

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Harvey and Elaine Luppescu

93-01522

Name of Respondents

A.R. Schmeidler & Co., Inc.
Arnold R. Schmeidler

REPRESENTATION

For Claimants, Harvey and Elaine Luppescu ("Claimants"): Christopher Lovell, Esq. located in New York, New York.

For Respondents, A.R. Schmeidler & Co., Inc. and Arnold R. Schmeidler, ("Respondents"): Charles Snow, Esq. of the law firm of Snow Becker Krauss P.C. located in New York, New York.

CASE INFORMATION

Statement of Claim filed: April 13, 1993.

Claimants' Submission Agreement signed on: April 8, 1993.

Statement of Answer filed by Respondents on: June 14, 1993.

Respondents' Submission Agreement signed on: June 9, 1993.

HEARING INFORMATION

Hearing Dates/Sessions:	June 29, 1994	-	Two sessions
	June 30, 1994	-	One session

Hearing Location: National Association of Securities Dealers, Inc. offices located in New York, New York.

CASE SUMMARY

Claimants alleged the following: the Respondents breached their fiduciary duty; breached their contract to the Claimants; falsely misrepresented an investment; and, negligently invested in unsuitable securities on behalf of the Claimants.

Claimants further alleged: the Claimants, who are elderly, retired residents of Florida and live on a fixed income, entrusted monies with the Respondents because they were reputed to be expert, investment advisers. The Claimants alleged that the Respondents knew that preservation of capital was their primary concern and that they would not tolerate any risky investments. Moreover, the allegations against the Respondents included a recommendation that the Claimants close their Merrill Lynch Pierce Fenner and Smith, Inc. accounts and use Bear Stearns and Co., Inc. ("Bear Stearns"), even though Bear Stearns had no office in Florida near either the Claimants or their bank, thereby resulting in the loss of a week's "float" every time a check was cut. Although the Respondents' insisted that their confidence in Bear Stearns was premised on that firm's ability to execute decisions quickly and competently, the Claimants alleged that the sole reasons Respondents wanted to use that company was because Bear Stearns split commissions with them.

Concerning the allegation of breach of fiduciary duty, the Claimants contended that the Respondents purchased Box ("Max") Energy Corp. for their account in May 1992. Claimants alleged that Respondents (i) presented Box Energy as a \$35 stock within a proximate year or less time frame, and (ii) falsely reported on the firm's profitability and that it was a suitable investment for Claimants and assured them they should have no concerns. When Claimants contested Box Energy's gloomy financial reports, Respondents asked the Claimants to trust their forecast that Box Energy would be profitable in two years. However, Claimants objected and claimed that Box Energy was highly speculative, generated no dividends or earnings, and that a two-year wait was unreasonable. Furthermore, Claimants maintained that the Respondents had purchased Box Energy for numerous accounts they managed in order to support the price of the stock. Finally, the Claimants alleged that the Respondents exercised discretion over Claimants' securities and funds and the only time Respondents ever consulted Claimants before an investment was the inquiry about buying more Box securities. Claimants further alleged Respondents violated Federal and Florida securities laws.

Respondents, which collectively operate as a registered investment advisor and broker-dealer in both New York and Florida, alleged that the Claimants were long-time New York residents who maintained a home on Long Island in which they resided from May through October each year and the Respondents maintain

offices in New York City and have an "800" telephone number for their clients' convenience and upon checking all incoming calls to this "800" telephone number which were recorded by the telephone company, the Respondents found that from May 22, 1992 through October 21, 1992 the Claimants made fifty-six calls to the Respondents from their Long Island home, while they made only one call on November 2, 1992 from their Florida address. Moreover, the Respondents alleged that the Claimant Harvey Luppescu, who is a certified public accountant and a former senior corporate finance executive of Pepsico, frequently inquired and actively participated in investment decisions. The Respondents alleged that when the Claimants opened their accounts, the Claimant Harvey Luppescu outlined his investment objectives at length and he stated at that time his dissatisfaction with his former advisors of whom he threatened suit, and subsequently, obtained a settlement, over a position in Macy's stock. Respondents maintained that the Claimants' investment objectives included the generation of annual income of \$150,000, which was not realistic within the context of the size of the accounts and the conservative investment specifications. Respondents further alleged the Claimants opened two accounts, a regular joint account and an IRA Rollover. The Respondents maintained that they received commission compensation only on transactions executed in the regular joint account, and not on the IRA Rollover account. Moreover, Respondents contended that the commissions charged by Bear Stearns and themselves were significantly lower than those of other firms.

