

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

George Fenimore, Trustee

NASD Arbitration
No. 92-00270

Name of Respondent(s)

Kayne, Anderson & Co., Inc.
Benjamin Bush

REPRESENTATION

For Claimant: H Thomas Fehn, Esq., Fields, Fehn & Sherwin, Los Angeles, California

For Respondents: Stephen Young, Esq., Keesal, Young & Logan, Long Beach, California

CASE INFORMATION

Statement of Claim filed: January 24, 1992

Claimant's Submission Agreement signed: February 21, 1992

Joint Statement of Answer filed by Respondents: May 22, 1992

Cross-Claim for Declaratory Relief, Total Indemnity, Partial Indemnity, and Contribution filed by Respondents: May 22, 1992

Respondents' Request for Pre-Arbitration Hearing and Dismissal of Claims based on Statutes of Limitations filed: June 10, 1992

Supplemental Brief in Support of Respondents' Request for Dismissal of Claims

based on Statutes of Limitations filed: February 3, 1993

Respondents' Submission Agreements signed as follows:

Kayne, Anderson & Co., Inc.: May 4, 1992

Benjamin Bush: May 14, 1992

HEARING INFORMATION

Pre-Hearing Conference Dates/Sessions: February 5, 1993 (one session)
February 19, 1993 (one session)

Hearing Dates/Sessions: May 10, 1993 (two sessions)
May 11, 1993 (two sessions)
May 12, 1993 (two sessions)
May 13, 1993 (two sessions)
May 14, 1993 (two sessions)

Hearing Location: Los Angeles, California

CASE SUMMARY

Claimant alleged unauthorized and unsuitable security transactions, churning, misrepresentation, fraud, lack of supervision and breach of fiduciary duty with respect to options and futures trading. Claimant further alleged: 1) in effecting unsuitable and unauthorized transactions in Claimant's accounts, Respondent Benjamin Bush acted in reckless disregard of the investment objectives which had been set for Claimant's accounts; 2) when Respondent generated commissions with unauthorized transactions he churned the accounts; 3) Kayne, Anderson & Co., Inc. failed to properly supervise Mr. Bush by allowing transactions to be completed that were contrary to the investment objectives of the customer; 4) by engaging in the above-described behavior, Respondents breached their fiduciary duty to Claimant, thus entitling him to punitive damages; and 5) that Mr. Bush furthered his wrongdoing by continuously misrepresenting the situation and his intentions to Claimant and in doing so denied him the opportunity to mitigate his damages.

Respondents denied generally and specifically each and every allegation of wrongful, improper, or actionable conduct set forth in the Statement of Claim, and requested that judgment be entered in their favor. Respondents alleged that

Claimant is no stranger to the investment business, that Claimant has had investment accounts at several brokerage firms and has a history of speculating in commodities, limited partnerships, options and stocks. Respondents further alleged that as trustee of the George W. Fenimore and Benetta L. Fenimore Family Trust (trust) Claimant has been specifically authorized, under the trust agreement, to utilize margin, options, and commodities trading in connection with the account. Respondents also asserted affirmative defenses.

Respondents also asserted cross-claims against Claimant for declaratory relief, total indemnity, partial indemnity, and contribution. Regarding the Cross-Claim, Respondents alleged that as trustee of the trust, George Fenimore owed a duty of care to the trust to insure that the trust's money was prudently invested and that the investment objectives of the trust were both clearly stated and followed. Respondents also alleged that as trustee of the trust, Mr. Fenimore owed a duty of care to the trust to preserve the corpus of the trust. Respondents further alleged that as trustee of the trust, Mr. Fenimore was also under a duty to use diligence in the management of the trust's assets, including inquiring and/or complaining regarding the management of the trust assets and of the trust's accounts, in monitoring the investments, in protecting the assets of the trust, and in mitigating the trust's losses and damages.

RELIEF REQUESTED

Claimant requested:

1. General damages in the approximate amount of \$2,100,000.00;
2. Punitive damages in such amount as the panel may determine;
3. Interest on any damages awarded from the date of the loss; and
4. Costs and reasonable attorneys' fees.

Respondents requested:

1. Dismissal of all claims against Respondents;
2. Costs; and
3. Such other and further relief as the panel may deem just and proper.

Regarding their Cross-Claim, Respondents requested:

1. On the first cause of action for a judicial declaration of Cross-Claimants' and Mr. Fenimore's respective responsibilities and liabilities, if any, for damages recovered by Claimant, if any, and a judicial declaration of the amount that Mr. Fenimore is obligated to pay Cross-Claimants under the principals of total equitable indemnity;

2. On the second cause of action for a judicial declaration of Cross-Claimants' and Mr. Fenimore's respective responsibilities and liabilities, if any, for damages recovered by Claimant, if any, and a judicial declaration of the amount that Mr. Fenimore is obligated to pay Cross-Claimants under the principals of partial equitable indemnity;

3. On the third cause of action for total equitable indemnity from Mr. Fenimore for all sums which Cross-Claimants may be compelled to pay as a result of any damages, judgment, settlement, or other recovery by Claimant;

4. On the fourth cause of action for partial indemnity and contribution from Mr. Fenimore of his share, according to proportionate fault of all sums which Cross-Claimants may be compelled to pay as a result of any damages, of any judgment, settlement, or other recovery by Claimant;

5. Attorneys' fees and costs; and

6. Such other and further relief as the panel may deem just and proper.

OTHER ISSUES CONSIDERED & DECIDED

Prior to the evidentiary hearing, the arbitrators reviewed and considered the positions of counsel relative to Respondents' Motion to Dismiss. The arbitrators denied the Motion.

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 National Association of Securities Dealers, Inc. (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. Respondent Kayne, Anderson & Co., Inc. is solely liable for and shall pay to Claimant the sum of \$317,880.00.

2. Respondent Benjamin Bush is solely liable for and shall pay to Claimant the sum of \$211,920.00.

3. Claimant's claims for interest and punitive damages are denied.

4. All claims by Cross-Claimants Kayne, Anderson & Co., Inc. and Benjamin Bush are dismissed.

5. The parties shall each bear their respective costs including attorney's fees.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall refund the \$1,000.00 hearing session deposit previously deposited by the Claimant and retain the \$1,500.00 hearing session deposit previously deposited by the Respondents. Forum fees are assessed against:

Kayne, Anderson & Co., Inc. in the amount of \$9,100.00, calculated as follows: Two pre-hearing sessions times \$300.00/session plus ten hearing sessions times \$1,000.00/session minus the \$1,500.00 hearing session deposit retained by the NASD.

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

ARBITRATORS

<u>Name</u>	<u>Public/Industry</u>
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Libbe R. Murez, Esq.
Lionel S. Heller
Jeanne C. Stilwell

Public Arbitrator
Public Arbitrator
Industry Arbitrator

Concurring Arbitrators' Signatures

Libbe R. Murez, Esq.

Lionel S. Heller

Jeanne C. Stilwell
Jeanne C. Stilwell

Date of Decision: *July 2, 1993*

Date Served: 07/07/93