

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

William M. McCarty and Janice E. McCarty

93-03486

Name of Respondents

Kathleen C. Peer
Kavanaugh Securities, Inc.
Commonwealth Equity Services, Inc.

REPRESENTATION

For Claimant: Roland M. Cavalier, Esq. of Harris Beach & Wilcox located in Albany, New York.

For Respondents: Thomas G. Nicholson, Esq. of Finneran & Nicholson, P.C. located in Newburyport, Massachusetts.

CASE INFORMATION

Statement of Claim filed: September 7, 1993.

Claimant's Submission Agreement signed on: March 25, 1993.

Statement of Answer, Counter-Claim and Cross-Claim filed by Respondent Commonwealth Equity Services, Inc. ("Commonwealth") on: November 10, 1993.

Statement of Answer filed by Respondent Kathleen C. Peer ("Peer") on: December 9, 1993.

Respondent Commonwealth's Submission Agreement signed on: November 10, 1993.

Respondent Peer's Submission Agreement signed on: December 8, 1993.

Notice filed by Respondent Commonwealth of voluntary dismissal of cross-claim against co-defendant Peer on: December 12, 1993.

Respondent Kavanaugh Securities, Inc. filed notice on July 5, 1994 that it filed its Chapter 11 Bankruptcy petition on January 29, 1993.

HEARING INFORMATION

Hearing Dates / Sessions: September 27, 1994 / 2 Sessions.
 September 28, 1994 / 2 Sessions.
 November 8, 1994 / 2 Sessions.
 November 9, 1994 / 2 Sessions.
 November 10, 1994 / 2 Sessions.
 December 28, 1994 / 3 Sessions.
 December 29, 1994 / 3 Sessions.
 December 30, 1994 / 2 Sessions.
 February 18, 1995 / 3 Sessions.
 February 19, 1995 / 3 Sessions.

Hearing Location: Desmond Americana located at 660 Albany-Shaker Road, Albany, New York.

CASE SUMMARY

Claimants alleged that Respondent Peer was an associated person of Respondents Commonwealth and Kavanaugh Securities, Inc. ("Kavanaugh") and that Respondent Commonwealth is the successor in title and interest to Respondent Kavanaugh. Claimants further alleged that, based upon Respondent Peer's recommendations, they purchased interests in ten (10) limited partnerships over a period dating from December 19, 1986 to December 13, 1991.

Claimants alleged that Respondents established a contractual relationship with the Claimants through various application, subscription and written agreements, and that Respondents breached their contractual duty of good faith and fair dealing practices and their contractual duty to assure that the best financial interests of Claimants were taken into account at all times. Claimants also alleged that Claimants at all times complied with the entirety of their contractual obligations.

Claimants alleged Respondents Commonwealth and Kavanaugh breached their fiduciary obligations to act with honesty, fairness and good faith dealing in all business matters. Claimants alleged that Respondents Commonwealth and Kavanaugh negligently, recklessly, willfully, knowingly and intentionally breached their fiduciary duties to the serious detriment of the Claimants and their retirement portfolios. Claimants further alleged that Respondents Commonwealth and Kavanaugh violated Sections 2 and 27 of Article III of the NASD Manual Rules of Fair Practice by, respectively, permitting Respondent Peer to knowingly engage in the sale of unsuitable securities and by failing to have in place a system of supervisory procedures.

Claimants alleged that Peer executed excessive trades of high-risk, unsuitable securities with the primary objective of generating commissions for her own benefit and that she failed to properly research these investments. Claimants further alleged that Peer engaged in inappropriate and unsuitable limited partnership trading and that she failed to disclose the hazardous nature of this trading to Claimants. Claimants also alleged that Peer failed to take into account Claimants' ability to take advantage of certain tax benefits associated with certain limited partnerships and instead solicited purchases of limited partnerships that lacked such advantages. Claimants further alleged that Respondents Commonwealth and Kavanaugh knowingly, recklessly and intentionally misrepresented the fair market value of the limited partnerships that formed the substance of this dispute.

Claimants next alleged reliance upon the actual and constructive ongoing misrepresentations of the Respondents Commonwealth and Kavanaugh to their detriment with respect to both the evaluations of the limited partnerships and to the McCarty's expectation that their retirement securities were being managed in a professional manner. Claimants alleged that Respondents Commonwealth and Kavanaugh knowingly, intentionally and recklessly failed to advise them that their retirement securities were not being managed in accordance with their needs and that Respondents intentionally and continually omitted to appraise Claimants that their accounts were sustaining catastrophic financial losses by way of diminution in value of the limited partnerships in question.

