

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Cubic and Carmen Fortenberry

Case No. 91-03132

Name of Respondent(s)

Kober Financial Corp.
Victor Alexander a/k/a Viktor Joerg Wieschalla
Randolph Kahl-Winter
James Allen

REPRESENTATION

For Claimants: Cubic and Carmen Fortenberry ("the Fortenberrys"): T. Kevin Knight, Esq. of Drage, DeBeaubien, Knight & Simmons.

For Respondent, Kober Financial Corp. ("Kober"): Dennis Graham, Esq. of Hopper & Kanouff, P.C.

Respondents, Victor Alexander a/k/a Viktor Joerg Wieschalla ("Alexander") and Randolph Kahl-Winter ("Kahl-Winter") were *pro se*.

For Respondent, James Allen ("Allen"): Douglas Gregory, Esq. of Gregory & Spurgin, P.A.

CASE INFORMATION

Statement of ~~Claim~~ filed on: October 7, 1991. Claimants' Submission Agreements signed on: October 31, 1991.

Respondent, Kober's, Statement of Answer and Crossclaim filed on: January 31, 1992. Respondent, Kober's, Submission Agreement signed: January 27, 1992 by Richard Rouse on behalf of Kober.

Respondent, Kahl-Winter's, Statement of Answer filed on: March 24, 1992. Respondent, Kahl-Winter's, Submission Agreement signed on: March 23, 1992.

Respondent, Allen's, Statement of Answer filed on: May 1, 1992. Respondent, Allen, failed to sign a Submission Agreement as required by Sections 12 and 25 of the Code. (see "Other Issues")

Respondent, Alexander, did not file a Statement of Answer or sign a Submission Agreement as required by Sections 12 and 25 of the Code. (see "Other Issues")

HEARING INFORMATION

On December 7 and 8, 1992 and February 25 and 26, 1993, in Tampa, Florida, hearings lasting eight (8) sessions were conducted.

CASE SUMMARY

Claimants alleged that Respondents were liable for: conversion; breach of fiduciary duty; negligent supervision; gross negligence; statutory conversion and civil theft; common law fraud; violations of Section 10(b) and Rule 10(b)-5 of the Securities Exchange Act; violations of Section 12(2) of the Securities Exchange Act; violations of Sections 17(A) and 15(c)-1 of the Securities Exchange Act; civil conspiracy; violation of the Federal RICO Act; and violation of the Florida Securities and Investor Protection Act. Claimants alleged that Respondents: forged their signatures; and, misrepresented the safety of certain stocks.

Respondent, Kober, denied all allegations of wrongdoing and alleged affirmative defenses including: failure to state a claim; good faith; Kober did not participate in any wrongful acts; the individual Respondents were not acting within the scope of their employment; estoppel; waiver; laches; contributory negligence; statutes of limitations; failure to mitigate damages; Claimants' damages were not caused by Kober; Claimants' damages were caused by third parties over whom Kober had no control; ratification; the RICO statutes are unconstitutional; and, punitive damages cannot be awarded in an NASD arbitration proceeding.

Respondent, Kober, filed a Crossclaim, against Alexander, Kahl-Winter and Allen for indemnification and/or contribution.

Respondent, Kahl-Winter, denied the allegations of wrongdoing and alleged that: he should not be held liable since he was merely following the instructions of Alexander and Allen in preparation to take over the account when Alexander left the firm.

Respondent, Allen, denied all allegations of wrongdoing and alleged that: he was not the branch manager at the time the majority of the trades occurred; and, upon discovering Kahl-Winter's trading practices during a random check, he notified Kober's compliance department and, subsequent thereto, Kahl-Winter's employment was terminated.

Respondent, Alexander, failed to file an Answer and did not appear at the hearing. (see "Other Issues")

RELIEF REQUESTED

Claimants requested damages in the amount of \$97,930.28, plus interest, attorney's fees and costs.

Respondent, Kober, requested dismissal of the Claim plus costs and attorney's fees and Crossclaimed against Alexander, Allen and Kahl-Winter for indemnification.

Respondent, Kahl-Winter, requested dismissal of the Claim.

Respondent, Alexander, failed to file an Answer.

OTHER ISSUES CONSIDERED & DECIDED

1. At the commencement of the hearing, the parties agreed to dismiss, with prejudice, all claims against Respondent, Allen.
2. Jurisdiction exists pursuant to Section 12 of the NASD Code of Arbitration Procedure and pursuant to the Form U-4 executed by Respondent, Alexander. This Panel finds that Alexander was required to sign a Submission Agreement and to file an Answer pursuant to Sections 12 and 25 of the Code, Alexander being a person associated with an NASD member firm, Kober, at the time the facts giving rise to the controversy occurred.
3. For the reasons set forth in the record of proceedings and contained in Arbitrator's Exhibit #2 this Panel finds service upon and adequate notice to Respondent, Alexander. The NASD has made every attempt to locate and serve Alexander with notice of this hearing as demonstrated by the evidence contained in Arbitrator's Exhibit #2 and the record of proceedings.
4. The Claimants and Respondents, Kober, Allen and Kahl-Winter, 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, these 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 Respondent, Alexander, neither appearing at the hearing nor requesting an adjournment thereof, notwithstanding his knowledge of this proceeding as evidenced in the record, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent, Kober, is found liable and shall pay to Claimants the amount of \$25,000 inclusive of interest.
2. Respondents, Alexander, and Kahl-Winter are found not liable and, therefore, all claims against them are hereby dismissed.

3. Claimants' request for attorney's fees, costs and punitive damages is denied.
4. Respondent, Kober's, request for attorney's fees and costs is denied.
5. Cross/Respondents, Alexander and Kahl-Winter, are found not liable to Kober and, therefore, all claims against them are hereby dismissed.

OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$6,000.00 (eight sessions x \$750.00 per session).
2. Claimants are hereby assessed \$3,000.00 for which the NASD shall retain the \$750.00 previously deposited by Claimants in partial satisfaction thereof leaving a balance due to the NASD of \$2,250.00 payable to the National Association of Securities Dealers, Inc.
3. Respondent, Kober, is hereby assessed \$3,000.00 for which the NASD shall retain the \$250.00 previously deposited by Kober in partial satisfaction thereof, leaving a balance due to the NASD of \$2,750.00 payable to the National Association of Securities Dealers, Inc.
4. The NASD shall retain the non-refundable filing fee of \$200.00 paid by the Claimants and shall retain the non-refundable filing fee of \$500.00 paid by Respondent, Kober. Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

/s/
Robert M. Shavick, Esq.

Public

7932
Bruce A. Beery

Public

/s/
John W. Platt

Industry

Date of Decision: May 3, 1993