

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimant(s)

Allen E. Castle
Barbara A. Castle

NASD Arbitration
No. 92-00936

Name of Respondent(s)

Sutro & Co., Incorporated
Bart J. Quigley
Jeffery M. Daft

REPRESENTATION

For Claimants: Mitchell S. Ostwald, Esq., Seaman, Seaman & Ostwald,
Sacramento, California

For Respondents Sutro & Co., Incorporated and Bart J. Quigley: Gil
Serota, Esq. and Daniel L. Rahago, Esq., Howard Rice Nemerovski
Canady Robertson Falk & Rabkin, San Francisco, California

For Respondent Jeffrey M. Daft: Page R. Barnes, Esq., McCutchen,
Doyle, Brown & Enersen, San Francisco, California

CASE INFORMATION

Statement of Claim filed: March 7, 1992

Claimants' Submission Agreement signed: March 5, 1992

Joint Statement of Answer filed by Respondents. June 12, 1992

Respondents' Submission Agreements signed as follows:

Sutro & Co., Incorporated: June 1, 1992

Bart J. Quigley: May 18, 1992

Jeffrey M. Daft: December 4, 1992

HEARING INFORMATION

Pre-Hearing Conference Date(s)/Session(s):

August 4, 1993 (one session)

August 25, 1993 (one session)

November 17, 1993 (one session)

February 28, 1994 (one session)

Hearing Date(s)/Session(s): March 2, 1994 (two sessions)
March 3, 1994 (two sessions)
March 4, 1994 (two sessions)

Hearing Location: San Francisco, California

CASE SUMMARY

Claimants submitted the following summary of issues/allegations:

1. Did Sutro & Co., Incorporated (Sutro) and its brokers fail to follow Claimants' investment objectives?
2. Were the investments in Perpetual Savings Bank (Perpetual) unsuitable by virtue of the overconcentration of that security in Claimants' portfolio?
3. Did Respondent Bart J. Quigley (Quigley) fail to fully disclose to Claimants, the extent and nature of the risk in overconcentrating in Perpetual?
4. Did Respondent Jeffrey M. Daft (Daft) fail to fully disclose to Claimants, the extent and nature of the risk in the overconcentration of Perpetual?
5. Did Respondent Daft's continuing misrepresentations about Perpetual constitute reckless and/or negligent conduct, in light of the overconcentration of Perpetual in Claimants' portfolio?
6. Were Respondent Quigley's and Respondent Daft's failures to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading?
7. Did Sutro engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon the Claimants, in connection with the purchases of Perpetual?
8. Have Claimants proven by clear and convincing evidence, that Respondents acted in a reckless disregard for Claimants' rights, warranting punitive damages of \$120,000.00?

Respondents Sutro and Quigley submitted the following summary of issues/allegations:

Claimants allege in this action that Respondents breached certain duties owed to Claimants and violated certain securities industry regulations by permitting Claimants to over-concentrate the funds in one of Claimants' investment accounts at Sutro in one common stock, Perpetual, thereby making some portion of their investments unsuitable for them. Claimants also contend that Sutro is responsible for trades made by the Claimants in Perpetual stock in their accounts at E.D. Jones and Quick & Reilly because the Claimants (on their own initiative) tried to employ a dollar averaging concept they first discussed with their Sutro broker.

Respondents contend that Claimants were fully informed and aware of the risks and opportunities involved in investing in Perpetual, made their own investment decisions to continue investing in Perpetual, were in a financial position to accept reasonable investment risk with a relatively small portion (\$120,000.00) of their net worth (\$2 million) given that their principal securities investment (\$250,000.00) was in a tax free municipal bond mutual fund and unit trust.

Respondents further contend that Respondents were on notice in March 1988 of possible claims asserted in this action, and Claimants independently chose to hold the stock even after they were advised to sell it hoping to break even. Claimants repeatedly rejected Respondents' advice that they invest in lower risk mutual funds or otherwise diversify their portfolio. Respondents did not breach any duty owed to Claimants or violate any industry rule or regulation.