With respect to Claimants' allegation of the loss of a week's float, Respondents maintained that no checks were ever paid out of the accounts on which interest might have accrued because of any delay in receipt of checks. Furthermore, the Respondents contended that the Claimants requested that account documentation be sent to their Long Island home, because of the extended receipt time in Florida.

Respondents alleged that all investment decisions in the Claimants' accounts were intended to be made through the exercise of discretion. Furthermore, the Respondents alleged that following the purchase of Box Energy over the period from May 1992 through September 1992, the position was frequently discussed with the Claimant Harvey Luppescu, but he never requested that Box Energy be liquidated and the Respondents affirmed the appropriateness of the position in light of the Claimants' desire to increase income yield over time and the Respondents continued to recommend Box Energy based on its economic and operational forecasts for the following two years, and contended that Box Energy represented less than three percent of the total assets of the Claimants' combined accounts. Additionally, Respondents denied any allegation that their motive in

recommending Box Energy was to support the stock. In conclusion, the Respondent contended that they invested and managed the accounts so as to comply with the Claimants' investment objectives to increase capital and income.

RELIEF REQUESTED

Claimants requested awards against the Respondents as follows:

1. \$18,680.21, representing the difference between the costs of Claimants' purchase of Box Energy and its sales proceeds, in addition to lost interest income in the amount of \$2,750.00;
2. \$4,400.00, representing the investment management fees the Claimants paid to the Respondents;
3. All commissions which Respondents received from executing Claimants' account transactions;
4. \$50,000.00 in punitive damages, as well as, damages for emotional distress, pain and suffering; and
5. Attorney's fees, the costs of arbitration and such other additional and further relief as the arbitration panel may seem just and proper.

Respondents requested that the arbitration panel find in Respondents' favor as follows:

1. The statement of claim be dismissed; and
2. The Respondents be awarded costs and attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

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 original remain on file with the NASD.

AWARD

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

1. All claims by the Claimants be and hereby are dismissed in all respects.
2. The Claimants' claim for punitive damages is denied.
3. Each party shall bear their respective costs including attorneys' fees.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.


3 sessions X \$500 = \$1,500 minus Claimant's hearing session deposit of 500 = net \$1,000 due.

Forum fees Assessed Against:

1. Claimants, in the amount of \$250.00 less hearing session deposit over payment of \$300.00 = net \$0.00 due; and
2. Respondents, jointly and severally in the amount of \$750.00 due.

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

ARBITRATORS' SIGNATURE


Roger J. Hawke, Esq.
Chairperson, Public Arbitrator

Richard S. Peskin, Esq.
Industry Arbitrator

Richard L. Herzfeld, Esq.
Public Arbitrator

Date of Decision: August 3, 1994

Award #93-01522

STATE OF: *New York*

COUNTY OF: *New York*

SS:

On this *1st* day of *August*, 1994, before me personally appeared **Roger J. Hawke, Esq.** known and 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.

Herbert Rodkin

HERBERT RODKIN
Notary Public, State of New York
No. 02RO4772725
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1998

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Richard S. Peskin, Esq.** known and 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.

STATE OF:


SS:

COUNTY OF:

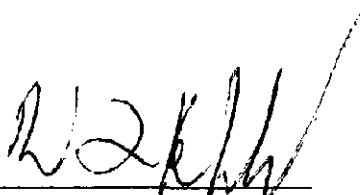
On this day of , 1994, before me personally appeared **Richard L. Herzfeld, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

ARBITRATORS' SIGNATURE

Roger J. Hawke, Esq.
Chairperson, Public Arbitrator



Richard S. Peskin, Esq.
Industry Arbitrator



Richard L. Herzfeld, Esq.
Public Arbitrator

Date of Decision: August 3, 1994

Award #93-01522

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Roger J. Hawke, Esq.** known and 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.

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Richard S. Peskin, Esq.** known and 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.



Martin Fishman
Notary Public, State of New York
No. 1233960
Qualified in Nassau County
Commission Expires: August 21, 1995

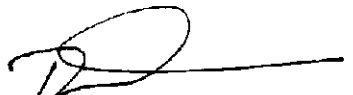
STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Richard L. Herzfeld, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.




TERRENCE M. DINE
Notary Public, State of New York
No. 24-4831713
Qualified in Kings County
Commission Expires 12/26/95