

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Fernando A. Kern & Reynalda E. Kern

93-03367

Name of Respondents

First Gateway Securities, Inc.;
James J. Gilmartin

REPRESENTATION

For Claimants: Fernando A. Kern and Reynalda E. Kern were represented by H. Clay Billingsley, Esq., of Klutho, Cody & Kilo, P.C., located in St. Louis, Missouri.

For Respondents: First Gateway Securities, Inc. was represented by David L. Schenberg, Esq. of Peper, Martin, Jensen, Maichel & Hetlage, located in St. Louis, Missouri.

Respondent James J. Gilmartin was represented by Robert L. Devereux, Esq. of Guilfoil, Petzall & Shoemaker, located in St. Louis, Missouri; and James Sauter, Esq. of Deeba Sauter Herd, located in St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed: August 26, 1993.

Claimants' Submission Agreement signed on: August 23, 1993.

Statement of Answer filed by Respondent James J. Gilmartin on: December 20, 1993.

Respondent James J. Gilmartin's Submission Agreement signed on: January 10, 1994

Respondent First Gateway Securities filed a Statement of Answer consisting of account documents on: October 12, 1993.

Respondent First Gateway Securities' Submission Agreement signed on: October 12, 1993 by Kenneth K. Kays, President, First Gateway Securities, Inc..

Claimants' Amendment By Interlineation of Statement of Claim filed on June 6, 1994.
Claimants' Second Amendment By Interlineation of Statement of Claim filed: July 25, 1994.
Respondent James J. Gilmartin's Motion to Strike Claimants' Second Amendment was filed on July 22, 1993

HEARING INFORMATION

Pre-Hearing Conference: March 4, 1994 for one session with NASD staff.
Hearing Date/Sessions: July 28, 1994 for Two (2) sessions.
Hearing Location: Saint Louis, Missouri

CASE SUMMARY

Claimants Fernando A. and Reynalda E. Kern alleged that Respondents Gateway Securities and James J. Gilmartin misrepresented the nature and risks of recommended investments and advised Claimants to purchase unsuitable securities. Claimants specifically alleged that:

1. Gilmartin and Gateway Securities made false statements of material fact and material omissions in the opening of a margin account for Claimants by failing to properly disclose the risks of margin trading. Respondents made further misrepresentations by promising specific investment results which could not be assured;
2. Respondents' investment recommendations of high-risk stocks on margin were unsuitable considering the financial and investment needs of Claimants;
3. Between October 1991 and February 1992 Respondents engaged in excessive trading, or "churning", by purchasing securities with a total purchase price of \$138,352.95, when the account had an average equity value of \$86,979.89;

4. When opening the margin account, Respondents failed to disclose the financial terms of margin credit, and failed to explain the conditions under which interest would be imposed, what interest rate would be used, and the method of computing the rate;

5. Respondent Gilmartin, as a fiduciary recommending investment advice, ignored a conflict of interest and induced Claimants to enter a real estate construction contract with an affiliate of Respondent, Gilmartin Brothers, Inc. Gilmartin also advised Claimants to use proceeds generated from the securities investments to pay alleged liabilities falling due under the real estate contract. Gilmartin Brothers, Inc. breached the contract and the matter is the subject of pending litigation; and

6. Gilmartin also was not honest and forthright with Claimants when asked many times about the status of their investments.

Based on the above allegations, Claimants Fernando A. and Reynalda E. Kern asserted the following claims: fraud pursuant to Section 10 of the Securities Exchange Act of 1934, the Missouri Uniform Securities Act and the common law; suitability violations; excessive trading, or "churning"; violation of federal margin disclosure regulations; breach of fiduciary duty; breach of duty to supervise; breach of contract; and negligence.

Respondent Gilmartin denied each and every allegation in the Statement of Claim. Gilmartin alleged that all trades were made with the full knowledge and consent of Claimants and that the opening of a margin account was consistent with the investment goals and objectives of Claimants.

RELIEF REQUESTED

Claimants requested an award for actual damages against Respondents Gilmartin and First Gateway, jointly and severally, in the amount of approximately \$12,000.00; for interest at the rate of 9% per annum from and after March 1, 1992; for attorneys fees; and for other such relief as the Panel deems necessary.

Respondents requested that an award be granted in favor of Respondents to compensate for attorneys fees and all other expenses Respondents will incur as a result of defending the claim.

OTHER ISSUES CONSIDERED & DECIDED

On July 27, 1994, Claimants Fernando A. and Reynalda Kern dismissed, with prejudice, their Statement of Claim against only First Gateway Securities, Inc. Claimants and First Gateway agreed to bear and pay their own respective costs incurred as a result of the action.

Claimants filed an Amendment by Interlineation of Statement of Claim on June 6, 1994. In it Claimants revised their amount of actual damages from \$26,874.68 to \$5,549.21. The Panel granted the Motion to reduce the claim on July 6, 1994.

Claimants filed a Second Amendment by Interlineation of Statement of Claim on July 25, 1994. Claimants again revised the amount of actual damages to approximately \$12,000. Respondent filed a Motion to Strike Claimants' second amendment. The Panel granted Claimants' request on July 25, 1994.

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 originals remain on file with the NASD.

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. Respondent James J. Gilmartin is liable for and shall pay to Claimants Fernando A. Kern and Reynalda E. Kern the sum of \$2,161.74 as actual damages, plus interest at the rate of Nine (9%) percent per annum from the date of service of this award until the sum is paid in full;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) hearing sessions x \$500.00 per session = \$1,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$150.00 claim filing fee and the \$500.00 hearing session deposit previously deposited by the Claimants, Fernando A. Kern and Reynalda E. Kern. Respondent James J. Gilmartin is liable for and shall pay to the NASD the sum of \$500.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Keith D. Patten, Esq.
Keith D. Patten, Esq.
Public Arbitrator
Chairperson

November 15, 1994

/s/ M. Peter Lux
M. Peter Lux
Public Arbitrator

December 7, 1994

/s/ Cheryl Cook-Schneider, Esq.
Cheryl Cook-Schneider, Esq.
Industry Arbitrator

November 15, 1994

For NASD Use Only
Date of Decision: December 7, 1994