

PUBLIC

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Jonathan Wahl

Claimant

vs.

CASE #92-01549
AWARD

Kidder, Peabody & Company, Inc.
John J. Roche

Respondents

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on May 6, 1992, Claimant Jonathan Wahl, who appeared Pro Se, alleged that in early March he contacted Respondent Kidder, Peabody & Company, Inc. in an attempt to secure a well informed, time proven broker for both sound investment advice in addition to first class executions and personal service in line with risk-averse investment philosophy, at which time, Respondent John J. Roche, Assistant Vice President, acting on behalf of Respondent Kidder, Peabody & Company, Inc. questioned his financial status, investment objectives degree of risk/reward tolerance and previous exposure to stock trading. Claimant further alleged that he advised Respondents that after evaluating the overall financial statement of the security in question, there had to be extraordinary news worthy of significantly boosting the share price within several hours after the purchase of such security and it was expressly understood that it was limited to a period of not more than two days. Claimant contended that on February 7, 1992 Respondent John J. Roche solicited him to purchase 100 shares of Compaq Computer Corporation at 29 5/8 by advising him that there was a major internal turnaround which should unquestionably make the share price go to fifty dollars a share in the next eight weeks and subsequently, on March 5, 1992 there was a publicly announced down grading of Compaq stock in addition to a significant price decline whereby Claimant sold his position at a loss. Claimant further contended that Respondent John J. Roche recommended several of Respondent Kidder, Peabody & Company, Inc.'s attractive new issues to help him recoup his Compaq Computer stock losses, and Claimant purchased 200 shares each of Opta Food Ingredients Company and Vitalink Pharmacies, at which time, Respondent failed to inform him that these stocks were highly speculative new issues. Claimant

asserted that on March 4, 1992 Respondent John J. Roche contacted him to solicit the purchase of 200 shares of Spectranetics by assuring him that in the next couple of days the stock would "pop" or rapidly move upwards in share price and subsequently on March 17, 1992 Claimant sold Spectranetics at a loss. Claimant further alleged that on March 10, 1992 in utter disgust he contacted Respondent Kidder, Peabody Company, Inc. to immediately sell off all his Opta Foods and Vitalink Pharmacy stock held in his account, which caused him to sustain losses. Claimant argued that Respondent Kidder, Peabody & Company, Inc. and John J. Roche issued misleading information to the public and kept silent when they had a duty to disclose whereby the undisclosed material facts would have affected Claimant's investment judgement and therefore, is technically sufficient to sustain a common law action against Respondents for fraud and deceit.

Respondents Kidder, Peabody & Company, Inc. and John J. Roche by and through their in-house counsel Pamela G. Armstrong, Esq., maintained that in December 1991 Claimant Jonathan Wahl called Respondent Kidder, Peabody & Company, Inc. regarding broker services, and Respondent John J. Roche who was broker of the day, was assigned to his call, at which time, Claimant advised Respondent John J. Roche that he wanted to purchase 1,000 shares of a forthcoming initial offering ("IPO") of Spectranetics Corp., and duly submitted an "Indication of Interest" as required, before the offering. Respondents further maintained Respondent John J. Roche sent Claimant a copy of the preliminary prospectus, describing the risks and characteristics of the Spectranetics IPO in detail and subsequently on or about January 22, 1992, Respondent John J. Roche contacted Claimant to advise him he had 100 shares of Spectranetics available but Claimant decided not to make the purchase after all but asked to be contacted if any more IPO's became available. Respondents contended that on February 7, 1992 Claimant contacted Respondent John J. Roche to inquire about IPO's and although none were available, Respondent John J. Roche suggested Compaq Computer Corp. which Respondent Kidder, Peabody & Company, Inc. was recommending, at which time, Claimant decided to open an account and purchase 100 shares. Respondents further contended that Respondent John J. Roche never made any representation that this or any other of the purchases would "rise significantly" starting that very day of the purchase or that there would be a "major turnaround which should unquestionably make the share price go to" to in the next eight weeks. Respondents asserted that on March 4, 1992 Respondent John J. Roche contacted Claimant to inform him that he had available 200 shares each of Opta Food Ingredients and Vita Link Pharmacy Services, Inc., both IPO's, in addition to Spectranetics being available, at which time, Claimant purchased 200 shares of the three stocks. Respondents further asserted that the next day Respondent John J. Roche called Claimant to tell him the amount he owed for these purchases whereby Claimant said that

he didn't have the money and explained for the first time that he assumed that the prices would rise immediately, at which time, he intended to sell them in a few days for a profit and just pocket the difference. Respondents argued that if they had known this before they would never have sold Claimant the stock because that strategy violated the prohibition against free riding under Section 220.8 of Regulation T under the Securities Exchange Act of 1934, the Free Riding Act. Respondents further argued that on March 10, 1992 Claimant decided to sell his Opta Foods and Vita Link stocks to satisfy the debt and since this purchase and sale violated the Free Riding Act, Claimant was restricted for 90 days from making purchases without funds on deposit. Respondents further maintained that on March 17, 1992 Claimant sold his Spectranetics and that was the last Respondents heard from Claimant until this proceeding. Respondents further contended that not only did they do nothing wrong, but there was nothing else they could have done under the circumstances without violating the federal securities laws and Respondents never misinformed Claimant, thus, they are not liable for his losses.

RELIEF REQUESTED

Claimant Jonathan Wahl requested \$1,117.98 in actual damages and \$8,500.00 in Punitive damages.

Respondents Kidder, Peabody & Company, Inc. and John J. Roche requested the claim be denied.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Bruce E. Fogarty, Esq., was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on May 20, 1992, by the Respondent Kidder, Peabody & Company, Inc. on July 9, 1992 and by Respondent John J. Roche on July 10, 1992.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of Claimant Jonathan Wahl against Respondents Kidder, Peabody & Company, Inc. and John J. Roche are dismissed.
2. The Claimant's request for Punitive damages is denied.

3. The parties shall bear their respective costs.
4. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Jonathan Wahl shall be retained by the NASD, Inc. Respondent Kidder, Peabody & Company, Inc. is liable and shall pay to the Claimant the sum of \$75.00 as partial reimbursement.

AFFIRMATION

I, **BRUCE E. FOGARTY, ESQ.**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

Bruce E. Fogarty
Signature of Arbitrator

DATE OF DECISION: November 12, 1992

STATE OF: *New York*

• SS:

COUNTY OF: *New York*

On this 4th day of November, 1992, before me personally appeared **Bruce E. Fogarty, Esq.** to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Jane Polisar

JANE POLISAR
Notary Public, State of New York
No. 31-4858707
Qualified in New York County
Commission Expires April 14, 1994