Claimants alleged that Respondents breached their duty to safeguard their monies from waste, dissipation, speculation and mismanagement, and that such breach caused their financial losses. Claimants alleged that Peer, with awareness on the part of respondent corporations, continually represented to Claimants that their investments were being managed in a professional manner when in fact Respondents knew that this was not the case. The seventh cause of action was for securities brokerage malpractice. Claimants alleged that Respondent corporations held out Peer as a fully licensed professional and that Respondents' breach of professional responsibility led to Claimants' damages.

Claimants further alleged that Respondents purchased highly speculative and unsuitable securities contrary to the Claimants' known investment needs with the sole motivation of generating commissions.

Claimants alleged that Peer maintained her exclusive licensure with Respondents Commonwealth and Kavanaugh at all relevant times and therefore Respondents Commonwealth and Kavanaugh imbued Peer with implied, actual and apparent authority to act as an authorized agent. As a result, Commonwealth and Kavanaugh were bound as principals to each and every act with respect to the limited partnerships that form the gravamen of this dispute. Claimants alleged that at all times relevant, Peer was acting within the scope of her employment as agent, servant and employee of Respondents Commonwealth and Kavanaugh, who are therefore responsible for the entirety of the losses sustained by Claimants.

Respondent Peer answered by either denying, or denying sufficient information to admit or deny, each of the ten allegations set forth in Claimants' Statement of Claim. Peer also maintained the following nine (9) affirmative defenses: (1) Claimants failed to state a cause of action upon which relief could be granted; (2) Claimants failed to fully disclose all of the investments made through Peer and that Claimants intentionally misrepresented the performance of said investments; (3) That Peer at no time exercised independent investment authority for the Claimants; (4) That damage, if any, sustained by Claimants was the result of acts, actions, errors, omissions and/or misrepresentations of third parties over which Peer had no control; (5) That Claimants were provided with all relevant information on the suitability of investments made by Claimants and that Claimants made all decisions regarding the purchase of said investments; (6) That some or all of the Claimants' claims were barred by applicable statutes of limitations; (7) That Peer at all times exercised the requisite care and diligence in dealing with Claimants and was at all times in full compliance with all applicable securities laws and NASD rules and regulations; (8) That Claimants were aware at all times of the various investments complained of and that full disclosure was made by the General Partners of said investments directly to Claimants; and, (9) That the damage complained of was the result of acts or forces beyond the control of Peer and for which Peer was not responsible.

Respondent Commonwealth maintained that Peer was at all times after July 6, 1992 an independent contractor and not an employee or agent of Commonwealth and that, although it was not bound to defend this case on the merits, maintained that it had no reason to believe that Peer acted in a non-professional manner. Commonwealth denied all items in the Statement of Claim except that Commonwealth was at all times a member of the NASD and that Peer was a Registered Representative of Commonwealth from and after July 6, 1992 (noting in summary that the actions complained of occurred prior to this time). Commonwealth also maintained the following ten (10) affirmative defenses: (1) That Claimants failed to state any claim upon which relief could be granted; (2) That Commonwealth has no joint and several or successor liability with respect to any other Respondents for any matters complained of; (3) That the Claims made are barred by applicable state and Federal statutes of limitations; (4) That Commonwealth did not misrepresent a material fact or fail to present a material fact necessary to make any offering material not misleading for any of the investments made by the Claimants during the period for which Commonwealth was responsible for supervising Peer; (5) That all of the investments complained of were suitable for, and the risks fully disclosed to, the Claimants; (6) That any damages sustained by the Claimants were the result of actions or omissions over which none of the Respondents had any control; (7) That Commonwealth is not liable as principal for the acts or omissions of Peer, who is not an agent of Commonwealth; (8) That Claimants have failed to fully disclose all investments made by them during relevant periods and that Claimants intentionally misrepresented the performance of the investments complained of; (9) That at no time did Commonwealth or Peer have any discretionary authority or control over any investment made by Claimants, that the Claimants were provided with all relevant information relative to the purchasing of their investments, and that Claimants made all the decisions relevant to purchasing the investments; and, (10) That Commonwealth at all times exercised the required

supervision and control of Peer pursuant to SEC, NASD, and New York laws and regulations.

RELIEF REQUESTED

Claimants requested:

1. Out-of-pocket damages in the amount of \$500,000.
2. Compensatory damages (including lost opportunity, emotional harm, lost interest, NASD filing, forum and arbitrator's fees, attorney's fees and the cost of proceedings) in the amount of \$250,000.

