

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Zygmund and Charlotte Tylock

93-01788

Name of Respondents

Seco West Limited  
David C. Hackney

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**REPRESENTATION**

For Claimants: Donald G. McGrath, Esq., Buffalo, New York.

For Respondents: Paul K. Stecker, Esq. of Phillips Lytle Hitchcock Blaine & Huber, Buffalo, New York.

**CASE INFORMATION**

Statement of Claim filed: April 30, 1993.

Claimants' Submission Agreement signed on: January 22, 1993.

Joint Statement of Answer filed by Respondents on: June 22, 1993.

Respondent Seco West's ("Seco") Submission Agreement signed on: June 17, 1993.

Respondent David Hackney's ("Hackney") Submission Agreement signed on: June 18, 1993.

**HEARING INFORMATION**

Hearing Dates/Sessions: November 10, 1994 / Two Sessions.  
November 11, 1994 / Two Sessions.  
December 7, 1994 / Two Sessions.

Hearing Location: Holiday Inn  
620 Delaware Avenue  
Buffalo, NY 14202

**CASE SUMMARY**

Claimants alleged that Zygmund Tylock was an unsophisticated investor and that in 1988, based upon Respondents' recommendations and using the proceeds from the sale of Zygmund Tylock's business, Claimants purchased the following limited partnership interests:

Datronics Equipment Income Fund XVII	\$50,000
Realmark Prop. Inv. VI - A	50,000
Krupp High Yield Plus	17,000
Star Partners II	73,000
Metric Partners	25,000

Claimants further alleged that these investments made distributions of approximately \$51,000 and had a market value of less than \$67,000 at the time of the Statement of Claim. Claimants alleged that the investments recommended by Respondents were unsuitable for unsophisticated investors such as themselves.

Claimants alleged that Respondents failed to provide competent, professional services and failed to conduct their business in accordance with various industry rules, regulations, customs and practices, and thereby breached their contractual duties owed to Claimants. Claimants also alleged that Respondents directed and effected unsuitable trades in Claimants' account. Claimants further alleged that Respondents made recommendations and effected trades without an adequate basis therefore and that Respondents made misrepresentations and omitted to state material facts. Claimants also alleged that Respondents breached their fiduciary duty owed to Claimants and that Respondents violated federal and state securities laws and the rules and regulations of the National Association of Securities Dealers, Inc. ("NASD") and various other exchanges.

Claimants alleged that Respondent Seco is liable to Claimants for any losses suffered by Claimants as a result of the alleged misconduct of its account representative. In addition Claimants alleged that Respondent Seco failed to reasonably supervise Respondent Hackney and to take affirmative steps to establish the level of sophistication and investment needs of the Claimants. In addition, Claimants alleged that Respondent Seco failed to establish and implement appropriate supervisory procedures and failed to investigate investments recommended to Claimants.

Claimants further alleged physical and emotional suffering as a result of Respondents alleged misconduct.

Respondents Seco and Hackney maintained in their joint answer that Claimants represented to Hackney that Claimants had prior investment experience in other brokerage accounts and other investments including stocks, oil and gas limited partnerships, real estate limited partnerships, rental properties, mutual funds and options. Respondents further maintained that Claimants were sophisticated investors who had a history of investing in limited partnerships, speculative stocks and high risk options. Respondents further maintained that Claimants' speculative stock trades were not solicited by Respondents. Respondents further maintained that Claimants indicated to Hackney they were dissatisfied with the low yield on mutual funds and desired higher current income and that on or about January 26, 1989 Claimants sold two mutual funds and purchased \$17,000 of units of Krupp Yield Plus Limited Partnership. Respondents also maintained that on or about March 31, 1989 Claimants contacted Hackney to purchase an additional \$20,000 investment in Datronics Equipment Income Fund XVII, L.P., a partnership in which Claimants had invested \$30,000 prior to becoming a customer of Seco. In addition, Respondents maintained that on or about March 31, 1989 Claimants invested \$25,000 in Metric Partners Growth Suite Investors, L.P. and on or about April 4, 1989 Claimants invested \$50,000 in Star Partners II, L.P. Respondents maintained that on May 5, 1989 Claimant sold Franklin U.S. Government Securities Fund, using proceeds to purchase an additional \$23,000 in interests in Star Partners II, L.P. against Hackney's advice. Respondents further maintained that Claimants' list of investments in their statement of claim was inaccurate, since it included investments made by Claimants prior to becoming clients of Seco.

