

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Jonathan O. Swan, et al.

vs.

Award
93-01815

Name of Respondents

George A. Klepacki
Moors & Cabot, Inc.

REPRESENTATION

For Claimant, Jonathan O. Swan individually and as Trustee for Cygnet Real Estate Trust ("Claimant"), Joseph P. Carmichael, Esq., located in Salem, Massachusetts.

For Respondent, Moors & Cabot, Inc. ("Moors & Cabot"), Karen M. O'Toole, Esq. from the law firm of Hutchins, Wheeler & Dittmar located in Boston, Massachusetts.

Respondent, George A. Klepacki ("Klepacki") represented himself at the hearing.

CASE INFORMATION

Statement of Claim was filed on April 30, 1993.

Claimant's Submission Agreement was signed on May 10, 1993.

Moors & Cabot Statement of Answer was filed on July 21, 1993.

Moors & Cabot Submission Agreement was signed on July 21, 1993.

Klepacki's Statement of Answer was filed on August 20, 1993.

Klepacki's Submission Agreement was signed on September 16, 1993.

HEARING INFORMATION

Hearing Dates/Sessions:	March 23, 1994	-	2 sessions
	March 24, 1994	-	2 sessions

Hearing Location: National Association of Securities Dealers, Inc's offices located at 260 Franklin Street, Boston, Massachusetts.

CASE SUMMARY

Claimant, Mr. Swan, states that he is a professional artist who retired from Boston Museum School in 1978. He also states that he was the Trustee of the Trust established for the benefit of his two daughters, one of whom has a hearing disability. Claimant further states that he also opened accounts at Moors & Cabot.

Claimant alleges that he informed Klepacki of his investment objective, his income, his obligations and that he did not want to sell any of his Chevron or Exxon stock because of the tax consequences. Claimant also alleges that trading in the two margin accounts were to be conservative and in companies of know repute, that Klepacki was to sell securities when they lost ten percent value to prevent the Chevron and Exxon shares from being sold to meet margin calls. Claimant further states that Klepacki told him that after commissions, margin costs and dividend gains, it was realistic to expect a combined return of \$10 -\$15,000 per year with the two margin accounts.

Claimant further alleges that when Klepacki abandoned the strategy they discussed and allowed 2000 HPSC warrants to expire worthless, Klepacki executed before a notary public an agreement to repay Claimant \$5,000 for losses sustained and \$2,402 in loans. Claimant contends that Klepacki's failure to follow instructions resulted in a loss of \$327,439.00. Claimant also states that the opening account form for his personal account was not signed by him while the form for the trust was signed by him in blank.

In a ten account Statement of Claim, Claimant contends that Respondents violated the Securities Exchange Act of 1934, breached his agreement to adhere to his investment objectives and not sell his Chevron and Exxon shares, made unsuitable trades, churned the accounts, committed forgery, common law fraud and breach their fiduciary duty, violated the Fraudulent and Other Prohibiting Practices Section of Massachusetts General Law, Chapter 110A and Moors & Cabot failed to supervise Klepacki.

Respondent Moors & Cabot denies the allegations of wrongdoing and denies liability. Moors & Cabot asserts thirteen affirmative defenses. Some of these defenses are that the Statement of Claim fails to state any claim against Moors & Cabot and that any losses sustained by Claimant was caused by their actions and negligence.

Respondent Klepacki denies the allegations of wrongdoing and denies liability. Klepacki contends that the Claimant claims are without merit. Klepacki contends that Mr. Swan was an experienced and sophisticated investor who knew the risks and determined the investment

strategies to be utilized in his letters. Klepacki contends that the overall strategy and transactions were discussed with Mr. Swan and that the attachments to the Statement of Claim is evidence that Mr. Swan understood and accepted each transaction made in the accounts.

Klepacki states that Mr. Swan represented his net worth at \$800,000 exclusive of his residence, that his annual income was \$100,000, that he had a flamboyant lifestyle. Klepacki also states that Claimant discussed his daughters generally and indicated that they did not live with him. Klepacki further states that Claimant often talked about his law suits against various oil and gas limited partnership and paid for expensive meals when the two ate at restaurants.

Klepacki acknowledges that he agreed in writing to settle a dispute involving certain losses in Claimant's accounts by paying Claimant \$10,000.00. Klepacki contends that Claimant kept the accounts at Moors & Cabot which demonstrated that Claimant was satisfied with the performance of the accounts in all other respects.

Klepacki also contends that the allegations of unsuitability, churning, forgery and breach of duty are insufficient as a matter of law and must be dismissed. Klepacki asserts twelve affirmative defenses.

RELIEF REQUESTED

Claimant request an award jointly and severally for \$327,439 in actual damages, repayment of the \$5,000 for losses associated with the losses on the HPSC warrants as well as the personal loan for \$2,402.00, \$200,000 for lost opportunity for the diminished value of the Chevron and Exxon shares, punitive damages, all costs, expenses and disbursements include punitive damages, including reasonable attorneys fees and for such other and further relief as this panel deems just and proper.

Moors and Cabot requests that the Statement of Claimant dismissed and that the panel award Moors and Cabot its costs and reasonable attorney's fees.

Klepacki requests that the arbitrators dismiss the Statement of Claim and award him costs and disbursements including reasonable attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

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

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:

1. Moors & Cabot is hereby liable to Claimant and shall pay Claimant **THREE HUNDRED AND TWENTY SEVEN THOUSAND FOUR HUNDRED AND THIRTY SEVEN DOLLARS AND ZERO CENTS (\$327,437.00)**.
2. Klepacki is hereby liable to Claimant and shall pay Claimant **SEVEN THOUSAND FOUR HUNDRED AND TWO DOLLARS (\$7,402.00)** for the outstanding note.
3. All other claims for relief are denied.

FORUM FEES

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

Non-refundable Filing Fee: \$250.00
Hearing Session Fees: \$1,000.00 x 4 sessions = \$4,000.00
Total Fees: \$4,250.00

1. Claimant is assessed a \$250.00 non-refundable filing fee.
2. Claimant is further assessed \$1,000.00. Claimant previously paid \$1,250 which shall be credited to the amount assessed.
3. Moors & Cabot is assessed \$1,500.00.
4. Klepacki is assessed \$1,500.00.

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

ARBITRATION PANEL

Peter J. Dale, Esq.	-	Public Chairperson
Ronald W. Cornew	-	Public Panelist
Bernard N. Roth	-	Industry Panelist

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Arbitrator's Signature


Peter J. Dale, Esq.

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Arbitrator's Signature



Ronald W. Cornew

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Arbitrator's Signature

A handwritten signature in dark ink, appearing to read "Bernard N. Roth", written over a horizontal line.

Bernard N. Roth

Date of Decision: June 20, 1994