

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Lawrence Kalkstein

vs.

Case #
92-03703

Name of Respondents

Phillips Appel & Walden, Inc.
Michael Woloshin
Joseph Xerri
Richard Fletcher
Robert Trause
John Henry Starr
Richard Mark Engelhardt

REPRESENTATION

For Claimant, Lawrence Kalkstein, appeared Joan M. Markey, Esq., a sole practitioner, located in New York, New York.

For Respondent Michael Woloshin ("Woloshin") appeared Bradford L. Jacobowitz, Esq. from the law firm of Gusrae, Kaplan & Bruno located in New York, New York.

Respondent Richard Engelhardt appeared pro se.

Respondent John Henry Starr appeared pro se.

For Respondent, Richard Thomas Sullivan ("Sullivan"), appeared Douglas P. Lobel, Esq. from the law firm of Dechert, Price & Rhoads located in Washington D.C.

For Respondent, Robert Trause ("Trause"), appeared J. Jerome Olitt, Esq. from Arbitration and Mediation Specialists, Inc. located in Stamford, Connecticut.

For Respondent, Joseph Xerri ("Xerri"), appeared Nicholas R. Weiskopf, Esq. from the law firm of Janvey, Gordon located in New York, New York.

Respondent, Richard F. Fletcher, appeared pro se.

For Respondent, Phillips Appel & Walden, Inc. ("PAW"), appeared Robert Blatt of Phillips Appel & Walden, Inc. located in Harrison, New York.

CASE INFORMATION

Statement of Claim was filed on October 30, 1992

Claimant's Submission Agreement was signed on December 1, 1992

Statement of Answer was filed by Respondent Woloshin on August 2, 1993.

Respondent Woloshin's Submission Agreement was signed on July 29, 1993.

Statement of Answer was filed by Respondent Engelhardt on February 12, 1993.

Respondent Engelhardt's Submission Agreement was signed on February 8, 1993.

Statement of Answer was filed by Respondent Starr on February 2, 1993.

Respondent Starr's Submission Agreement was signed on February 1, 1993.

Statement of Answer was filed by Respondent Sullivan on February 2, 1993.

Respondent Sullivan's Submission Agreement was signed on January 27, 1993.

Statement of Answer was filed by Respondent Trause on February 1, 1993.

Respondent Trause's Submission Agreement was signed on January 19, 1993.

Statement of Answer was filed by Respondent, Xerri on January 26, 1993.

Respondent Fletcher's Submission Agreement was signed on January 12, 1993.

HEARING INFORMATION

Pre-Hearing Conference:	August 23, 1993	One Session/2 Arbitrators
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Hearing Dates/Sessions:	February 4, 1994	Two Sessions
	March 16, 1994	Two Sessions
	May 31, 1994	One Session
	June 1, 1994	Two Sessions
	June 20, 1994	Two Sessions
	September 30, 1994	Two Sessions
	October 7, 1994	Two Sessions
	December 13, 1994	Three Sessions
	December 20, 1994	Two Sessions
	December 29, 1994	One Session
	January 27, 1995	One Session

Hearing Location: N.A.S.D. Inc.
Broad Financial Center
33 Whitehall Street, 8th Floor
New York, N.Y. 10004

CASE SUMMARY

Claimant Kalkstein allege that he is a middle-aged man with a limited educational background who was persuaded by Respondent Woloshin to open a brokerage account. Claimant allege that Woloshin was aware of Kalkstein's financial circumstances when the account was opened and Respondents Woloshin and Xerri churned his account, executed unauthorized transactions in his account and generated excessive commissions. Claimant also alleges that Respondents Woloshin and Xerri recommended and purchased unsuitable, speculative and low quality securities that were not in Claimant's best interests. Claimant states Respondent Woloshin, for example, recommended that Claimant purchase stock in such companies as Cogenic Energy Systems, Professional Agricultural Management, Spectran and Wedtech. According to Claimant, all of the above purchases were wholly unsuitable for Claimant and significantly risky because the size of the positions was substantial. Moreover, Claimant states that the few better quality stocks that were purchased on behalf of Claimant's account were sold soon after their purchase, but due to the commissions charged, caused Claimant to lose money on the transactions. Claimant further alleges that Respondents Woloshin and Xerri engaged in price manipulation and wash sales and failed to promptly honor Claimant's request for the sale of securities. The claimant for example, states that on November 12, 1986, he followed Woloshin's recommendation and purchased 10,00 shares of Wedtech stock a \$3.00 per share. When Claimant instructed Woloshin to sell the Wedtech, price of the stock increased, Claimant states that Woloshin failed to do so and instead purchased an additional 17,000 shares at prices of $2 \frac{7}{8}$ and $2 \frac{3}{4}$ without discussing the purchase in advance with the Claimant and without informing Claimant that Wedtech was in serious financial difficulties. By the time Woloshin sold the Wedtech stock, Claimant states that he had incurred losses of \$18,550. Claimant contends that Woloshin was utilizing Claimant's account in an effort to manipulate the price of Wedtech stock. Further, Claimant alleges that Respondent Fletcher failed to supervise Woloshin and Xerri and that Respondents Trause, Starr and Engelhardt failed to supervise the operation of Claimant's account.

