

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimant(s)

Michael LeVine  
Filet Products, Inc.  
Filet Menu, Inc.

NASD Arbitration  
No. 93-03328

Name of Respondent(s)

Kayne, Anderson & Co., Inc.  
David DeWind

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REPRESENTATION

For Claimants: Paul M. Krueger, Esq., Barry And Krueger, Beverly Hills, California

For Respondents: Stephen Young, Esq. and Jill E. Olofson, Esq., Keesal, Young & Logan, Long Beach, California

CASE INFORMATION

Amended Statement of Claim filed: August 20, 1993

Claimants' Submission Agreements signed: March 23, 1995

Joint Statement of Answer filed by Respondents: February 18, 1994

Respondents did not file Submission Agreements. 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):

March 14, 1995 (one session)

Hearing Date(s)/Session(s): July 11, 1995 (two sessions)

July 12, 1995 (two sessions)

Hearing Location:

Los Angeles, California

### CASE SUMMARY

Claimants alleged that the above-captioned matter was filed by Michael LeVine (LeVine), individually and as President/Trustee for Filet Products, Inc. and Filet Menu, Inc. (Filet) against Respondents for negligent misrepresentation, intentional misrepresentation, breach of fiduciary duty, breach of contract and money had and received. Claimants further alleged that at the time LeVine entered into the customer agreement with Kayne, Anderson & Co., Inc., he informed Respondent David DeWind (DeWind) that he was interested in safe and secure investments, including money market funds; that DeWind informed LeVine that he would indeed invest the monies on behalf of the pension plan in safe and secure investments, solely money market funds; that DeWind did not invest Filet's monies in safe and secure investments but instead, he invested in high risk stocks and securities causing LeVine's initial One Million Two Hundred Thousand Dollar investment to decrease to Eight Hundred Thousand Dollars, a loss of Four Hundred Thousand Dollars.

Respondents denied generally and specifically each and every allegation of wrongful, improper, or actionable conduct set forth in the Amended Statement of Claim, and further denied any liability to Claimants for damages in any amount. Respondents alleged that the allegations in Claimants' Amended Statement of Claim can be broken down into three series of events and that Respondents have more than compensated Claimants for losses arising out of the first two events in question, although they were not required to do so under any law. As to the third event in dispute, Respondents alleged that they cannot be liable as a matter of law, and that Claimants' losses arising out of this third dispute are wholly attributable to the October 1987 stock market crash, and thus could not have been anticipated or prevented. Respondents further

alleged that the investments in question were consistent with Claimant LeVine's stated investment objective and were purchased at his express direction; that Claimant LeVine was in frequent contact with DeWind who repeatedly apprised Mr. LeVine of the status of his accounts; and that contrary to Claimant LeVine's allegations, Mr. LeVine never requested that his money be invested in a money market fund until after the October 1987 stock market crash. Respondents also asserted affirmative defenses.

#### RELIEF REQUESTED

Claimants requested a return of the principal amount of Four Hundred Thousand Dollars (\$400,000.00) plus interest at the legal rate on that sum from October 1987 to the present, plus loss of interest on the entire One Million Two Hundred Thousand Dollar (\$1,200,000.00) investment for the period of time that the monies were not invested in money market funds. In addition, Claimants requested recovery of costs, and attorneys fees in an amount to be determined at hearing.

Respondents requested:

1. Dismissal of Claimants' Claim;
2. That Claimants take nothing by way of their Claim;
3. Costs and expenses incurred in defending against the Claim; and
4. Such other relief as the panel deems just and proper.

#### OTHER ISSUES CONSIDERED AND DECIDED

Claimants' claims were originally filed in the Superior Court of the State of California, County of Los Angeles, Case No. BC 008946. Claimants' claims were submitted to arbitration pursuant to stipulation by the parties and order staying the court proceedings pending the outcome of the NASD arbitration.

Prior to the evidentiary hearing, the panel of arbitrators reviewed and considered the positions of the parties relative to Respondents' Motion to Dismiss. The panel denied Respondents' Motion without prejudice to the parties' presentation of additional evidence and arguments on statute of limitations issues at the evidentiary hearing.

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 motions, 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. All claims by Claimants, including any claim for punitive damages, are dismissed.

2. The parties shall each bear their respective costs including attorney's fees.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall retain the \$750.00 hearing session deposit previously deposited by the Claimants. Forum fees are to be split between the parties and are calculated as follows:

One pre-hearing session @ \$300.00/session	=	\$ 300.00
Four hearing sessions @ \$750.00/session	=	<u>\$3,000.00</u>
Total fees assessed	=	\$3,300.00
 Claimants' share (50%)	=	\$1,650.00
Credit for hearing deposit	=	\$ 800.00
Balance due	=	\$ 850.00
 Respondents' share (50%)	=	\$1,650.00
Balance due	=	\$1,650.00

Claimants are also assessed \$750.00 in connection with the adjournment of the September 20-21, 1994 hearing dates.

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

**ARBITRATORS**

Name ..... Public / Industry

Thomas M. Adams, Esq.

Public Arbitrator

Louis R. Eglash, Esq.

Public Arbitrator

Luis R. Ruiz

Industry Arbitrator

**Concurring Arbitrators' Signatures**

Thomas M. Adams

Thomas M. Adams, Esq.

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Louis R. Eglash, Esq.

\_\_\_\_\_  
Luis R. Ruiz

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

Date Served: 8/22/95

**ARBITRATORS**

Name ..... Public / Industry

Thomas M. Adams, Esq.

Public Arbitrator

Louis R. Eglash, Esq.

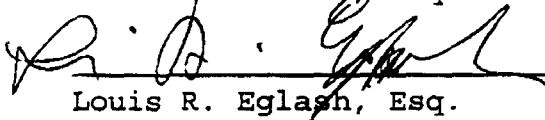
Public Arbitrator

Luis R. Ruiz

Industry Arbitrator

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Louis R. Eglash, Esq.

\_\_\_\_\_  
Luis R. Ruiz

Date of Decision:

8-16-95

Date Served: 8/22/95

**ARBITRATORS**

Name ..... Public / Industry

Thomas M. Adams, Esq.

Public Arbitrator

Louis R. Eglash, Esq.

Public Arbitrator

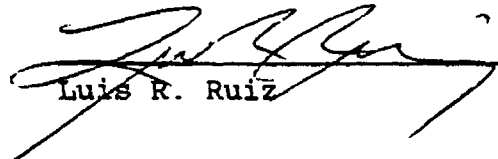
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Louis R. Eglash, Esq.

  
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Luis R. Ruiz

Date of Decision:

8-1-95

Date Served: 8/22/95