

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Brandes Properties Ltd.  
Bill Anton Brandes  
Bernard Kahn  
William B. Kahn  
Virginia Kahn Coogler

91-02207

Name of Respondent(s)

Eppler, Guerin & Turner, Inc.

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REPRESENTATION

For Claimants : Brandes Properties, Ltd., Bill Anton Brandes, Bernard Kahn, William B. Kahn and Virginia Kahn Coogler were represented by J. Eugene Clements, Esq. of Porter & Claimants located in Houston, Texas.

For Respondent: Eppler, Guerin & Turner was represented by Stephen E. Fox, Esq. of Jenkins & Gilchrist located in Dallas, Texas.

CASE INFORMATION

Joint Statement of Claim filed: July 19, 1991.

Claimant Brandes Properties Ltd.'s Submission Agreement signed by Bill Brandes on: June 20, 1991.

Claimant Bill Anton Brandes' Submission Agreement signed on: June 20, 1991.

Claimant Bernard Kahn's Submission Agreement signed on: June 18, 1991.

Claimant William B. Kahn's Submission Agreement signed on: June 18, 1991.

Claimant Virginia Kahn Coogler's Submission Agreement signed on: June 18, 1991.

Statement of Answer filed by Respondent on: August 29, 1991.

Respondent, Eppler, Guerin & Turner, Inc.'s Submission Agreement signed by Samuel P. Mitchell, President, on: August 29, 1991.

HEARING INFORMATION

Pre-Hearing Conference: None held.

Hearing Dates/Sessions: May 4, 1992 for two (2) sessions.  
May 5, 1992 for two (2) sessions.

Hearing Location: Houston, Texas.

#### CASE SUMMARY

Claimants Brandes Properties, Ltd., Bill Anton Brandes, Bernard Kahn, William B. Kahn and Virginia Kahn Coogler ("Claimants") alleged that:

Claimants were securities investment customers of Eppler, Guerin & Turner, Inc. ("EGT") for many years including the period immediately prior to December 1987 through early March 1990. During this period EGT employed Bruce Fridley ("Fridley") as an account executive. Fridley advised Claimants regarding securities as part of his employment duties with EGT. At all times Fridley was acting within the course and scope of his employment. EGT also employed a securities research analyst named Eugene Mellenchenko ("Mellenchenko") who gave investment advice to EGT customers and EGT account executives. Mellenchenko advised Fridley and the Claimants regarding ICN Pharmaceuticals, Inc. ("ICN"), Viratek, Inc. ("Viratek"), and GAMMA Biologicals, Inc. ("GAMMA"). At all times Mellenchenko was acting within the course and scope of his employment.

During the relevant period, Fridley advised the Claimants to invest in and, subsequently, to maintain their investments in ICN, Viratek, and GAMMA. Fridley based the investment advice on the work of Mellenchenko. Following Fridley's advice, Claimant invested in ICN, Viratek, and GAMMA between December 1987 and June 1989. In addition, upon Fridley's advice Claimant retained their holdings in the relevant stocks. EGT's agents made many material representation regarding ICN, Viratek, and GAMMA, including, but not limited to the following: (1) the net liquidating value of ICN; (2) that Viratek would definitely obtain approval in the United States for use of a revolutionary new drug (ribavirin) in the treatment of AIDS; and (3) that GAMMA would be bought out on a specific date. These representations were false. Claimants alleged at the time that Fridley and Mellenchenko made these and other material misrepresentations to the Claimants regarding ICN, Viratek and GAMMA, they knew that the representations were false or they made the representations without any knowledge of the truth of the representations.

EGT, Fridley, and Mellenchenko owed a fiduciary duty to the Claimants and violated their fiduciary duty to the Claimants by participating in the buy and retain campaign regarding ICN, Viratek and GAMMA as specifically alleged, EGT, Fridley and Mellenchenko violated their fiduciary duty by (1) negligently or willfully, wantonly, maliciously and unconscionably making false material

representations to the Claimants, (2) failing to disclose the actual basis for their investment advice and (3) omitting to inform the Claimants of negative material information regarding ICN, Viratek and GAMMA of which EGT and its agents were aware. Each of the Claimants suffered injury as a result of the breach of fiduciary duty.

