

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Stuart Schwartz, as an Individual,
Stuart Schwartz, as Trustee/Restated
Profit Sharing, Stuart Schwartz C.F./Robin Schwartz,
Stuart Schwartz C.F./Rachel Schwartz
Stuart Schwartz C.F./Julie Schwartz, and
Stuart Schwartz, Conservator/Estate of Rachel Schwartz
Claimants,

v.

No. 93-05264

Kennedy, Cabot & Company,
Brock Cooper, and
Mark Fink
Respondents

REPRESENTATION OF PARTIES

Claimants Stuart Schwartz, an Individual, Stuart Schwartz, as Trustee/Restated Profit Sharing, Stuart Schwartz C.F./Robin Schwartz, Stuart Schwartz C.F./Rachel Schwartz Stuart Schwartz C.F./Julie Schwartz, and Stuart Schwartz, Conservator/Estate of Rachel Schwartz ("Claimants") were represented by Bruce Garfield of Investors Arbitration Services, Los Angeles, California.

Respondent Mark Fink ("Fink") appeared pro se.

Respondent Kennedy Cabot & Company ("KCC") and Respondent Brock Cooper ("Cooper") were represented at the hearing by George Kupper, Esq., of Kennedy Cabot & Company, Los Angeles, California. Prior to the hearing, Cooper had represented himself.

CASE INFORMATION

Claimants' Statement of Claim was filed on or about November 29, 1993. Claimants' Submission Agreements were signed on November 23, 1993, and February 3, 1994.

Respondent KCC's Answer was filed on or about April 29, 1994. Respondent's Submission Agreement was signed on March 14, 1994.

Respondent Cooper's Answer was filed on or about April 13, 1994. Respondent Cooper's Submission Agreement was signed on April 13, 1994.

Respondent Fink's Answer was filed on or about April 12, 1994. Respondent Fink's Submission Agreement was signed on April 12, 1994.

HEARING INFORMATION

Pre-Hearing conference
date: January 25, 1995. Two (2) sessions.

Hearing dates: February 7, 1995. Two (2) sessions.
February 8, 1995. Two (2) sessions.

Hearing Location: Scottsdale, Arizona.

CASE SUMMARY

Claimants, alleged that Respondents KCC, Fink, and Cooper: Breached thier contract with the Claimants; made unsuitable investments; violated the Rules of the various Exchanges; violated the customes and usages of the industry; violated Arizona law and/or Federal law; failed to supervise Claimants' accounts; used Claimants' funds in an improper manner; breached their fiduciary duties owed to the Claimmants; perpetrated fraud upon the Claimants under the provisions of the Arizona common law, and/or corporate securities laws, rules and regulations, anr/or federal laws, rules and regulations, including, without limitation, Rule 10b-5; and through their actions, committed negligence. The allegations arose out of transactions in Continental Airlines, Incc., Third Priority Secured Equipment Bonds in each of the accounts involved in this arbitration.

For his Answer, Cooper , unless specifically admitted therein, denied the allegations contained in the Statement of Claim. Cooper asserted that at the time Claimants purchased the Continental bonds, it looked like a viable investment. Cooper further asserted that no one could have forseen the downturn in the economy, the Gulf War, or the collapse in the airline industry. Cooper also asserted that Claimants were given adequate information to make an informed investment decision, and that Claimants chose the "thirds" over the "first" and "seconds" because of the higher coupon rate. Additionally, Cooper asserted the following points: Stuart Schwartz is a sophisticated investor; Claimants, Kennedy, Cabot and Cooper all felt that the Contental Airlines secured equipment Trust Certificates were a suitable investment; the bonds matched the risk tolerance, rate of return, and investment objective Claimants were looking for and had matched Claimants' prior trading pattern; and Cooper had provided Claimants with the most up-to-date information and had provided Claimants with the trustees phone number so that Claimants could make their own independent inquiry as to the status of the bonds.

In his Answer, Fink denied the allegations contained in the Sstatement of Claim. Fink further asserted that the Claimants presented a misleading claim involving conversations that never occurred with people who were no longer working for the firm. Fink

further asserted that he neither solicited the Claimants business, nor did he give the Claimants advice as to the outcome of their investments. Fink also asserted that the Claimants failed to mention that the price of their bonds had already fallen to 11 cents on the dollar before the time of Claimants' alleged conversation with him. Lastly, Fink asserted that Claimants failed to state that after Continental went into bankruptcy, their bonds were almost worthless.

