

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Walter S. Hojka, Sr.

No. 91-02877

Name of Respondents

Advest, Inc.

Ray DeRobbio

Herbert J. Sims & Co., Inc.

REPRESENTATION OF PARTIES

For Claimant: Henry F. Field, Esq., Chicago, Illinois.

For Respondents Advest, Inc. and Ray DeRobbio: Kevin M. Flynn, Esq. of Coffield Ungaretti & Harris, Chicago, Illinois.

For Respondent Herbert J. Sims & Co., Inc.: Stephen P. Bedell, Esq. of Gardner, Carton & Douglas, Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed: September 16, 1991.

Claimant's Submission Agreement signed on: September 10, 1991.

Statement of Answer filed by Respondent, Advest, Inc. and Ray DeRobbio on: November 6, 1991.

Respondent Advest, Inc.'s Submission Agreement signed on: October 1, 1991.

The NASD does not have a record of a Submission to Arbitration being filed by Respondent Ray DeRobbio.

Statement of Answer filed by Respondent, Herbert J. Sims & Co., Inc. on: November 8, 1991.

Respondent Herbert J. Sims & Co., Inc.'s Submission Agreement signed on: October 23, 1991.

Amended Statement of Claim filed: March 4, 1992.

Answer to Amended Statement of Claim filed by Respondents Advest, Inc. and Ray DeRobbio on: March 18, 1992.

Answer to Amended Statement of Claim filed by Respondent Herbert J. Sims & Co., Inc on: March 11, 1992.

HEARING INFORMATION

Hearing dates:

- July 20, 1992. Two (2) sessions.
- July 21, 1992. Two (2) sessions.
- August 31, 1992. Two (2) sessions.
- September 1, 1992. Two (2) sessions.
- September 14, 1992. Two (2) sessions.
- September 15, 1992. Two (2) sessions.
- October 6, 1992. Two (2) sessions.
- October 7, 1992. Two (2) sessions.
- November 23, 1992. Two (2) sessions.
- November 24, 1992. Two (2) sessions.
- November 30, 1992. Two (2) sessions.
- December 1, 1992. Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant, Walter Hojka, Sr. ("Claimant") alleged that Respondents, Advest, Inc. and Ray DeRobbio ("Respondents"), and Herbert J. Sims & Co., Inc. ("HJS") recommended and placed Claimant in speculative and high-risk investments despite Claimant's express desire to engage in safe, low-risk investments. On or about March 16, 1988, Claimant opened an account with Respondents. Then, between March 1988 and April 1990, Claimant alleged that Respondents encouraged investment in "junk" bonds, some of which were allegedly in default when recommended to the Claimant. As a result of these allegedly "unsuitable" investments and alleged mismanagement of his account, Claimant alleged a substantial loss of funds. In his

Statement of Claim, the Claimant specifically set forth the following allegations:

1. Breach of fiduciary duty;
2. Breach of contract;
3. Fraudulent conduct;
4. Constructive fraud;
5. Negligence;
6. Violation of the Securities Act of 1934;
7. Violation of the Illinois Securities Act; and
8. RICO violations.

Respondents denied the allegations in the Statement of Claim and asserted the following affirmative defenses:

1. Claimant's sophistication as a investor rendered his reliance on Respondent Ray DeRobbio as unjustified;
2. Claimant's losses were the result of his contributory negligence;
3. Claimant's transactions were authorized in advance, and were suitable investments; and
4. Claimant was aware of all risks and did not complain, thereby ratifying the transactions and barring his claims.

HJS denied the allegations in the Statement of Claim and asserted the following affirmative defenses:

1. Claimant's transactions had been authorized in advance and were suitable for a person with his investment objectives, investment history, and financial circumstances.
2. Losses, if any, incurred by Claimant were the result of investing and trading decisions of the Claimant, and market fluctuations and conditions over which HJS had no control.
3. HJS handled Claimant's account properly and in accordance with Claimant's specific instructions. Claimant was a sophisticated investor aware of the investment risks. Any losses sustained by Claimant were due to his contributory negligence.
4. Claimant authorized, directed, and effected the transactions effected in his account. He knowingly and willingly purchased the securities of which he now complains after his own assessment of the risks involved, and after conducting his own research and investigation of the securities purchased. Due to his sophistication, he did not, and could not, reasonably rely upon any investment advice of Mr. DeRobbio.

5. Claimant, by his own behavior and acquiescence, failed to mitigate damages.
6. Claimant's losses, if any, were proximately caused by his express and implied agreement to voluntarily assume the risk of the positions in his account.
7. Claimant's claims are barred by the doctrines of waiver, estoppel, ratification, and acquiescence.
8. Claimant cannot seek recovery of attorneys' fees in the absence of a contractual or statutory provision providing therefore.

