

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Barbara Cox

93-00889

Name of Respondents

Kemper Securities, Inc.;  
Michael Watts

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**REPRESENTATION**

For Claimant: Barbara Cox ("Cox") was represented by Don Fogel, Esq. and Roy Camberg, Esq. of Ware, Snow, Fogel & Jackson, P.C., located in Houston, Texas.

For Respondent: Kemper Securities, Inc. ("Kemper") was represented by William D. Nelson, Esq. and Cynthia R. Shearon, Esq. of Robinson, Waters, O'Dorisio and Rapson, located in Denver, Colorado.

Michael Watts ("Watts") was represented by Charles F. Brega, Esq. of Brega & Winters, P.C., located in Denver, Colorado.

**CASE INFORMATION**

Statement of Claim filed: March 9, 1993.

Claimant's Submission Agreement signed on: March 3, 1993.

Statement of Answer filed by Respondent Kemper on: May 13, 1993.

Respondent's Submission Agreement signed on: April 14, 1993 by Janet L. Reali, Senior Vice President and Associate General Counsel of Kemper Securities, Inc.

Respondent Kemper's Motion to Amend Statement of Answer filed on: August 13, 1993.  
Amended Statement of Answer of Respondent Kemper filed on: August 13, 1993.

Respondent Watts did not file an executed submission agreement.  
Respondent Watts' Request to File Amended Answer filed: August 25, 1993.  
Respondent Watts' Amended Statement of Answer filed on: October 4, 1993.

Claimant's Motion to Expedite Hearing filed on: September 8, 1993.  
Respondent Kemper's Reply to the Motion for Expedited Hearing filed: September 10, 1993.  
Respondent Watts Reply to Claimant's Motion to Expedite Hearing filed on: September 14, 1993.

### HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: October 19, 1993 for Two (2) sessions;  
October 20, 1993 for Two (2) sessions;  
December 20, 1993 for Three (3) sessions;  
December 21, 1993 for One (1) session.

Hearing Location: Houston, Texas.

### CASE SUMMARY

Claimant Cox alleged that Respondent Watts, while employed by or acting as an agent for Respondent Kemper, misrepresented the possible return on her account, purchased for the account unauthorized and unsuitable investments, and churned Cox's account in an attempt to generate commissions for Respondents. Cox specifically alleged that:

1. In the summer of 1990, Cox met Watts, who sought to solicit her investment business. Cox explained her financial situation and desires, stating that while she had minor income from part-time employment, she needed to keep her money safe because she planned to live off her investments. Cox advised Watts that she needed \$3,000.00 a month for living expenses. Watts promised that he could earn this level of income and still keep the principal safe;

2. In order for Cox's account with Watts to earn \$3,000.00 a month, Cox's investments would have requires an annual return, after commissions, of 18%. In order to generate this return, Watts began a program of unauthorized investments in unsuitable securities, placed Cox's money at great risk, and churned the account;

3. Kemper is vicariously liable for the actions of Watts. In addition, Kemper is individually liable for negligently employing Watts even though he had a history of similar complaints, and for its failure to properly supervise Watts' activities.

Based upon the above allegations, Cox asserted claims for violation of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. and Comm. Code §17.41, et seq.; statutory fraud in violation of Tex. Bus. and Comm. Code §27.01; breach of fiduciary duty; violation of the Texas Blue Sky Law, Tex. Rev. Civ. Stat. Ann. Art. 581-33 (Vernon Supp. 1986); violation of the Federal Securities Laws, including Section 12(2) of the Securities Act of 1933, 15 U.S.C. §771, as well as Rule 10b-5; negligence; breach of contract and breach of warranty.

Respondent Kemper denied the material allegations of the Statement of Claim, asserting that:

1. Cox was a sophisticated investor with a succession of accounts at PaineWebber, Shearson Lehman Hutton, Smith Barney and Oppenheimer. At Oppenheimer, Cox listed her investment objective as "income/moderate growth" and her occupation as "investor". In addition, Cox had completed and executed an option agreement information form indicating a primary investment objective of "trading profits";

2. In June of 1990, Cox contacted Watts about opening an account with him. Cox completed a new account form representing an approximate annual income of between \$25,000.00 and \$50,000.00, an approximate net worth of between \$200,000.00 and \$500,000.00, 20 years of investment experience, a primary investment objective of aggressive income, and ownership of a business called Foodarama. In addition, Cox completed and executed an option trading agreement;

3. When the account was opened, Cox told Watts she would need approximately \$3,000.00 per month from the account. Watts explained that aggressive investing with a higher level of risk would be required to generate this type of income. Cox acknowledged that she was aware of these facts, but wanted to invest aggressively;

