

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Jorge & Mary Trow Garcia

91-02503

Name of Respondents

John G. Kinnard and Company, Inc.
Paul Shute
Summit Investment

REPRESENTATION

For Claimants: Mark Briol, Esq. and Gregory Wilmes, Esq. of Briol & Wilmes, Minneapolis, Minnesota.

For Respondent Paul Shute: Terrence J. Fleming, Esq. of Lindquist & Vennem, Minneapolis, Minnesota. For Respondent Summit Investment, Inc.: Ann Exline Starr, Esq. and Robert Abrams, Esq. of Summit Investment, Inc., Minneapolis, Minnesota. For Respondent John G. Kinnard and Company, Inc.: F. Chet Taylor, Esq. of Fredrickson & Byron, Minneapolis, Minnesota.

CASE INFORMATION

Statement of Claim filed: August 13, 1991. Amendment to the Statement of Claim filed: May 4, 1992.

Claimants's Submission Agreement signed on: March 20, 1991.

Statement of Answer and crossclaim filed by Respondent, John G. Kinnard & Co. on: September 27, 1991. Statement of Answer, counterclaim, and crossclaim filed by Respondent Summit Investment Corporation on: July 21, 1992.

Respondent John G. Kinnard and Company's Submission Agreement signed on: September 30, 1991.

HEARING INFORMATION

Hearing Date/Session: August 10, 1992 for one (1) session.

Hearing Location: Minneapolis, Minnesota.

CASE SUMMARY

Claimants Jorge L. Garcia and Mary Trow Garcia ("the Garcias") alleged that Respondent Paul Shute ("Shute"), broker for Respondent John G. Kinnard and Company, Inc. ("Kinnard"), controlled all of the Garcia's accounts while employed at Kinnard. The Garcias also alleged that Kinnard was negligent or reckless in employing Shute. The Garcias alleged that Shute left Kinnard and obtained employment with Summit Investment Corporation ("Summit"); the Garcias alleged that at the time the Garcia's accounts were transferred to Summit, most of their money had been lost by Shute at Kinnard, and the losses had been concealed. The Garcias alleged the following violations: (1) conversion-misappropriation, Federal Securities Fraud, Sections 10(b) and 15(c)(1) and Rules 10b-5 and 15c-1, respondent superior, negligent supervision, N.Y.S.E. Rule 405, AMEX Rule 411, Minn. Rule 2875.0910, federal control person liability, general negligence, state securities laws Minn. Stat. Section 80A.01 and section 80A.03, breach of fiduciary duties, and Common Law Fraud.

In Claimant's Amended Statement of Claim, the Garcias added Summit as a Respondent. The Garcias alleged that Jorge Garcia invested his mother's, Elsie Sanchez, life insurance proceeds, which she received from her other son, in an account held at Kinnard. The Garcias alleged that Shute stole part of the insurance proceeds by forging a \$29,399.10 check payable to Elsie Sanchez and Jorge Garcia. The Garcias alleged that they believed that the money had been transferred to Summit when Shute joined Summit.

Kinnard denied any wrongdoing, and alleged that the Garcias simply lost money in the market. Kinnard alleged that it did not appear that any money was stolen from the account, nor that the account was excessively traded. For Kinnard's crossclaim, Kinnard alleged that they are entitled to recover from Shute all damages caused by his actions, including indemnification and contribution for all costs of defense and any liabilities Kinnard may face.

Summit denied that it engaged in any fraudulent conduct. Summit alleged that the Garcias had a duty of due diligence with respect to their own accounts that they failed to exercise. For their counterclaim against Elsie Sanchez ("Sanchez"), Summit alleged that Sanchez entered into a settlement agreement with Kinnard which made her whole, and that in the event an Award be entered against Summit for repayment to the Garcias for funds converted by Sanchez, Sanchez should be ordered to contribute to and/or indemnify Summit in the amount of any such Award.