RELIEF REQUESTED

Claimant requested the following in damages:

1. Regarding Counts I, III, IV and V, Claimant requested: a) compensatory damages in an amount of at least \$650,000.00 from Respondents Advest, Inc. and Ray DeRobbio, and \$40,000.00 from Respondent Herbert J. Simms & Co., Inc., less the value of the defaulted bonds; b) punitive damages in an amount of at least \$1,500,000.00 from Respondents Advest, Inc. and Ray DeRobbio; c) attorneys' fees and the costs associated with this lawsuit to the extent permitted by law; and d) such other and further relief which Claimant may prove himself entitled to, including pre-judgment interest.
2. Regarding Counts II and VI, Claimant requested: a) compensatory damages in an amount of at least \$650,000.00 from Respondents Advest, Inc. and Ray DeRobbio, and \$40,000.00 from Respondent Herbert J. Simms & Co., Inc., less the value of the defaulted bonds; b) attorneys' fees and the costs associated with this lawsuit to the extent permitted by law; and c) such other and further relief which Claimant may prove himself entitled to, including pre-judgment interest.
3. Regarding Count VII, Claimant requested: a) compensatory damages in an amount of at least \$650,000.00 from Respondents Advest, Inc. and Ray DeRobbio, and \$40,000.00 from Respondent Herbert J. Simms & Co., Inc., less the value of the defaulted bonds; b) punitive damages in an amount of at least \$1,500,000.00 from Respondents Advest, Inc. and Ray DeRobbio; c) rescission of all trades by or through Respondents or those affected by their advice and control; and d) such other and further relief which Claimant may prove himself entitled to, including pre-judgment interest.
4. Regarding Count VIII, Claimant requested: a) compensatory damages in an amount of at least \$650,000.00 less the value of the defaulted bonds; b) treble damages of the amount determined as compensatory damages, pursuant to 18 U.S.C. section 1964(c); c) attorneys' fees

and costs associated with this lawsuit; and d) any other relief available.

Respondents requested that judgment be entered in their favor.

HJS requested an award in its behalf, and against the Claimant, plus attorneys' fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

The NASD does not have a record of Respondent Ray DeRobbio having filed a properly executed submission to arbitration but he is required to submit to arbitration pursuant to Section 12 of the Code and having answered the claim, appeared and testified at the hearing. Therefore he is bound by the determination of the arbitration panel on all issues submitted.

Upon Motion to Dismiss made by Respondent Herbert J. Sims & Co., Inc. at the close of Claimant's case, the arbitrators, after hearing argument from all parties and deliberation, granted the Motion, and Herbert J. Sims & Co., Inc. was dismissed from the case.

The parties have agreed that the Award in this matter may be executed by 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 the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The undersigned arbitrators Order the Rescission of purchases of bonds cited in Claimant's exhibit 8, that is transfer of bonds still owned by the Claimant Walter S. Hojka, Sr. to Respondent Advest, Inc. and assignment to Advest, Inc. from Claimant Walter S. Hojka, Sr. of all settlement amounts and other future payments such as facilities sales, with interest at (10%) from the date of rescinded bond purchases as set forth in Claimant's exhibit 1, then off-set against the recovery all interest received by the Claimant, Walter S. Hojka, Sr., on bonds since purchases, and those amounts received from the sale of bonds not now owned by the Claimant, Walter S. Hojka, Sr. The Award of Rescission is in satisfaction for Claimant Walter S. Hojka, Sr.'s claims contained in Counts I, IV, V, VI, and VII of the Statement of Claim and Amended Statement of Claim. However, the favorable ruling on Count VI refers only to transactions after September 10, 1988.

2. Claimant Walter S. Hojka, Sr.'s claims contained in Counts II, III and VIII of the Statement of Claim and Amended Statement of Claim are hereby denied and dismissed with prejudice.
3. Claimant Walter S. Hojka, Sr.'s requests for an Award of punitive damages are hereby denied and dismissed with prejudice.
4. Claimant Walter S. Hojka, Sr.'s claims against Respondent Herbert J. Sims & Co., Inc. are hereby denied and dismissed with prejudice.

OTHER COSTS

5. Each party shall bear its own costs, expenses, and attorneys' fees associated with this arbitration, except as set forth more fully below.
6. Respondents Advest, Inc. and Ray DeRobbio are jointly and severally liable for, and shall pay to Claimant Walter S. Hojka, Sr. the sum of \$80,000.00 as an award of attorneys' fees and costs pursuant to Section 13 of the Illinois Securities Act. The authority for the award had been provided to the undersigned arbitrators at the hearing, and was also contained in post hearing submissions received from the parties.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

$$24 \text{ hearing sessions} \times \$1,000.00 = \$24,000.00$$

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00 previously paid to the NASD by the Claimant. The Director of Arbitration waived the payment of a hearing session deposit to the NASD by the Claimant.

Additional forum fees in the amount of \$12,000.00 are assessed against Claimant Walter S. Hojka, Sr.

Additional forum fees in the amount of \$12,000.00 are assessed jointly and severally against Respondents Advest, Inc. and Ray DeRobbio.

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

CONCURRING ARBITRATORS

Dated:

January 20, 1993

/s/ George T. Donoghue, Jr.
George T. Donoghue, Jr.
Presiding Chairman
Public Arbitrator

January 26, 1993

/s/ John D. Crawford
John D. Crawford
Public Arbitrator

January 21, 1993

/s/ John L. Bodolay
John L. Bodolay
Industry Arbitrator

Date of Service by the NASD:

1-27-93