Finally, Respondents contend that each and every claim against Sutro and Quigley is barred by the statutes of limitation, the longest being three years. This action was brought more than four years after their last dealings with Sutro and more than three years after the Claimants were put on notice in writing of possible claims against Sutro or its brokers.

Respondent Daft submitted the following summary of issues/allegations:

This claim arises out of trades made by Claimants in the stock of Perpetual. Claimants make four claims against Respondents: 1) breach of certain duties; 2) misrepresentation; 3) breach of contract; and 4) violations of certain securities industry regulations. Claimants contend that Respondent Daft is liable for losses on the Perpetual stock they purchased through Sutro because he did not advise them to sell their Perpetual holdings until he advised a sale and repurchase of the stock for tax purposes in December 1990. Claimants further contend that Daft is liable for purchases they made (on their own initiative) at another brokerage firm.

Daft contends that he is not responsible for any losses which were incurred as a result of investments made prior to March 1988 because Daft had no involvement with the Claimants prior to March 1988 and Claimants had removed all their Perpetual holdings from their account at Sutro prior to March 1988. Daft never executed a trade for the Claimants, never earned any commissions from the Claimants, and was never listed as broker of record on any account in which the Claimants held Perpetual stock.

Daft further contends that he gave Claimants sound advice about Perpetual. Claimants assumed responsibility for their own investment decisions (including the decision to hold the stock) when they ignored the advice of their brokers and began purchasing stock at Edward D. Jones & Co.

Daft further contends that Claimants suffered no losses as a result of their sale of Perpetual in December 1990 and that they are

not entitled to any damages as a result of purchases by Castle Concrete in December 1990. Daft did not execute either of these trades, and Castle Concrete is not a party to this action.

Finally, Daft contends that the claims against him are barred by the statutes of limitation and that he is entitled to be reimbursed by Claimants for his attorney's fees and costs in defending these claims.

RELIEF REQUESTED

Claimants requested:

1. Damages of \$120,628.80 plus interest;
2. Or alternatively for comparable index damages according to proof;
3. Punitive damages of \$120,000.00;
4. Costs, expenses and disbursements, including reasonable attorney's fees; and
5. Such other relief as the Arbitration Panel deems just and proper.

Respondents requested dismissal of Claimants' claims and requested costs and expenses.

OTHER ISSUES CONSIDERED AND DECIDED

Prior to the evidentiary hearing, the panel of arbitrators reviewed and considered the positions of the parties relative to Respondent Daft's Motion to Dismiss. The panel denied the Motion.

The parties have agreed that the Award in this matter may be executed in either 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. All claims by Claimants, including the claim for punitive damages, are dismissed.

The panel found that there is insufficient evidence to conclude that during the time Claimants traded in their account with Sutro the investment in Perpetual was unsuitable. The decisions Claimants

made to procure additional Perpetual at another brokerage firm demonstrated a deliberate venture to concentrate in Perpetual. Based on the facts, the Respondents did not have a continuing obligation nor a financial responsibility to monitor the subsequent investments.

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

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall refund the \$750.00 hearing session deposit previously deposited by the Claimants. Forum fees are assessed against: Sutro & Co., Incorporated, solely, in the amount of \$5,700.00 calculated as follows: Six hearing sessions times \$750.00/session plus four pre-hearing sessions times \$300.00/session.

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

ARBITRATORS

<u>Name</u>	<u>Public / Industry</u>
Nancy Hutt, Esq.	Public Arbitrator
Carl H. Auer	Public Arbitrator
Wilford W. Nelson	Industry Arbitrator

Concurring Arbitrators' Signatures

Nancy Hutt, Esq.

Carl H. Auer

Wilford W. Nelson

Date of Decision: _____

Date Served: 05/09/94