

N.A.S.D. AWARD**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

In the Matter of the Arbitration Between

Name of Claimant

James Robinson

92-00528

Name of Respondents

Rauscher Pierce Refsnes, Inc.;
Graystone Nash, Inc.;
Kober Financial Corporation;
Firm One;
Boucher Oehrke & Quinn;
Joe DiPalma;
Anthony Casacci

REPRESENTATION

For Claimant: James Robinson was represented by A. Bentley Nettles, Esq. of The Law Offices of A. Bentley Nettles, located in Houston, Texas.

For Respondent: Rauscher Pierce Refsnes, Inc. was represented by Bruce W. Collins, Esq. of Carrington, Coleman, Sloman & Blumenthal, located in Dallas, Texas, but was not required to appear at hearing.

Graystone Nash, Inc. did not answer or appear at hearing.

Kober Financial Corporation did not appear at hearing.

Firm One did not answer or appear at hearing.

Boucher Oehrke & Quinn did not answer or appear at hearing.

Joe DiPalma did not appear at hearing.

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Anthony Casacci appeared pro se.

CASE INFORMATION

Statement of Claim filed: February 12, 1992.

Claimant's Submission Agreement signed on: March 11, 1992.

Statement of Answer filed by Respondent Rauscher Pierce Refsnes, Inc. on: May 26, 1992.
Respondent Rauscher Pierce Refsnes, Inc.'s Submission Agreement signed on: May 26, 1992.
Renewed Request for Summary Dismissal filed by Respondent Rauscher Pierce Refsnes, Inc.
on or about: May 16, 1993.

Claimant's Response to Respondent's Request for Summary Dismissal filed on: May 26, 1993.

Statement of Answer and Motion for Summary Dismissal filed by Respondent Kober Financial Corp. on: May 12, 1993.

Respondent Kober Financial Corp.'s Submission Agreement signed on: May 12, 1993.

Statement of Answer and Declination to Granting Jurisdiction to Arbitrate filed by Respondent Joseph A. DiPalma on: October 24, 1992.

Statement of Answer filed by Respondent Anthony Casacci on: June 1, 1992.

Respondent Anthony Casacci's Submission Agreement signed on: May 27, 1992.

Respondents Graystone Nash, Inc., Firm One and Boucher Oehmke & Quinn did not file a Statement of Answer or a properly executed submission agreement.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Date/Sessions: June 23, 1993 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant James Robinson ("Robinson") alleged that Respondents Rauscher Pierce Refsnes, Inc. ("Rauscher"), Graystone Nash, Inc. ("Graystone"), Kober Financial Corp. ("Kober"), Firm One, Boucher Oehmke & Quinn ("Boucher"), Joseph A. DiPalma ("DiPalma"), and Anthony Casacci

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("Casacci") misrepresented the values and risks of certain "penny stocks", inducing him to purchase investments which were unsuitable given his investment objectives, experience and need to preserve his retirement income. Robinson specifically alleged that:

1. In May of 1988, DiPalma solicited Robinson requesting that he invest his retirement funds into "penny stock", representing that Robinson could make better interest on his money than he was presently making in a Money Market Fund and CDs. Robinson initially invested \$48,000.00 and had invested a total of approximately \$203,250.00 by November of 1988 with DiPalma;
2. In January of 1989, Casacci, then with Lord & Sterling in Boca Raton, Florida, took over the account from DiPalma, proceeding to liquidate the account. In March 1989, Casacci moved to U.S. Advisors in Colorado, eventually investing Robinson's funds in Triple Crown Communications;
3. In May 1989, Casacci changed to Firm One in Wichita, Kansas, and urged Robinson into investing his funds in Corporate Capital Resources, buying approximately 250,698 shares. Casacci again changed brokerage houses, going to Boucher in Florida. Casacci continued to trade in Robinson's account generating excess commissions;
4. Casacci changed firms to Kober, transferring Robinson's account to a new broker in April of 1990. In May of 1990, Robinson requested all his stock certificates, the present value of which are estimated to be a little over \$5,000.00.