Respondent Woloshin denies the allegations in the statement of claim that he breached a fiduciary duty owed to Claimant by not recommending suitable investments and by seeking to maximize commissions and that he effected the unauthorized trades in Claimant's account. Said Respondent also denies Claimant's allegations of fraud. As affirmative defenses, Respondent Woloshin asserted that Claimant failed to state a cause of action, any damages sustained by Claimant were the proximate result of the Claimant's own failure to monitor the activity in his account and to timely and properly complain of alleged wrongdoing. Respondent Woloshin also

asserted that Claimant's claims were barred by the six year statute of limitations and the doctrines of laches, waiver and estoppel.

Respondent Engelhardt maintains that he is not a proper party to this arbitration and asserts the following affirmative defenses: that Claimant's claim lacked specificity; the wrong Respondents were named; and that Claimant's claim failed to include records and other documentation necessary to prepare a specific response. In addition, Engelhardt asserts that Claimant received confirmations and statements of account.

Respondent Starr maintains that although he was PAW's Executive Vice President in charge of branch office administration, during all relevant times he was not responsible for the supervision of Claimant's account. Respondent Starr asserts the following affirmative defenses: Claimant's claim is barred by the Statute of Limitations; Claimant has waived his right to bring the action due to his failure to exercise due diligence in the handling of his affairs; and Claimant's request for punitive damages should be denied as punitive damages are not available under New York law.

Respondent Sullivan denies that he was aware of any "serious compliance problems" Respondent Fletcher had prior to becoming a branch manager; that extra scrutiny should have been given to accounts handled by Mr. Fletcher; that the Wedtech trades were the kinds of transactions that the chief compliance officer should have noticed; and, that he was the chief compliance officer. Respondent Sullivan also denies that the frequency and size of Claimant's option trades should have alerted him; that Claimant was an "inexperienced investor"; and that he had any supervisory responsibility over Respondents Woloshin, Xerri and Fletcher. Accordingly, Respondent Sullivan denies that he is liable to Claimant in any way or that his conduct contributed to or caused any of Claimant's alleged losses.

Respondent Sullivan asserts the following defenses: he had no involvement in any of the transactions described in the claim, and was therefore not liable to Kalkstein; Kalkstein's claims were barred by the doctrine of laches; and the five to six year delay had prejudiced Sullivan's ability to defend himself particularly since PAW's defunct status has deprived Sullivan of access to records and information which would be useful in his defense. In addition, Sullivan also asserts that the claim was time-barred under the six year limitation period of Section 15 of the *NASD Code of Arbitration* ("Code") and the statute of limitations under applicable state and federal securities laws, that the statement of claim lacks specificity and that under New York law, Claimant is barred from being awarded punitive damages.

Respondent Trause denies Claimant's allegations that Trause failed to properly supervise Kalkstein's account. Trause asserts the following defenses: any and all transactions complained of as attributable to the supervisory responsibilities of Respondent Trause were authorized securities trades that were either approved, ratified and/or acquiesced to; Claimant is properly chargeable with and subject to the doctrines of "assumption risk", "waiver" and/or "laches";

and Kalkstein substantially prejudiced Respondent Trause's fair and complete defense by the undue delay in filing a Statement of Claim. Accordingly, Respondent Trause argues that the doctrine of "estoppel en pais" is applicable. In addition, Respondent Trause asserts that any monetary loss or damage complained of was contributed to or caused by, in whole or in part, the actions of the Claimant.

Respondent Xerri denies Claimant's allegations that he churned Kalkstein's account, placed Kalkstein in unsuitable investments, held himself out as having inside information, or in any way abused Kalkstein's trust. Xerri asserts the following defenses: the Statement of Claim fails to segregate adequately the alleged wrongdoing of Respondent Xerri, who had no involvement in a significant portion of the transactions at bar; the Statement of Claim lacks specificity and fails to attach pertinent account records and other documentation; that the events complained of are barred under the six year limitations period of the Code and applicable federal and state securities laws. In addition, since Claimant fails to meet the prerequisites for common law fraud under New York Law which are not barred by applicable time limitations, Respondent Xerri argues that the Statement of Claim ought to have been dismissed. Respondent Xerri also asserts that Kalkstein's claims are barred by the doctrine of laches due to the five to six year delay in pressing Claimant's allegations which had prejudiced Xerri's ability to defend himself.