In addition, EGT was aware that Mellenchenko had a past relationship with and loyalty to ICN and its affiliates. The Claimants alleged that EGT was negligent in failing to properly supervise Mellenchenko in the performance of his research analyst duties with respect to ICN, ICN's affiliates and other companies in the pharmaceutical industry. Further allegations were made that EGT was aware that Mellenchenko was violating his duties as a research analyst and that Fridley was basing his investment advice on Mellenchenko's falsities and omissions, but EGT allowed Mellenchenko and Fridley to continue the buy and retain campaign unabated and with EGT's active assistance. Therefore, EGT is liable for Fridley and Mellenchenko's acts and omissions discussed above.

Respondent Eppler, Guerin & Turner, Inc. ("EGT") denied the material allegations in the Statement of Claim and further alleged that:

The stocks recommended by EGT and its agents did not perform as anticipated. However, such conduct does not amount to fraud and breach of fiduciary duty as Claimants Brandes Properties, Ltd., Bill Anton Brandes, Bernard Kahn, William B. Kahn and Virginia Kahn Coogler ("Claimants") insist. In addition, Claimants waived, ratified and are estopped to assert their claims; and Claimants failed to mitigate their damages.

#### RELIEF REQUESTED

Claimants Brandes Properties, Ltd., Bill Anton Brandes, Bernard Kahn, William B. Kahn and Virginia Kahn Coogler ("Claimants") requested:

1. Compensatory damages for the Claimants' out-of-pocket losses on ICN, Viratek and GAMMA as follows:

Brandes Properties, Ltd.	\$31,401.07
Bill Anton Brandes	\$42,204.61
Bernard Kahn	\$88,509.22
William B. Kahn	\$89,240.05
Virginia Kahn Coogler	\$97,703.79

2. Compensatory damages in an amount equal to Claimants' out-of-pocket losses for commissions that they paid in connection with the purchases and sales of the relevant stocks;

3. Lost investment opportunity damages;
4. Reasonable attorneys' fees;
5. Punitive damages;
6. Pre- and post-arbitration award interest; and
7. Expenses and costs in connection with this proceeding, including their administrative costs and fees.

Respondent Eppler, Guerin & Turner, Inc. ("EGT") requested that the arbitration dismiss the claim in its entirety and award EGT all of its costs incurred in connection with this arbitration proceeding.

#### 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.

#### 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. The Claimants Brandes Properties, Ltd., Bill Anton Brandes, Bernard Kahn, William B. Kahn, and Virginia Kahn Coogler's claim is dismissed and denied in its entirety.
2. Each party shall bear its own costs, including attorneys' fees, except for those enumerated herein.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Four (4) sessions x \$750.00 = \$3,000.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and the hearing session deposit of \$750.00 previously deposited by the Claimants Brandes Properties, Ltd., Bill Anton Brandes, Bernard Kahn, William B. Kahn and Virginia Kahn Coogler. The Claimants will be jointly and severally liable for and shall pay to the NASD additional forum fees in the amount of \$2250.00.

The NASD shall refund the \$750.00 previously deposited by the Respondent  
Eppler, Guerin & Turner.

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

Concurring Arbitrators' Signatures

DATED:

MICHAEL E. MCGOWN, ESQ.  
Michael E. McGown, Esq.  
Public Arbitrator  
Chairperson

AUGUST 12, 1992

THEODORE DAVIS  
Theodore Davis  
Public Arbitrator

JULY 24, 1992

JOHN C. BOOTH, JR.  
John C. Booth, Jr.  
Industry Arbitrator

JULY 24, 1992

Date of Service on Parties:

August 13, 1992