

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Jaroslav Persan

92-02406

Name of Respondents

Pacific Southern Securities, Inc.;
Otra Clearing, Inc., now known as
Reynolds Kendrick Stratton, Inc.
P. Jackson Pontious;
William Michaud;
Gerald M. Schechter

REPRESENTATION

For Claimant: Jaroslav Persan was represented by Joseph A. McDermott, III, Esq. of Soape, Brown & McDermott, located in Houston, Texas.

For Respondents: Respondents did not appear at hearing.

CASE INFORMATION

Statement of Claim filed: July 21, 1992.

Claimant's Submission Agreement signed on: August 7, 1992.

Supplemental Statement of Claim filed on: November 9, 1992.

Motion for Leave to File Second Supplemental Statement of Claim filed on: December 28, 1992.

Second Supplemental Statement of Claim filed on: December 28, 1992.

Response to Claimant's Second Supplemental Statement of Claim filed by Respondent Pacific Southern Securities, Inc. on: January 12, 1993.

Respondent Pacific Southern Securities, Inc. did not file an executed submission agreement.

Statement of Answer filed by Respondent Otra Clearing, Inc., now known as Reynolds Kendrick

Stratton, Inc. on: October 13, 1992.

Respondent Otr Clearing, Inc., now known as Reynolds Kendrick Stratton, Inc.'s Submission Agreement signed on: Scott G. Monson, Legal Counsel, Reynolds Kendrick Stratton, Inc. Response to Claimant's Supplemental Statements of Claim filed by Respondent Otr Clearing, Inc., now known as Reynolds Kendrick Stratton, Inc. on: December 31, 1992.

Notice of Settlement filed by Respondent Otr Clearing, Inc., now known as Reynolds Kendrick Stratton, Inc., on: February 5, 1993.

Statement of Answer and Motion for Dismissal filed by P. Jackson Pontius on: December 22, 1992.

Respondent P. Jackson Pontius' Submission Agreement signed on: January 7, 1993.

Statement of Answer filed by Respondent William Michaud on: January 14, 1993.

Respondent William Michaud's Submission Agreement signed on: January 14, 1993.

Response to Claimant's Statement of Claim filed by Respondent Gerald M. Schechter on: February 4, 1993.

Respondent Gerald M. Schechter's Submission Agreement signed on: February 3, 1993.

HEARING INFORMATION

Pre-Hearing Conference:

None Held.

Hearing Date/Sessions:

February 10, 1993 for One (1) session.

Hearing Location:

Houston, Texas.

CASE SUMMARY

Claimant Jaroslav Persan ("Persan") alleged that Respondent William Michaud ("Michaud"), while employed by or acting as an agent for Respondent Pacific Southern Securities ("Pacific Southern"), misrepresented the potential of a speculative "penny" stock and placed Persan's IRA funds into an unsuitable investment. Persan specifically alleged that:

1. In October of 1991, Persan's acquaintance recommended that he contact Pacific Southern. Persan spoke with Michaud and was sold a block of 100,000 shares of Champion Sports, Inc., a penny stock which was trading for 1/32 bid, 1/16 asked;

2. Michaud did not advise Persan of the difference between the bid and ask price, that one-half of the realizable value of the investment vanished when

purchased and that Champion was a speculative stock. In addition, Michaud made incomplete or incorrect entries on the new account form, did not ascertain whether the speculative investment was appropriate for Persan, and did not ascertain that the funds invested were from Persan's IRA and that he wanted them to remain in the IRA:

3. Michaud established a cash account for Persan and the funds from Persan's IRA were transferred into this account, resulting in an IRS penalty of \$2,637.00. After the initial transaction, Michaud received the \$11,492.84 from Persan's IRA account by wire and asked what Persan wanted to do with the additional funds. Persan advised Michaud that he wanted to have the funds kept on account. Instead, Michaud caused Persan's funds to be expended on more shares of Champion:

4. Persan made several inquiries regarding the value of his account and continued to receive false and misleading information. On November 9, 1991, Persan called Respondent Jack Pontious ("Pontious") and requested that his Champion shares be sold and his account changed to an IRA. Pontious replied that he was only interested in knowing how much more Persan had to invest; and

5. Champion stock continued to decrease in value and is now worthless.

Persan further alleged that Respondent Otr Clearing, Inc., now known as Reynolds Kendrick Stratton, Inc. ("Otr") was negligent in doing business with Pacific Securities and in failing to ascertain that Persan's funds were from an IRA. Persan also alleged that Respondent Gerald M. Schechter ("Schechter"), as principal owner and branch manager of Pacific Securities, was liable for failure to supervise the operation of Pacific Securities and Michaud, and under agency, respondent superior and other vicarious liability theories.