In their cross claim against Shute, Summit alleged that Shute's conduct was unauthorized and beyond the scope of his employment with Summit, and that Shute should be ordered to indemnify Summit if an Award is entered against them.

Elsie Sanchez filed an Answer and objection to the arbitrator's jurisdiction of Summit's counterclaim against her, alleging that the

counterclaim is frivolous. Sanchez alleged that she did not agree to arbitrate any claim Summit may have against her. Sanchez requested that the pretended counterclaim against her be dismissed, and that she be awarded attorney's fees against Summit.

RELIEF REQUESTED

Claimant requested the following against Respondent Summit Investment Company: compensatory damages in the amount of \$5,000.00, attorney's fees, interest, costs, disbursements and expenses, and such other relief as the arbitrators, based on the evidence, deem just and equitable. Claimants also requested the following against Respondents Kinnard and Shute: compensatory damages in the amount of \$10,000.00, attorney's fees, pre and post award interest on all damages awarded, costs, disbursements, and expenses, and such other relief as the panel deems just and equitable.

Kinnard requested that the claims be denied entirely and that they be entitled to judgment against Shute for contribution, indemnity, damages, costs of defense and attorney's fees. Summit requested that an Award be issued in their favor, dismissing the Statement of Claim with prejudice and granting Summit its reasonable and disbursements, including reasonable attorney's fees. Summit requested that an Award be entered in its favor, dismissing Claimant's Statement of Claim with prejudice and granting to Summit its reasonable cost and disbursements, including reasonable attorney's fees.

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.

The Claimants Jorge Garcia and Mary Trow Garcia were granted permission to Amend their Statement of Claim to add Summit Investment Corporation as a respondent. Summit Investment Corporation did not file a properly executed Submission Agreement pursuant to Section 12 of the NASD Code of Arbitration Procedure, but having answered the Statement of Claim, appeared and testified, is bound by the conclusions of the Panel on all issues submitted for determination.

The Claimants Jorge Garcia and Mary Trow Garcia settled their claims against Respondent John G. Kinnard and Company, Inc. with prejudice by letter to the NASD dated May 22, 1992. Respondent John G. Kinnard and Company, Inc. withdrew its cross-claim without prejudice against Respondent Paul Shute.

Respondent Paul Shute did not file an Answer to the Statement of Claim or a Submission Agreement. Paul Shute did not appear at the hearing. By letter to the NASD dated August 26, 1991, counsel for Respondent Paul Shute said that "Mr. Shute does not desire to, and will not, participate in the

above proceeding, and as a non-participant, he will not be bound by any arbitral award." The NASD sent counsel for Respondent Paul Shute, a copy of O'Neal v. NASD, pertaining to retention of jurisdiction over former registered representatives. The arbitrator determined that Paul Shute had knowledge of the claim filed against him and proper notice of the hearing.

The arbitrator denied and dismissed Respondent Summit's counterclaim against Elsie Sanchez.

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' Statement of Claim is denied and dismissed in its entirety as to Respondent Summit Investment Corporation;
2. The Respondent Paul Shute shall be and hereby is liable for and shall pay to the Claimants Jorge L. Garcia and Mary Trow Garcia actual damages in the amount of Five Thousand Dollars (\$5,000.00);
3. The Respondent Paul Shute shall be and hereby is liable for and shall pay to the Claimants Jorge L. Garcia and Mary Trow Garcia interest at the Minnesota legal rate from the date of the decision;
4. Each of the parties shall bear their own costs and expenses incurred, including attorney's fees, other than those specifically enumerated for herein.

FORUM FEES

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

1 session X \$200 = \$200 minus hearing session deposit of \$200 = net 0 due.

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

By The Arbitration Panel:

Dated:

October 6, 1992

/s/ Arthur L. Sirkin
Arthur L. Sirkin, Esq., Chairperson
Public Arbitrator

NASD Award served on: October 8, 1992