

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

In the matter of the Arbitration Between

**Name of Claimant(s)**

Clarence L. Healy  
Dolores M. Healy

NASD Arbitration  
No. 93-01715

**Name of Respondent(s)**

Kober Financial Corp.  
Cohig & Associates, Inc.  
Richard M. Gawlik  
Harvey F. Levin  
Peter N. Bowinski

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**REPRESENTATION**

For Claimants: Bruce I. Garfield, Investors Arbitration Services, Inc., Woodland Hills, California

For Respondents Kober Financial Corp., Richard M. Gawlik, Harvey F. Levin and Peter N. Bowinski: Dennis A. Graham, Esq., Hopper And Kanouff, Denver, Colorado

For Respondent Cohig & Associates, Inc.: David H. Drennen, Esq., Cohig & Associates, Inc., Denver, Colorado

**CASE INFORMATION**

Statement of Claim filed: April 23, 1993

Claimants' Submission Agreement signed: May 24, 1993

Statement of Answer filed by Respondent Cohig & Associates, Inc.: October 28, 1993

Submission Agreement signed by Respondent Cohig & Associates, Inc.: September 23, 1993

Joint Statement of Answer filed by Respondents Harvey F. Levin and Peter N. Bowinski: September 20, 1993

Statement of Answer filed by Respondent Richard M. Gawlik: March 10, 1994

Respondent Harvey F. Levin's Submission Agreement signed: October 20, 1993

Respondent Peter N. Bowinski's Submission Agreement signed: October 11, 1993

Respondent Kober Financial Corp. (Kober) did not file a Statement of Answer and Submission Agreement. Respondent Richard M. Gawlik did not file a Submission Agreement. However, they appeared at the hearing and are subject to National Association of Securities Dealers, Inc. (NASD) jurisdiction in accordance with Section 12 of the NASD Code of Arbitration Procedure.

#### HEARING INFORMATION

Pre-Hearing Conference Date(s)/Session(s): None

Hearing Date(s)/Session(s): April 20, 1994 (two sessions)  
April 21, 1994 (two sessions)

Hearing Location: San Francisco, California

#### CASE SUMMARY

Claimants asserted the following causes of action with respect to their investments in penny stocks: 1) fraud, deceit, misrepresentation and omission of material fact; 2) suitability; 3) violation of New York Stock Exchange, Inc. Rule 342 and NASD Rules of Fair Practice, Article III, Section 2 and Section 27 - supervision; 4) breach of fiduciary duty; 5) negligence; 6) breach of the implied covenant of good faith and fair dealing; and 7) violation of California Corporations Code Section 25401 and California Civil Code Section 3294.

Respondent Cohig & Associates, Inc. (Cohig) denied any liability to Claimants and alleged that it has been named in Claimants' Claim solely because Claimants believe that Kober's assets and liabilities are now owned by Cohig. Cohig further alleged that neither Ronald M. Perry, the account representative, nor any of the other Respondents have ever worked for Cohig; that the Claimants have not had an account at Cohig; and that Cohig has provided Claimants with documentation establishing that Cohig did not acquire Kober's assets and liabilities.

Respondents Richard M. Gawlik (Gawlik), Harvey F. Levin (Levin) and Peter N. Bowinski (Bowinski) asserted that Claimants' Statement of Claim lacks any allegation which would form the basis for a claim against Respondents Gawlik, Levin and Bowinski. Gawlik, Levin and

Bowinski alleged that they had no direct supervisory authority over Ronald Perry, the account representative, and were not control persons of Kober. Respondents Gawlik, Levin and Bowinski further alleged that Claimants alleged no direct contact with either Gawlik, Levin and Bowinski and that the inclusion of these individuals in the Statement of Claim was done solely for the purpose of adding as many parties as possible to the action in the hopes that parties who otherwise have no liability with respect to the Claimants' claims would find it cheaper to settle this matter than to defend it. Respondents Gawlik, Levin and Bowinski also asserted affirmative defenses.

#### RELIEF REQUESTED

Claimants requested a joint and several award against Respondents as follows:

1. Rescission of the penny stock investments or, in the alternative, compensatory damages in an amount of not less than \$52,500.00;
2. Pre-award and post-award interest at the maximum rate allowed by law from the date of the original investment;
3. For cost of arbitration and expenses including reasonable consulting fees, expert witness fees and any other costs deemed reasonable; and
4. Punitive damages in an amount to be determined by the panel of arbitrators.