In its Answer, unless specifically admitted therein, KCC denied each and every allegation contained in the Statement of Claim. Additionally, Respondent asserted the following points: Claimant attempted to place all of the blame for his losses on two brokers, one whom never sold nor advised him to buy or sell securities (Fink) and by blaming the other broker (Cooper) who left the business before any perceptible loss had occurred; Claimants had the number of the trustee for the Continental bonds and was encouraged to call him and keep abreast of the appraisal value; the

the Garn-St. Germain Depository Institutions act of 1982, the Tax Reform Act of 1986; the collapse of Drexel, Burnham, Lambert, and the Gulf War, and the Financial Institution Reform, Recovery and Enforcement Act of 1989 all played major roles in the unforeseen events which lead to the collapse of the high yield bond market; and Stuart Schwartz could have gotten out of his position at any time, but voluntarily chose not to do so in violation of his fiduciary duty as a conservator, custodian, and trustee to the respective accounts.

RELIEF REQUESTED

Claimant requested

Fink requested that his name be dropped as a Respondent from this arbitration.

Cooper requested that he be dismissed from the case and any forum fees or other costs in connection with this arbitration be levied against the Claimant for abuse of process.

KCC requested that all claims be dismissed. Respondent further requested an award against the Claimants of all forum fees and any other costs or attorney's fees be dismissed for their intentionally misleading the arbitrators in the naming of innocent Respondents.

OTHER ISSUES CONSIDERED & DECIDED

On or about February 3, 1995, Respondent Fink filed a Motion to Dismiss the Statement of Claim. After review of the motion, Claimants' response, Fink's Reply, and deliberation, the arbitrators denied the motion.

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 Stuart Schwartz, as Conservator/Estate of Rachel Schwartz's claims are, and each of them, denied and dismissed with prejudice.
2. Respondents Kennedy, Cabot & Company, Brock Cooper, and Mark Fink are found jointly liable to Claimants Stuart Schwartz, as an Individual, Stuart Schwartz, as Trustee/Restated Profit Sharing, Stuart Schwartz C.F./Robin Schwartz, Stuart Schwartz C.F./Rachel Schwartz Stuart Schwartz C.F./Julie Schwartz. The arbitrators find that Respondents were one-third (1/3) negligent, and find that Claimants are two-thirds (2/3) negligent. The arbitrators further find that Respondents Mark Fink and Brock Cooper are indemnified by Respondent Kennedy, Cobot & Company. Therefore, the undersigned arbitrators award damages in the amount of \$38,991.00, together with interest in the amount of \$19,496 for a total award of \$58,487.00. The award is to be paid by Respondent Kennedy, Cabot & Company.

OTHER COSTS

All parties shall bear their own costs and expenses associated with this arbitration, except as set forth more fully below.

Each party shall bear an equal amount of the forum fees as assessed below.

FORUM FEES

Pursuant to Section 43/44(c) of the Code, the following forum fees are assessed:

- 1 pre-hearing conference sessions x \$300.00 = \$300.00
- 4 hearing sessions x \$750.00 = \$3,000.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$200.00, and shall retain the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimant.

Pursuant to Sections 30(b) and 43(c) of the Code, the NASD shall retain the postponement fee in the amount of \$750.00 previously paid by Respondent Kennedy, Cabot & Company.

Additional forum fees in the amount of \$75.00 are assessed against The Claimants.

Additional forum fees in the amount of \$825.00 are assessed against Respondent Kennedy, Cabot & Company.

Additional forum fees in the amount of \$825.00 are assessed against Respondent Brock Cooper.

Additional forum fees in the amount of \$825.00 are assessed against Respondent Mark Fink.

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

CONCURRING ARBITRATORS

Dated:

Name:

February 17, 1995

Howard R. Gaines /s/
Howard R. Gaines
Presiding Chair
Public Arbitrator

February 20, 1995

Melvin H. Borovay /s/
Melvin H. Borovay
Public Arbitrator

February 22, 1995

James D. Koster /s/
James D. Koster
Industry Arbitrator

2-22-95