4. Watts began implementing an investment strategy consistent with Cox's objectives. All transactions were discussed and approved in advance by Cox. Watts was in frequent phone contact with Cox, who received all statements and confirms, as well as other materials relating to her investments;

5. On or about May 21, 1992, Watts' branch manager, in the course of his duty to supervise the account, called Cox to discuss her account. Cox confirmed that her investment objectives had not changed, trading activity was consistent with her objectives, the account form information was accurate, she was aware of the account activity and the commissions generated, and was happy with the way Watts handled the account; and

6. While the account was with Respondents, Cox withdrew cash totaling in excess of \$90,000.00.

In addition, Kemper alleged several affirmative defenses, including the following:

1. Cox failed to state a claim upon which relief can be granted;
2. The claims are barred by the doctrines of estoppel, waiver and ratification, and by the applicable statutes of limitation;
3. Cox's losses and/or damages, if any were caused by factors over which Respondent had neither responsibility or control, or by Cox's own negligence; and
4. Cox is not a "consumer" within the meaning of the Texas Deceptive Trade Practices-Consumer Protection Act.

Respondent Watts denied the material allegations of the statement of claim. In addition, Watts asserted several affirmative defenses, including the following

1. Cox failed to state a claim upon which relief can be granted;
2. The claims are barred by the doctrines of estoppel, waiver and ratification, and by the applicable statutes of limitation;
3. Cox's losses and/or damages, if any were caused by factors over which Respondent had neither responsibility or control, or by Cox's own negligence; and

4. Cox is not a "consumer" within the meaning of the Texas Deceptive Trade Practices-Consumer Protection Act.

### **RELIEF REQUESTED**

Claimant Cox requested entry of an award against Respondents for actual damages in the sum of \$110,404.00; punitive and exemplary damages in an amount not less than two times her actual damages; interest in the amount Cox would have earned had Kemper invested the funds consistent with her objectives; recovery of commissions and mark-ups paid to Respondents in the approximate sum of \$47,550.00; reasonable attorneys' fees; costs of expert witnesses and costs of arbitration.

Respondent Kemper requested that Cox's Statement of Claim be dismissed in its entirety and that Cox take nothing by her statement of claim.

Respondent Watts requested that the Statement of Claim be dismissed in its entirety and that Watts be granted his costs and attorneys' fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondent Watts did not file an executed submission agreement, but filed an answer, appeared and testified at the hearing. The panel finds that Respondent Michael Watts is an associated person and required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

On September 20, 1993, after review of the Motion and all documents filed in response, the Panel determined that Claimant Cox's Request for an Expedited Hearing would be denied.

On September 27, 1993, the panel determined that Respondents' Motion to Amend would be granted.

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

### AWARD

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

1. Respondents Kemper Securities, Inc. and Michael Watts are jointly and severally liable for and shall pay to Claimant Barbara Cox the sum of \$40,000.00 as actual damages;
2. In addition, Respondents Kemper Securities, Inc. and Michael Watts are jointly and severally liable for and shall pay to Claimant Barbara Cox the sum of \$70,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the arguments of the parties, as well as the laws of the State of Texas permitting the finder of fact to award punitive damages upon findings of gross negligence, malice or intent, and determined that authority existed for an award of punitive damages to the Claimant, Barbara Cox;
3. Furthermore, Respondents Kemper Securities, Inc. and Michael Watts are jointly and severally liable for and shall pay to Claimant Barbara Cox interest, at the statutory rate for the State of Texas on judgments, for amounts awarded her under this arbitration award, from the date of service of this award until paid;
4. The claims for attorneys' fees are hereby dismissed and denied in the entirety;
5. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
6. Any relief not specifically granted is hereby denied.

### OTHER COSTS

The National Association of Securities Dealers, Inc. shall retain the \$750.00 postponement fee previously paid by the Respondent, Michael Watts.

**FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Eight (8) Hearing sessions x \$750.00 per session = \$6,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and refund the \$750.00 hearing session deposit previously deposited by the Claimant, Barbara Cox. Respondents Kemper Securities, Inc. and Michael Watts are jointly and severally liable for and shall pay to Claimant Barbara Cox the sum of \$200.00 as reimbursement of the claim filing fee paid herein. In addition, Respondents Kemper Securities, Inc. and Michael Watts are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$6,000.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Donald J. Willy, Esq.  
Donald J. Willy, Esq.  
Public Arbitrator  
Chairperson

March 21, 1994

/s/ James P. Hoefling  
James P. Hoefling  
Public Arbitrator

March 22, 1994

/s/ Karen Settle Newton  
Karen Settle Newton  
Industry Arbitrator

March 28, 1994

For NASD Use Only

Date of Service of Award: 3-29-94