Respondent Peer requested:

1. Judgment by way of contribution from Kavanaugh including Peer's costs and attorney's fees.

Respondent Commonwealth requested:

1. Judgment on its counterclaim against Claimants.
2. Judgment by way of indemnification and/or contribution, including all costs, against Peer.
3. Judgment by way of indemnification and/or contribution, including all costs against Kavanaugh.

OTHER ISSUES CONSIDERED & DECIDED

During the first hearing session the panel granted Respondents' motion, pursuant to Section 15 of the NASD Code of Arbitration Procedure, to dismiss Claimants' claims with respect to the 595 Investors investments in both accounts. The panel granted Claimants' motion to add three (3) additional limited partnership investments, Diversified Investors V, Coral Oaks and DMC Regency Residence Limited, to their statement of claim.

Respondent Commonwealth counterclaimed against Claimants for all costs and expenses and recovery on any cross-claims, including direct costs of travel, investigation, reasonable experts and attorneys fees and for all indirect costs including allocated time and overhead of executive and other personnel.

Respondent Commonwealth cross-claimed against Respondent Peer for all costs by way of indemnification and/or contribution. This cross-claim was voluntarily dismissed on December

12, 1993.

Respondent Commonwealth cross-claimed against Respondent Kavanaugh for all costs by way of indemnification and/or contribution.

Claimants and Respondents agreed during the hearings to dismiss their claims with prejudice against Respondent Commonwealth and Commonwealth was stipulated out of the arbitration on December 29, 1994.

Respondent Kavanaugh filed with the NASD notice that Kavanaugh filed a Chapter 11 petition on January 29, 1993 and was accordingly removed as a Respondent Party to the arbitration.

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 Peer and Kavanaugh are jointly and severally liable and shall pay to Claimants the sum of \$101,000.00.
2. All other Claims are hereby denied.

FORUM FEES

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

24 sessions X \$1,000 = \$24,000 minus hearing session deposit of \$1,000 = net \$23,000 due.

Forum fees Assessed Against:

1. Claimant is assessed the sum of \$9,600.00 which represents 40% of the total forum fees due, less \$1,000.00 hearing session deposit paid by Claimant, leaving \$8,600.00 due. Claimant is liable and shall pay to the NASD the sum of \$8,600.00.
2. Respondents Peer and Kavanaugh are assessed the sum of \$14,400.00 which represents 60% of the total forum fees due. Respondents Peer and Kavanaugh are liable jointly and severally and shall pay to the NASD the sum of \$14,400.00.

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

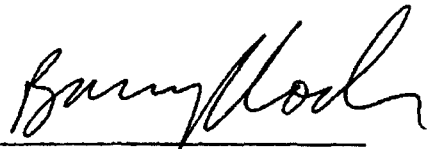
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NASD Award #93-03486

Concurring Arbitrators' Signatures

Name

Public Chairperson



Barry M. Koch, Esq.

Name

Public Panelist

Michael S. Durham

Name

Industry Panelist

Robert A. Foy, Esq.

Date of Decision: August 14, 1995

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Barry M. Koch, Esq.

Name

Public Panelist

A handwritten signature in black ink, appearing to read "Michael S. Durham", written over a horizontal line.

Michael S. Durham

Name

Industry Panelist

Robert A. Foy, Esq.

Date of Decision: August 15, 1995

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Public Chairperson

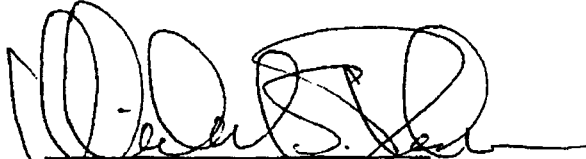
"I, Barry Koch, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter."

Barry M. Koch, Esq.

Name

Public Panelist

"I, Michael S. Durham, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter."



Michael S. Durham

Name

Industry Panelist

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Robert A. Foy, Esq.

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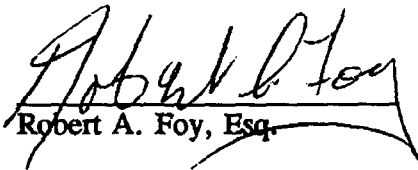
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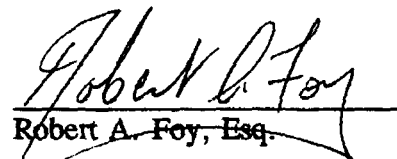
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Michael S. Durham

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Industry Panelist

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Robert A. Foy, Esq.

Date of Decision: August 14, 1995