panel award them the sum of \$140,649.00.

Respondent LGTC requested that the panel deny the Claimants' claims in their entirety.

Respondent Kirk requested that the panel deny Claimants Claims.

Respondent KSI requested that the panel dismiss the Statement of Claim and to assess the costs of this proceeding against the Claimants. In its Counterclaim, KSI further requested that the panel enter an award against the Claimants in an amount equal to the attorney's fees and costs incurred in defending the above-captioned Statement of Claim, in addition to any award entered in favor of the Claimants on their Statement of Claim against KSI.

The Claimants requested that KSI's Counterclaim be denied.

#### OTHER ISSUES CONSIDERED & DECIDED

Respondent Thomas Kirk did not file with the NASD a properly executed Submission agreement as required by Section 12 of the NASD Code of

Arbitration Procedure. Respondent Kurk, having answered the claim, and appeared and testified at the hearing, is therefore subject to the jurisdiction of the NASD.

After hearing evidence concerning the dissolution of Kurk & Kurk Financial Group, Kurk Financial Securities, Inc., and Syndex Securities Corp., the panel deliberated and ruled to dismiss these originally named defendants from the case.

Respondent LGTC made a motion to dismiss itself from this arbitration at the hearing conducted on December 17, 1991. After hearing argument from all of the parties, the Claimants voluntarily agreed to dismiss LGTC from this arbitration. After deliberation, the panel ruled that LGTC would be dismissed from this case.

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 (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Claimants, Robert and LaVergne Benza, will assign and deliver to Respondents Kavanaugh Securities, Inc. and Thomas Kurk jointly and severally all right, title and interest in the unit of North Orlando Limited Partnership owned by the Claimants. Upon receipt of the aforementioned title to said interest, Kavanaugh Securities, Inc. and Thomas Kurk shall be jointly and severally liable for, and shall pay to the Claimants Robert and LaVergne Benza the sum of \$46,110.00.

2. The Counterclaim of Kavanaugh Securities, Inc. is hereby dismissed and denied.

3. Claimants Robert and LaVergne Benza's claims against Respondent Long Grove Trading Company are hereby denied and dismissed.

FORUM FEES

Pursuant to Section 43 (c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

1 Pre-hearing Session x \$300.00 = \$300.00  
6 Hearing Sessions x \$750.00 = \$4,500.00

Forum Fees in the amount of \$4,050.00 are assessed jointly and severally against Respondents Thomas Kurk and Kavanaugh Securities, Inc.

Pursuant to Section 43 (c) of the Code of Arbitration Procedure, the NASD shall retain the filing fee in the amount of \$200.00, and the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimants Robert and LaVergne Benza.

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

Concurring Arbitrators' Signatures

Date:

January 20, 1992

/s/Arthur Medow  
Arthur Medow  
Chairman  
Public Arbitrator

January 24, 1992

/s/Daniel M. Bercaw  
Daniel M. Bercaw  
Public Arbitrator

January 20, 1992

/s/Daniel J. Foley  
Daniel J. Foley  
Industry Arbitrator