Respondents further maintained that they did not fail to provide competent service to Claimants and that Respondents met all their obligations under the Rules of the NASD and the standards of the profession. Respondents denied that any actions by Respondents violated any NASD Rules. Further, Respondents maintained that Hackney at all times explained the risks inherent in the recommended investments and that no negligent misrepresentations were made to Claimants. Respondents maintained that Hackney recommended such investments based upon the information available at the time and always portrayed these investments as a high-risk, high reward possibility. Respondents also maintained that Claimants did not rely on any representation of Respondents and that Hackney sent copies of prospectuses to Claimants' son, an attorney, for his review prior to investment by Claimants. Respondents denied ever representing themselves as financial advisors to Claimants and Respondent Seco denied any possible recovery based upon breach of contract. Respondent Seco maintained that it took all necessary steps to supervise Hackney within the customs of the securities industry and to

rules of the NASD and SEC. Respondents maintained that Claimants were made aware of the risks involved in real estate and similar investments and Claimants could not claim ignorance of such facts, since they executed subscription agreements stating they understood the risks inherent in the investment. Respondents maintained that there was no basis, in the law or the rules applicable to Claimants' claim, for Claimants' to seek recovery for physical and mental suffering.

Respondents maintained the following affirmative defenses: (1) Any claim for alleged losses sustained more than three years prior to the commencement of this proceeding is time barred insofar as it relates to matters which Claimants' discovered or should have discovered, more than one year before this proceeding was commenced, or to acts of alleged fraud committed more than three years before this proceeding was commenced; (2) Claimants failed to state a claim upon which relief could be granted; (3) Claimants' claims were barred by the doctrine of laches; (4) Any loss that Claimants may have suffered was caused by Claimants' own conduct or negligence; (5) Claimants failed to mitigate damages; (6) Respondents acted in good faith and at no time did they commit directly or indirectly any act or acts which would give rise to a valid claim by Claimants; (7) Claimants fail to use the requisite due diligence in monitoring, managing and handling their investments; (8) Claimants waived any right to recovery through their conduct; (9) Claimants expressly ordered, approved, authorized, participated in, and ratified the acts and transactions that Claimants complained of and upon which Claimants seek recovery and that Claimants are precluded from recovery; (10) Claimants had unclean hands with respect to the handling of their investments and were therefore precluded from recovery; (11) Claimants voluntarily assumed the risk of investing in the market and were precluded from recovery; (12) Any losses or damages suffered by Claimants were caused or contributed to by the negligence, acts, or omissions of persons other than Seco, including Hackney and that any acts or omissions of Seco are found to have contributed to any such losses, Claimants' recovery, if any, is limited to the percentage of their losses equal to the percentage by which Seco's negligence, acts or omissions contributed to such injury; (13) Claimants are barred from Recovery on the grounds that they are in pari delicto; (14) Respondents maintained that there is no private right of action for violation of the New York State Securities Law ("The Martin Act"); (15) Claimants' claims for mental suffering are not available in this proceeding and attorneys' fees are not recoverable.

**RELIEF REQUESTED**

Claimants requested:

1. Rescission of all the limited partnership transactions and damages in the sum of at least \$210,659.
2. Interest from December 31, 1991.
3. Damages in the amount of \$250,000 for physical and mental suffering.
4. All costs, expenses and disbursements, including reasonable attorneys' fees in pursuing this arbitration proceeding.
5. Such other and further relief as the arbitration deems just and proper.