Based upon the above allegations, Robinson asserted claims for violation of Section 10b of the Securities Exchange Act of 1934 and Rule 10b(5) promulgated thereunder; violation of the NASD Rules of Fair Practice; common law fraud and/or negligence; breach of fiduciary duty; and misrepresentation.

Respondent Rauscher denied owing any sums pursuant to the Statement of Claim and requested Summary Dismissal, alleging that it was added as a Respondent merely because it was the clearing broker for Boucher while Robinson maintained an account with that firm. Rauscher further alleged that its responsibilities did not include any compliance matter, but were confined to the narrow clearing function of executing and processing securities transactions. Rauscher asserted as affirmative defenses that the claims were barred by limitations, and the doctrines of estoppel, waiver, ratification and comparative negligence.

Respondent Kober denied the material allegations of the Statement of Claim, alleging as defenses that:

1. The Statement of Claim failed to state a claim upon which relief can be

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granted;

2. Kober at all times acted in good faith and did not directly or indirectly induce any acts which would constitute a violation of the state or federal securities laws and did not participate in any way in any wrongful act purported to have been committed;

3. Kober maintained established procedures and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any violations, and reasonably discharged the duties and obligations incumbent upon them;

4. The claims are barred by the applicable statute of limitations, and by the doctrines of waiver, estoppel and unclean hands;

5. The claims are barred, in whole or in part, by Robinson's own negligence;

6. Robinson failed to mitigate the damages, if any, as required by law;

7. Robinson signed a new account card which stated his investment objective as "Speculation-High Degree of Risk and/or High Activity" and had prior investment experience. Therefore, the transactions effected in his account were consistent with his investment experience and objectives; and

8. Robinson never deposited any funds with Kober, but effected a total of two purchases at Kober totaling \$4,230.00 and paid for the purchases by selling other "penny stocks" bought by him at another broker/dealer and deposited with Kober.

Respondent DiPalma filed an answer declining NASD jurisdiction.

Respondent Casacci denied the material allegations of the Statement of Claim, alleging that:

1. Upon inheriting the account from a broker other than DiPalma, the account was not sold and liquidated;

2. Any trades that were run at Boucher were run with the express approval of Robinson, the account was not discretionary and therefore, Casacci did not generate excess commissions for himself;

3. Robinson was market wise and had approximately \$200,000.00 invested initially in all facets of the market from low priced issues to mutual funds at the time Casacci inherited the account. Robinson expressed his dissatisfaction with

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the returns and losses incurred by DiPalma. was motivated to recoup his losses and opened all his accounts with Casacci with the prime objective of speculation with growth;

4. Robinson started trading low price stocks with DiPalma around May of 1989 and continued trading in this fashion for the duration of their relationship. Robinson had extensive dealings in low priced stocks when Casacci first came into contact with him;

5. Casacci traded with Robinson for a two year period and Robinson never expressed any dissatisfaction with the way the account was traded; and

6. Casacci never made any omissions or half truths. Robinson was aware of the risks of low priced stocks through his relationship with DiPalma. In addition, Casacci deduced Robinson's suitability from his yearly income and net worth.

RELIEF REQUESTED

Claimant Robinson requested an award of monetary damages against Respondents, jointly and severally, in an amount equal to the actual damages suffered as a result of the wrongful conduct of the Respondents; attorneys' fees; and other general and specific relief to which he would show himself entitled.

Respondent Rauscher requested that the panel summarily dismiss Rauscher from the arbitration and that Robinson pay all costs incurred through date of dismissal, including attorneys' fees.

Respondent Kober requested that the claims against them be denied; that its fees and costs in defending the matter, including reasonable attorneys' fees, be awarded to it; and for such other and further relief as the Panel deemed just and proper.

Respondent Casacci did not specify any relief in his Statement of Answer, but requested dismissal at hearing.

OTHER ISSUES CONSIDERED & DECIDED

The NASD dismissed without prejudice named Respondents James A. Juno and J.C.C., Inc. for lack of jurisdiction as the parties were never registered with the NASD as a member firm and/or associated person, and would not voluntarily submit to NASD jurisdiction of the arbitration.

