

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Mary Fernandez

vs.

NASD #91-01531

Name of Respondents

J.W. Gant & Association, Inc.  
Oppenheimer & Company, Inc.  
Allied Capital Group, Inc.  
Jan Marie Kennedy  
Peter F. Mercaldi  
John E. Bradley  
Carl A. Militello

REPRESENTATION

For Claimant: William B. Federman, Esq., of Day, Hawett & Federman, Oklahoma City, Oklahoma.

For Respondent: (J.W. Gant) David Zizzer, Esq., of Gordon Dible, Esq., of Dible & Company, Inc., Englewood, Colorado.

For Respondent: (Oppenheimer) Joseph C. Pichard, Esq., of Oppenheimer & Company, New York, New York.

For Respondent: (Fred Borries) No appearance.

For Respondent: (William Kennedy) No appearance.

For Respondent: (Mercaldi and Allied Capital) Peter Frank Mercaldi, Jr.

For Respondent: (Jan Kennedy) Dean Aarestead, Esq. of Aarested Bros., Inc., Aurora, Colorado

For Respondent: (Militello) No appearance.

CASE INFORMATION

Statement of Claim filed: May 17, 1991

Claimant's Submission Agreement signed: May 6, 1991

Statement of Answer filed by Respondents on:

Jan Kennedy and J.W. Gant	-	July 22, 1991
Mercaldi and Allied Capital	-	May 15, 1992
Oppenheimer	-	July 23, 1991
Bradley	-	July 8, 1991

Respondent Carl Militello, and third-party respondents William Kennedy and Fred Borries did not file Answers but are subject to National Association of Securities Dealers, Inc. (NASD) jurisdiction in accordance with Section 12 of the NASD Code of Arbitration Procedure.

Respondents, Submission Agreement signed on:

Jan Kennedy	-	July 24, 1991
J.W. Gant	-	July 24, 1991
Mercaldi	-	July 23, 1991
Oppenheimer	-	July 23, 1991 (Settled before hearing).

Respondents Bradley and Allied Capital Group did not file a Submission agreement but did file Answers and are subject to National Association of Securities Dealers, Inc. (NASD) jurisdiction in accordance with Section 12 of the NASD Code of Arbitration Procedure. Respondent Militello and third-party respondents William Kennedy and Fred Borries did not file submission agreements but also are subject to the NASD jurisdiction in accordance with Section 12 of the NASD Code of Arbitration Procedure.

#### HEARING INFORMATION

Prehearing Conference(s) Date(s) Sessions:

March 23, 1992 (one session)  
June 4, 1992 (one session)

Hearing Date/ Sessions: June 9, 1992 (two sessions)  
June 10, 1992 (two sessions)  
June 11, 1992 (three sessions)

Hearing Location: San Francisco, California

#### CASE SUMMARY

Claimant alleged common law fraud/violation of California Securities Laws, negligence in hiring employees, breach of fiduciary duty and negligence and lack of suitability in the purchase of stocks and options.

Respondents J.W. Gant and Jan Kennedy denied all substantive allegations of the Statement of Claim and alleged that all transactions were suitable, full disclosure and failure to mitigate damages.

Respondent Mercaldi denied all substantive allegations of the Statement of Claim and asserted a counterclaim against claimant, crossclaim against Jan Kennedy and a third-party claim against Fred Borries and William Kennedy. Respondent Mercaldi counterclaimed against claimant for costs and punitive damages and crossclaimed against respondent Jan Kennedy and third-party respondents William Kennedy and Fred Borries for indemnification.

Respondent Oppenheimer denied all substantive allegations of the Statement of Claim, alleged a crossclaim against claimant but settled prior to the hearing.

Respondent John Bradley denied all substantive allegations of the Statement of Claim.

Although duly served Third-party respondents Fred Borries and William Kennedy did not file Answers to the Third-party claims or appear at the hearing.

RELIEF REQUESTED

Claimant requested:

1. Compensatory damages of \$200,000;
2. Prejudgment interest; and
3. Punitive damages;
4. For such other relief as the arbitrators find appropriate.

Respondent Mercaldi requested:

1. Costs of \$25,000, plus punitive damages against claimant; and
2. Indemnification from third-party Fred Borries and William Kennedy; and

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 originals remain on file with the NASD. Although duly served, respondent Carl Militello and third-party respondents Fred Borries and William Kennedy did not file Answers or submission agreements, and did not appear at the hearing, but are subject to the jurisdiction of the NASD in accordance with NASD Code of Arbitration Procedure Sections 12 and 29.

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 Jan Kennedy and J.W. Gant are jointly and severally liable for and shall pay claimant Sixty Thousand Dollars and Zero Cent (\$60,000) in compensatory damages, with comparative fault as follows: Kennedy 20% at fault and J.W. Gant, 80% at fault.

2. All other claims, including the claim for punitive damages, are dismissed.

3. The parties shall each bear their respective costs including attorneys' fees.

OTHER COSTS

Respondents Jan Kennedy and J.W. Gant are jointly and severally liable for and shall pay claimant \$10,000 towards claimant's costs for expert witness fees, copying cost, postage and travel with comparative fault assessed 20% for Jan Kennedy and 80% for J.W. Gant.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following forum fees are assessed: The National Association of Securities Dealers, Inc. shall refund the \$750 hearing session deposit previously deposited by the claimant. Forum fees assessed against:

Jan Kennedy, J. W. Gant and Allied Capital, jointly and severally, in the amount of \$5,850.00 calculated as follows: Seven sessions times \$750.00 equalling \$5,250.00, plus two prehearing sessions times \$300/prehearing session, equals \$5,850.00.

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

ARBITRATION PANEL

Public/Industry

Public Arbitrator  
Public Arbitrator  
Industry Arbitrator

\_\_\_\_\_' Signature

  
Walter Hitchcock

Date of Decision: \_\_\_\_\_