Respondent Fletcher denies Claimant's allegations that Respondent failed to supervise Respondents Woloshin and Xerri and denies having any involvement in any alleged manipulation of Wedtech stock. As affirmative defenses, Respondent Fletcher asserts that the complaint was barred in whole or in part by the applicable statute of limitations, was barred in whole or in part by the doctrines of waiver and estoppel, and was barred in whole or in part by Claimant ratification of the transactions.

RELIEF REQUESTED

Claimant requests that the arbitration panel award compensatory damages of \$171,218.03, plus interest for roughly five and a half years compounded annually at a rate of 9% in the amount of \$165,497.58. Additionally, Claimant requests the arbitration panel to award him an additional amount of \$5,720.46 which represents a return of six percent for the period of one year the account was open. Claimant also requests that punitive damages of \$300,000 be assessed jointly and severally against Respondents Woloshin, Xerri, Sullivan, Star, Engelhardt, Trause and PAW.

Respondents request a dismissal of all claims and that Claimant be ordered to pay the costs and fees associated with the proceedings as well as the costs of counsel fees incurred by the Respondents.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Sullivan settled with the Claimant on February 7, 1994 and was therefore removed as a party to this arbitration.

AWARD

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

After deliberations on February 13, 1995, the case was dismissed with the fees divided 50% for Claimant and 50% for Respondents, individually and jointly as outlined in the Forum Fees section of this decision. No attorneys fees are to be awarded.

FORUM FEES

Pursuant to Section 43 of the *Code of Arbitration Procedure*, the arbitrators have determined that the NASD shall retain the \$250.00 filing fee previously deposited by Claimant and have assessed Forum Fees as follows.

Pre-hearing conference: \$1,000
20 sessions @ \$1,000 per session: \$20,000
Total Fees: \$21,000.00

1. Claimant is assessed \$10,500.00. Claimant previously paid \$4,750.00 and owes a balance of \$5,750.00.
2. Respondents are jointly and severally assessed \$10,500.00.

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

ARBITRATION PANEL

David Fogel, Esq.	-	Public Chairperson
Madelon M. Rosenfeld	-	Public Panelist
John J. Witkowski, Jr., Esq.	-	Industry Panelist

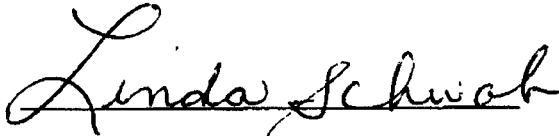
Concurring Arbitrator's Signature


MADELON ROSENFELD

Date of Decision: May 2, 1995

State of NEW YORK s.s.:
County of NEW YORK

On this 1st day of may 1995, before me personally appeared MADELON ROSENFELD, known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

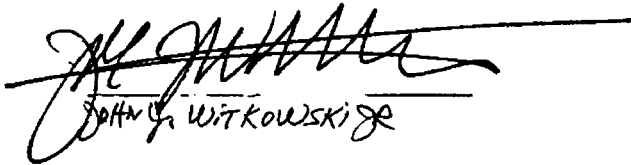


LINDA SCHWAB
Notary Public, State of New York
No. 41-4520033
Qualified in Queens County
Term Expires March 30, 1996

ARBITRATION PANEL

David Fogel, Esq.	-	Public Chairperson
Madelon M. Rosenfeld	-	Public Panelist
John J. Witkowski, Jr., Esq.	-	Industry Panelist

Concurring Arbitrator's Signature


JOHN J. WITKOWSKI, JR.

Date of Decision: May 2, 1995

State of new York s.s.:
County of Richmond

On this 17th day of April, 1995, before me personally appeared JOHN J. WITKOWSKI, JR. known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that she executed the same.

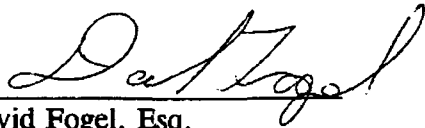


THOMAS P. DONNELLY
NOTARY PUBLIC, STATE OF NEW YORK
NO. 43-6068750
QUALIFIED IN RICHMOND COUNTY
COMMISSION EXPIRES 9/30/96

ARBITRATION PANEL

David Fogel, Esq.	-	Public Chairperson
Madelon M. Rosenfeld	-	Public Panelist
John J. Witkowski, Jr., Esq.	-	Industry Panelist

Concurring Arbitrator's Signature


David Fogel, Esq.

Date of Decision: May 2, 1995

State of _____ s.s.:
County of _____

On this 12th day of April, 1995, before me personally appeared David Fogel, known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