On June 7, 1993, upon review of Respondent Rauscher Pierce Refsnes, Inc.'s Motion for

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Summary Dismissal, the Renewed Request and all responses thereto, the Panel determined that the Motion would be granted. By order signed by the Arbitration Panel and incorporated herein by reference, Respondent Rauscher Pierce Refsnes, Inc. was dismissed with prejudice.

Upon review of the NASD correspondence and evidence presented in this matter, the Panel has determined that Respondents Graystone Nash, Inc., Firm One and Boucher Oehmke & Quinn were not served with the Statement of Claim and/or Notice of the Hearing required pursuant to the NASD Code of Arbitration Procedure. Therefore, Respondents Graystone Nash, Inc., Firm One and Boucher Oehmke & Quinn are dismissed without prejudice for lack of proper service.

Respondent Kober Financial Corp. did not appear at hearing, but filed an executed submission agreement and Statement of Answer. Pursuant to Section 29 of the Code of Arbitration Procedure, the panel finds that Respondent Kober was properly served with Notice of the Hearing and therefore, the arbitrators proceeded with the arbitration hearing in Kober Financial Corp.'s absence.

Respondent Joseph A. DiPalma did not file an executed submission agreement, but did file a Statement of Answer declining jurisdiction advising that he was not presently registered with the NASD. Upon review of the evidence presented in this matter and the NASD correspondence, the Panel hereby determines that Respondent Joseph A. DiPalma was an associated person of the NASD within the meaning of Section 12 of the NASD Code of Arbitration Procedure at the time the incidents complained of occurred, and that pursuant to Section 12, Respondent Joseph A. DiPalma is required to submit to arbitration. In addition, the Panel has determined that Respondent DiPalma received proper notice of the hearing and that the arbitration would proceed pursuant to Section 29 of the NASD Code of Arbitration Procedure.

At hearing, Respondent Anthony Casacci requested leave to amend his answer to include a request for costs and fees incurred in defending this matter if he was found not liable for any sums due under the claims. After hearing argument, the Panel determined that the Motion would be granted.

The parties present at hearing 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 present at the hearing have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleading, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for deter-

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mination as follows:

1. Respondents Kober Financial Corp. and Anthony Casacci are jointly and severally liable for and shall pay to Claimant James Robinson the sum of \$42,173.69;
2. In addition, Respondents Joseph A. DiPalma and Kober Financial Corp. are jointly and severally liable for and shall pay to Claimant James Robinson the sum of \$51,376.00;
3. Furthermore, Respondents Kober Financial Corp., Joseph A. DiPalma and Anthony Casacci are jointly and severally liable for and shall pay to Claimant James Robinson the sum of \$250.00 as reimbursement of the non-refundable filing fee deposited in this matter by the Claimant;
4. Respondent Anthony Casacci's request for costs and expenses is hereby denied; and
5. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

OTHER COSTS

Respondent Kober Financial Corp. is liable for and shall pay to the NASD the sum of \$50.00 due on the postponement fee due for the agreed postponement of the hearing date of February 11, 1993.

Respondent Anthony Casacci is liable for and shall pay to the NASD the sum of \$150.00 for the postponement fee due as a result of the agreed postponement of the hearing date of February 11, 1993.

FORUM FEES

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

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$250.00 and refund the hearing session deposit of \$600.00 previously deposited by the Claimant, James Robinson. Respondents Kober Financial Corp., Joseph A. DiPalma and Anthony Casacci are jointly and severally liable for and shall pay to the NASD the sum of \$1,200.00 as forum fees

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in this matter.

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

Concurring Arbitrators' Signatures

Name

Date

Gordon W. Hall, Esq.
Gordon W. Hall, Esq.
Public Arbitrator
Chairperson

September 8, 1993

Edward T. Bowen
Edward T. Bowen
Public Arbitrator

September 9, 1993

Stuart Hellmann
Stuart Hellmann
Industry Arbitrator

September 16, 1993

For NASD Use Only

Date of Decision: 9.20-93