Respondents requested:

1. Claimants' claims be dismissed.

**AWARD**

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

1. Respondents are liable jointly and severally to Claimants for the sum of \$84,000.
2. Claimant's purchase of Star Partners is rescinded. Claimants must return Star Partners to Respondents on or before June 1, 1995.
3. Claimant's purchase of Datronics is rescinded. Claimants must return Datronics to Respondents on or before June 1, 1995.
4. Claimant's purchase of Metric is rescinded. Claimants must return Metric to Respondents on or before June 1, 1995.
5. Respondents are liable, jointly and severally, to Claimants for the sum of \$950 which amounts represents a reimbursement for the filing fee and hearing session deposit paid by Claimants to the NASD.
6. All other Claims are denied.

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**FORUM FEES**

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

Filing Fee = \$200

6 sessions X \$750 = \$4,500.

Total forum fees = \$4,700.

Forum fees Assessed Against:

1. Respondents are assessed jointly and severally the sum of \$4,700 which represents the total forum fees due, less filing fee and hearing session deposit of \$950 paid by Claimants, leaving \$3,750 due. Respondents are jointly and severally liable and shall pay to the NASD the sum of \$3,750.

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

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Concurring Arbitrators' Signatures

Name

Public Chairperson

Robert Gleichenhau, Esq.

Name

Industry Panelist

Kirstin M. Jahn, Esq.

Name

Public Panelist

Vincent J. Muffoletto

Date of Decision: May 4, 1995

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NASD Award #93-01788

STATE OF:

SS:

COUNTY OF:

On this       day of       , 1995, before me personally appeared **Robert Gleichenhau, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

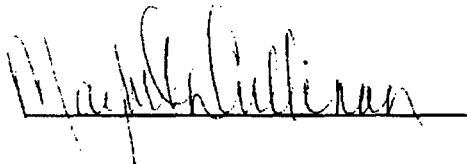
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STATE OF:

SS:

COUNTY OF:

On this 3<sup>rd</sup> day of May , 1995, before me personally appeared **Kirstin M. Jahn, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



MARYBETH CULLINAN  
NOTARY PUBLIC, STATE OF NEW YORK  
QUALIFIED IN ERIE COUNTY  
My Commission Expires 3/31/95

STATE OF:

SS:

COUNTY OF:

On this       day of       , 1995, before me personally appeared **Vincent J. Muffoletto** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

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NASD Award #93-01788

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Name

Public Chairperson

  
Robert Gleichert, Esq.

\_\_\_\_\_

Name

Industry Panelist

\_\_\_\_\_  
Kirstin M. Jahn, Esq.

\_\_\_\_\_

Name

Public Panelist

\_\_\_\_\_  
Vincent J. Muffoletto

\_\_\_\_\_

Date of Decision: May 4, 1995

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NASD Award #93-01788

STATE OF: *New York*

COUNTY OF: *Errie*

SS:

On this *28* day of *April*, 1995, before me personally appeared **Robert Gleichenhau, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

*Janet M. Urbanczyk*

JANET M. URBANCZYK  
NOTARY PUBLIC, State of New York  
Qualified to perform notary duties  
My Commission Expires *9/20/96*

STATE OF:

SS:

COUNTY OF:

On this      day of      , 1995, before me personally appeared **Kirstin M. Jahn, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF:

SS:

COUNTY OF:

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NASD Award #93-01788

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Public Chairperson

Robert Gleichenhaus, Esq.

Name

Industry Panelist

Kirstin M. Jahn, Esq.

Name

Public Panelist

Vincent J. Muffoletto  
Vincent J. Muffoletto

Date of Decision: May 4, 1995

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NASD Award #93-01788

STATE OF:

SS:

COUNTY OF:

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STATE OF:

SS:

COUNTY OF:

On this       day of       , 1995, before me personally appeared **Kirstin M. Jahn, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.


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STATE OF: *N.Y.*

SS:

COUNTY OF: *Erie*

On this *2* day of *May* , 1995, before me personally appeared **Vincent J. Muffoletto** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

  
JOSEPH V. LOTEMPPIO  
NOTARY PUBLIC, STATE OF NEW YORK  
QUALIFIED IN ERIE COUNTY  
MY COMMISSION EXPIRES JAN. 31, 1996