Respondent Otr denied the allegations of the Claim, alleging that:

1. During the relevant time period, Otr acted as the clearing firm for Pacific Southern, and followed its instructions, as the introducing broker-dealer, in establishing and setting up the account; and

2. Otr had no duty or obligation Persan to investigate the validity, the authorization or suitability of any trade placed on his behalf. Otr effected all trades in Persan's accounts pursuant to instructions received from Pacific Southern and sent periodic account statements and specific confirmations for each transaction.

In addition, Otra asserted several affirmative defenses, including the following:

1. Persan's claim fails to state a claim against Otra upon which relief can be granted;
2. Persan has failed to state any claim against Otra and any losses to him are the result of actions of parties other than Otra;
3. Otra was acting solely as a clearing broker-dealer whose relationship was described in the Customer Information Brochure. Otra did not violate any of its duties;
4. Pursuant to the Federal securities regulations, NASD Rules and Regulations and the clearing agreement with Pacific Southern, Otra owed no duty to Persan and no duty to act other than it did; and
5. The claims asserted by Persan are barred by the doctrines of waiver and estoppel.

Respondent Pacific Southern alleged that:

1. Persan is going on a "witch hunt", naming as many Respondents as he can;
2. The "alter ego" theory is not supported by the facts as brokers were not told what stocks to purchase for their clients;
3. The transactions in Champion were not trades which took place in an actively-traded market; and
4. Pacific Southern was not negligent in approving the account acceptance or in its supervision of Michaud.

Respondent Michaud denied the material allegations of Persan's claim, alleging that:

1. On October 17, 1991, Persan called in and requested purchase of \$6,000.00 worth of Champion stock based upon the recommendation of his advisor, Mr. Hale, and knew the price per share of the stock. Michaud never made any representations about the merits or future of the stock. The trade was marked "unsolicited";
2. On October 31, 1991, after being notified of the excess funds in Persan's account, Michaud called Persan and offered to send him a check for the excess

amount. Persan instead requested the purchase of additional shares of Champion;

3. A few days later, the account was taken from Michaud and given to Pontious because he had been instrumental in Mr. Hale convincing Persan to purchase Champion shares;

4. Persan never mentioned an IRA and Michaud was unaware of its existence or Persan's need for one until he was asked to call Persan in April of 1992 to discuss putting the Champion stock in an IRA. Michaud advised Persan that it could not be done;

5. Persan's financial advisor, Mr. Hale, must have been aware of the IRA, and the firm who held the account prior to Pacific Southern must have advised him of the penalties. In addition, Persan's age should have made him exempt from withdrawal penalties.

Respondent Pontious denied the material allegations of the Claim, alleging that:

1. He was not involved in any trading activity and did not act in a supervisory capacity;

2. Pontious had no knowledge of the transactions in Persan's account until a month after his initial trade;

3. Mr. Hale had been in contact with another Pacific Securities broker who had been terminated. Hale had Persan call Pontious, who advised Persan that Champion was a speculative stock. Persan asked that Pontious handle the account and Pontious agreed;

4. Pontious had no idea that the funds involved were from an IRA account and never did any trades in the account even after it was transferred to him.

Respondent Schechter denied any liability as alleged in the Original and Amended Statements of Claim, alleging that:

1. Persan's claim is excessive because he still retains 1910 shares of Champion Sports stock valued at approximately \$2.00 per share and settled with another party for \$4,000.00;

2. Persan did not inform Michaud that he needed to open an IRA until it was too late and must accept responsibility for his actions;

3. Schechter, acting through Pacific Southern's compliance department, had set up adequate written supervisory procedures governing a registered representatives interaction with clients and was unaware of the alleged exaggerated claims made to Persan;
4. The account card reviewed by Schechter indicated the proper income, net worth and investment objectives for the investment purchased, and the account and trade approval were within the guidelines established by the Securities Industry;
5. Schechter is not the "alter-ego" of Pacific Southern.