Respondent Cohig requested dismissal of Claimants' claims and requested reasonable costs, including attorney's fees.

Respondents Gawlick, Levin and Bowinski requested dismissal of Claimants' claims, costs, attorney's fees, and requested such further relief as the panel deems just.

#### OTHER ISSUES CONSIDERED AND DECIDED

Prior to the hearing, Ronald M. Perry was removed as a party in this matter because of his bankruptcy filing.

Prior to the hearing, arbitrator Jane B. Soden, Esq., on behalf of the panel, reviewed and considered the positions of the parties relative to the Motion by Respondents Gawlick, Levin and Bowinski to testify at hearing via telephone. Ms. Soden granted the Motion.

At the outset of the hearing, the panel of arbitrators reviewed and considered the positions of the parties relative to the following Motions: 1) Claimants' Motion to Bar Respondent Gawlick from presenting any matter, arguments, or defenses at the hearing; and 2) Respondents' (Gawlick, Levin and Bowinski) Motion to disqualify Investors Arbitration Services, Inc. from representing

Claimants. The panel denied the Motions.

The parties have agreed that the Award in this matter may be executed in either 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, 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. At the outset of the hearing, the panel of arbitrators reviewed and considered the positions of the parties relative to Respondent Cohig & Associates, Inc.'s Motion to Dismiss. The panel, after deliberations, announced the granting of the Motion and all claims, including the claim for punitive damages, were dismissed against Respondent Cohig & Associates, Inc.

2. During the hearing, Respondents Richard M. Gawlik, Harvey F. Levin and Peter N. Bowinski moved for dismissal of Claimants' claims against them. The panel, after deliberations, announced the granting of the Motion and all claims, including the claim for punitive damages, were dismissed against Respondents Richard M. Gawlik, Harvey F. Levin and Peter N. Bowinski.

3. All claims by Claimants, including the claim for punitive damages, against Respondent Kober Financial Corp., are dismissed.

4. Claimants Clarence L. Healy and Dolores M. Healy are liable for and shall pay to Respondent Cohig & Associates, Inc. the sum of \$667.35 in costs.

5. Claimants Clarence L. Healy and Dolores M. Healy are liable for and shall pay to Respondent Peter N. Bowinski the sum of \$2,787.35 in costs.

6. Claimants Clarence L. Healy and Dolores M. Healy are liable for and shall pay to Respondent Richard M. Gawlik the sum of \$1,167.00 in attorney's fees.

7. Claimants Clarence L. Healy and Dolores M. Healy are liable for and shall pay to Respondent Harvey F. Levin the sum of \$1,167.00 in attorney's fees.

8. Claimants Clarence L. Healy and Dolores M. Healy are liable for and shall pay to Respondent Peter N. Bowinski the sum of \$1,167.00 in attorney's fees.

The panel of arbitrators made their award of attorney's fees pursuant to McQuiston v. Marsh (1983 CA9 Cal) 707 F2d 1082 and Hall v. Cole (1973) 412 U.S. 1, 36 L.Ed. 2d 702, 93 S.Ct. 1943. The panel made a factual finding that Claimants named Respondents Richard M. Gawlik, Harvey F. Levin and Peter N. Bowinski in bad faith.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall retain the \$500.00 hearing session deposit previously made by the Claimants. Forum fees are assessed against: Claimants Clarence L. Healy and Dolores M. Healy in the amount of \$1,500.00, calculated as follows: Four hearing sessions times \$500.00/session minus the \$500.00 hearing deposit retained by the NASD.

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

#### ARBITRATORS

<u>Name</u>	<u>Public / Industry</u>
Nancy Roberts Lonsdale, Esq.	Public Arbitrator
Jane B. Soden, Esq.	Public Arbitrator
Linda H. Perry-Cabrera	Industry Arbitrator

#### Concurring Arbitrators' Signatures

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Nancy Roberts Lonsdale, Esq.

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Jane B. Soden, Esq.

  
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Linda H. Perry-Cabrera

Date of Decision: \_\_\_\_\_

Date Served: 06/03/94