

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Kemper Securities, Inc.,

Claimant/Counterrespondent,

v.

No. 93-04983

John Holland,

Respondent/Counterclaimant.

REPRESENTATION OF PARTIES

Claimant Kemper Securities, Inc. ("Claimant") were represented by William D. Nelson, Esq., of Robinson, Waters, O'Dorsio and Rapson, Denver, Colorado.

Respondent John Holland ("Holland") appeared at the hearing, and was assisted by Martin Kass, J.D., Phoenix, Arizona.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about November 29, 1993. Claimant's Submission Agreement was signed on November 23, 1993. Claimant's Reply to Counterclaim was filed on or about June 13, 1994.

Holland's Answer and Counterclaim was filed on or about June 22, 1994. Holland's Submission Agreement was signed on May 10, 1994.

HEARING INFORMATION

Hearing date: December 8, 1994. Two (2) sessions.

Hearing Location: Scottsdale, Arizona.

CASE SUMMARY

Claimant stated that in connection with Holland's employment with Claimant, on or about November 25, 1988, Holland executed a memorandum of Understanding and Promissory Note (collectively the "Note") payable to Boettcher Investment Corporation in the principal sum of \$124,481.00. Claimant further stated that the Note provided that the remaining principal of the Note would become immediately due and payable, without notice or demand, if Holland's employment ceased or terminated for any reason prior to the due date on the Note. Claimant next stated that Holland voluntarily resigned from Claimant on August 13, 1993. The due date on the note is November 25, 1994. Claimant asserted that as of the date of filing of the Statement of Claim, Holland has, despite

demand, failed and has refused to pay the principal balance of \$41,767.00. Claimant also asserted that Holland received commissions on several managed accounts for the full year, even though he resigned and was not employed the full year with the Claimant. Lastly, Claimant denied the allegations set forth in Holland's Counterclaim.

Holland denied all of the allegations of the Statement of Claim not specifically admitted in his Answer. Holland also asserted the following affirmative defenses:

1. Claimant's Statement of Claim fails to state a claim upon which relief can be granted.
2. The parties entered into an accord and satisfaction which discharged the Note in its entirety.
3. Claimant is estopped from proceeding with collection of the Note because it was forgiven in full and therefore deemed paid in full.
4. Holland is entitled to an offset against any sums alleged to be due and owing under the Note. The Note provides for an offset of any amounts owed by Boettcher to employee including commissions or compensation owed to Holland as a result of his employment.
5. Claimant's claims are barred by the doctrines of unclean hands and bad faith.

Holland also asserted a Counterclaim which alleged the following against Claimant: Negligent misrepresentation in relation to the Note and the Deferred Compensation Plan; and unjust enrichment relating to the Deferred Compensation Program.

RELIEF REQUESTED

Claimant requested that the Arbitrators enter an award against Holland as follows:

1. \$41,767.00 for the outstanding principal balance on the Note;
2. \$6,048.56 for reimbursement of commissions received on managed accounts;
3. Interest on the outstanding principal balance at the specified rate per annum from August 13, 1994, until paid; and
4. All costs and expenses incurred by Claimant in connection with the enforcement of the Note, including the NASD filing fee and attorneys' fees.

Claimant also requested that the Counterclaim be dismissed in their entirety.

Holland requested that the Panel award him the following relief:

1. The entire amount of Holland's deferred compensation account plus accrued interest;
2. Damages attributable to Claimant's misrepresentations concerning the Note;
3. All amounts wrongfully withheld by Claimants to which Holland is otherwise entitled; and
4. An Order Dismissing Claimant's Statement of Claim.

OTHER ISSUES CONSIDERED & DECIDED

On or about June 6, 1994, Claimant filed a Motion, pursuant to Section 25 of the NASD Code of Arbitration Procedure (the "Code") to Strike the Answer and Counterclaim of Holland as untimely. Holland filed his response to the motion on or about June 8, 1994. After the undersigned panel was appointed, the arbitrators considered the motion and response. After deliberation, the panel denied Claimant's Motion to Strike.

The parties have agreed that the Award in this matter may be executed by 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 original(s) 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. Claimant Kemper Securities, Inc.'s claims are, and each of them, denied and dismissed with prejudice.
2. Respondent John Holland's counterclaims are, and each of them, denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully below.

FORUM FEES

Pursuant to Section 44(c) of the Code, the following forum fees are assessed:

2 hearing sessions @ \$600.00 per session = \$1,200.00

Pursuant to Section 44(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$500.00, and shall retain the hearing session deposit in the amount of \$600.00 previously paid to the NASD by the Claimant.

Pursuant to Section 44(c) of the Code, the NASD shall retain the nonrefundable Counterclaim filing fee in the amount of \$500.00, and shall retain the Counterclaim hearing session deposit in the

amount of \$600.00 previously paid to the NASD by the Respondent/Counterclaimant.

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

CONCURRING ARBITRATORS

Dated:

Name:

December 23, 1994

Mark Leibsohn /s/
Mark Leibsohn
Presiding Chair
Industry Arbitrator

December 22, 1994

Marc Faigus /s/
Marc Faigus
Industry Arbitrator

December 22, 1994

James M. Rapisarda /s/
James M. Rapisarda
Industry Arbitrator

Date of Service by the NASD: _____