RELIEF REQUESTED

Claimant Persan requested that the Arbitrators enter an award against the Respondents for actual damages of \$11,492.84 for the investment loss and \$2,637.00 for the IRS penalty; for common law exemplary damages and statutory exemplary damages pursuant to Section 27.001, et seq. of the Texas Business and Commerce Code; for reasonable attorneys' fees pursuant to Section 38.001, et seq. of the Texas Civil Practices and Remedies Code and Section 27.001, et seq. of the Texas Business and Commerce Code; pre- and post-judgment interest; costs of arbitration; and for any other relief to which Persan showed himself entitled.

Respondent Otra requested that any and all claims against it be dismissed and that Persan take nothing on his claim against Otra. Otra further requested that Persan reimburse it for its costs expenses and reasonable attorneys' fees for defending itself in this arbitration.

Respondent Pacific Southern made no specific relief request in its Statement of Answer.

Respondent Michaud made no specific relief request in his Statement of Answer.

Respondent Pontious requested a finding of no liability and moved for dismissal of the claim.

Respondent Schechter that the panel enter a judgment against Persan, dismissing the claim with prejudice, for the costs and expenses he has incurred, and for such other relief as the panel deemed just.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Pacific Southern Securities, Inc. did not file an executed submission agreement, but as a member firm of the NASD is required to submit to arbitration pursuant to Section 12 of the

NASD Code of Arbitration Procedure.

By letter dated February 3, 1993, Respondent Ota Clearing, Inc., now known as Reynolds Kendrick Stratton, Inc., informed the NASD that it had reached a settlement with Persan and the claim against it was dismissed with prejudice.

Respondents Pacific Southern Securities, Inc., William Michaud, P. Jackson Pontious and Gerald Schechter did not appear at hearing. Upon review of the record and the representations of counsel, the panel determined that the Respondents had been properly served with notice of the hearing pursuant to Section 26 of the NASD Code of Arbitration Procedure. Pursuant to Section 29 of the NASD Code of Arbitration Procedure, the panel determined that the hearing would proceed in the Respondents' absence.

AWARD

After considering the pleading, the testimony and the evidence presented at the hearing, the undersigned arbitrator have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Pacific Southern Securities, Inc. and William Michaud are jointly and severally liable for and shall pay to Claimant Jaroslav Persan the sum of \$2,692.00;
2. In addition, Respondents Pacific Southern Securities, Inc. and William Michaud are jointly and severally liable for and shall pay to Claimant Jaroslav Persan the sum of \$750.00 as attorneys' fees. In determining to award attorneys' fees to Claimant, the panel considered the arguments of counsel, as well as Section 38.001 of the Tex. Civ. Prac. Code cited by the Claimant, and determined that authority existed for an award of attorneys' fees to Claimant Jaroslav Persan;
3. Furthermore, Respondents Pacific Southern Securities, Inc. and William Michaud are jointly and severally liable for and shall pay to Claimant Jaroslav Persan the sum of \$750.00 as costs of bringing this arbitration;
4. The claims asserted against Respondents P. Jackson Pontious and Gerald M. Schechter are hereby dismissed and denied in their entirety;
5. All other costs of arbitration shall be borne by the party incurring the cost, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) hearing session x \$400.00 per session = \$400.00.

The National Association of Securities Dealers, Inc. shall retain the \$100.00 claim filing fee and the \$400.00 hearing session deposit previously deposited by the Claimant, Jaroslav Pernan.

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


Concurring Arbitrators' Signatures
Name

Date



Leighton E. Moss, Esq.
Public Arbitrator
Chairperson

8/9/93



Leonard S. Alpert
Public Arbitrator

8/18/93



Victor Montalbano
Industry Arbitrator

8-3-93

For NASD Use Only

Date of Service of Award: 8-30-93