

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Caroline Park Homes Defined Benefit Pension Plan
Sommers and Messmer Properties
James P. Sommers
Robert Messmer

Case No. 91-01592

Name of Respondent(s)

Kemper Securities Group, Inc., as successor to Gulfstream Financial
Associates, Inc. and Boettcher & Co., Inc.
Kemper Securities Group Holdings, Inc.
Kemper Financial Companies
Alex Brown & Sons, Inc.
Roy Warren
Ronald Potts
James Boris

REPRESENTATION

For Claimants, Caroline Park Homes Defined Benefit Pension Plan ("Caroline Park"), Sommers and Messmer Properties ("S&M");, James Sommers ("Sommers") and Robert Messmer ("Messmer"): William Doyle, Esq. of the Law Offices of William P. Doyle, Esq.

For Respondents, Kemper Securities Group, Inc. as successor to Gulfstream Financial Associates, Inc. and Boettcher & Co., Inc. ("Kemper"), Kemper Securities Group Holdings, Inc. ("Kemper Holdings"), James Boris ("Boris") and Kemper Financial Companies ("Kemper Financial"): Ronald Shindler, Esq. of Fowler White, Burnett, Hurley, et al.

For Respondent, Alex Brown and Sons, Inc. ("Alex Brown"): Daniel McIntyre, Esq. of Alex Brown.

For Respondent, Roy Warren ("Warren"): Michael McAllister, Esq. of Lane and Mittendorf and Ronald Shindler, Esq. of Fowler, White, Burnett, Hurley, et al.

Respondent, Ronald Potts ("Potts") was pro se.

CASE INFORMATION

Statement of Claim filed: May 22, 1991. Claimants' Submission Agreements signed: May 13, 1991 by Sommers and Messmer, individually and as trustees of Caroline Park and on June 11, 1991 by Sommers and Messmer on behalf of S&M.

Respondents', Kemper and Boris's, Statement of Answer filed: September 9, 1991. Respondents' Submission Agreements signed: April 10, 1992 by Janet Reali on behalf of Kemper and on July 22, 1991 by Boris.

Respondent, Alex Brown's, Statement of Answer filed: August 9, 1991. Respondent, Alex Brown's, Submission Agreement signed: August 7, 1991 by W. Gar Richlin on behalf of Alex Brown.

Respondent, Warren's Statement of Answer filed: November 27, 1991. Respondent, warren's, Submission Agreement signed: November 20, 1991 by Warren.

Respondent, Potts, did not file a Statement of Answer or sign a Submission Agreement as required by Sections 12 and 25 of the Code. Respondent, Potts, being a person associated with an NASD member firm at the time this controversy arose.

Respondents, Kemper Holdings and Kemper Financial, did not file Statements of Answer or sign Submission Agreements since they are not member firms of the NASD and did not voluntarily submit to the NASD's jurisdiction (see "Other Issues").

HEARING INFORMATION

On March 10, 11 and 12, 1992; July 21, 22 and 23, 1993; and August 25 and 27, 1993 in Fort Lauderdale, Florida, hearings lasting 16 sessions were conducted.

CASE SUMMARY

Claimants alleged that: Respondents were liable for: violations of the Employee Retirement Income Security Act of 1974, Rule 10-b-5(1) and (3) Section 15(c)(1) and Section 17(a) of the Securities Exchange Acts of 1933 and 1934, NYSE Rule 405, NASD Rules of Fair Practice and Sections 517.301 and 517.211 of the Florida Statutes; breach of fiduciary duty; negligence and gross negligence; misrepresentation; and, fraud. Claimants alleged that Respondents misrepresented the safety and suitability of various equities and limited partnerships for Claimants' pension plan, partnership and individual accounts. In particular, Claimants alleged that, under ERISA, Warren was a fiduciary for the pension plan and had a duty to recommend investments which were suitable for the

pension plan and that he breached this duty by recommending unsuitable investments.

Respondents, Kemper and Boris, denied all allegations of wrongdoing and alleged that: Claimants are experienced and knowledgeable investors; Claimants were kept apprised of the performance of their accounts and received prospectuses; Warren did not control the accounts; Claimants rejected some of Warren's advice and conducted some of their own investigations before purchasing some of the investments; Claimants were advised of the risks; Warren was not a fiduciary of the pension plan; and, no misrepresentations were made. Kemper and Boris asserted affirmative defenses of: failure to state a claim; statute of limitations; losses were caused by market conditions; ratification; laches; waiver; estoppel; failure to mitigate damages; Claimants' negligence caused the losses; lack of reliance; and, lack of proximate cause.

Respondent, Warren, denied all allegations of wrongdoing and alleged that: Claimants were sophisticated investors; Claimants were aware of the risks; and, Claimants ratified the trades. Warren asserted affirmative defenses including: failure to state a claim; waiver; laches; ratification; estoppel; statute of limitations; Warren was not a fiduciary; assumption of risk; lack of reliance; and no private right of action for violation of SRO rules.

Respondent, Alex Brown, denied all allegations of wrongdoing and alleged that: aside from selling securities that had been purchased elsewhere, and the purchase and sale of a short term money market mutual fund there was no investment activity through Alex Brown and Claimants do not specify any wrongdoing by Alex Brown.

Respondent, Potts, failed to file an Answer.

RELIEF REQUESTED

Claimants requested damages in the amount of \$800,000, plus punitive damages, attorney's fees pursuant to Chapter 517 of the Florida Statutes, interest, and costs.

Respondents, Kemper, Boris and Warren, requested dismissal of the claim, plus costs, and attorney's fees.

Respondent, Alex Brown, requested dismissal of the Claim.

OTHER ISSUES CONSIDERED & DECIDED

1. This Panel finds that Respondent, Potts, did not receive notice of this arbitration and, therefore, dismissed him without prejudice.

2. Claimants dismissed Respondents, Kemper Holdings and Kemper Financial, from this arbitration since they are not member firms and did not voluntarily submit to this arbitration.

3. Pursuant to Respondents' Motion to Dismiss, this Panel has dismissed Respondent, Boris with prejudice.

4. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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. Respondents, Kemper, Warren and Alex Brown, are found not liable and, therefore, all claims against them are hereby dismissed.

2. Claimants' request for attorney's fees, costs and punitive damages is denied.

3. Claimants are found liable for attorney's fees pursuant to Section 517.211 of the Florida Statutes and shall pay to Respondents, Kemper, Boris and Warren, the amount of \$78,968.75. The Panel bases its authority to award attorney's fees on the Federal Arbitration Act and the case law interpreting that Act.

OTHER COSTS

1. Claimants are also found liable and shall pay to Respondent, Kemper, the amount of \$15,355.12 for Federal Express, photocopy, transcripts, telephone, postage, transportation, expert witness and other costs.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$16,000 (16 sessions x \$1,000 per session).

2. Claimants are hereby assessed \$16,000 for which the NASD shall retain the \$1,250 previously deposited in partial satisfaction thereof leaving a balance due to the NASD of \$14,750 payable to the National Association of Securities Dealers, Inc.

3. The NASD shall retain the non-refundable filing fee of \$250 paid by the

Claimants.

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

Concurring Arbitrators' Signatures

/s/
William A. Fleck, Esq.

Public

/s/
Nigel J. Yates

Industry

Dissenting Arbitrator's Signature

/s/
Jack L. Ratzkin, Esq.

Public

Arbitrator, Jack Ratzkin dissents as to paragraph 3 of the "Award", paragraph 1 of "Other Costs" and as to paragraph 2 of "Forum Fees" and otherwise concurs in the decision.

Date of Decision: September 20, 1993