

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Rob Kimbrough, Glenn Mocek and Meleesa Mocek

and

NASD Case Number 94-00838

Oppenheimer & Company, Inc. and Kip Herriage

REPRESENTATION OF PARTIES

Claimants, Rob Kimbrough, Glenn Mocek and Meleesa Mocek, were represented by Gary S. Gunn, Esq. of Gunn & Holt, P.C. located in Houston, Texas.

Respondents, Oppenheimer & Company, Inc. and Kip Herriage, were represented by Michelle Murphy, Esq. and Eugene Small, Esq. of Oppenheimer & Company, Inc. located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about March 3, 1994.

The Submission Agreement of Claimant, Rob Kimbrough, was signed on February 17, 1994. The Submission Agreement of Claimant, Glenn Mocek, was signed on February 17, 1994. The submission Agreement of Claimant, Meleesa Mocek, was signed on February 22, 1994.

The Joint Statement of Answer was filed by Respondents, Oppenheimer & Company, Inc. and Kip Herriage, on or about May 6, 1994.

The Submission Agreement of Respondent, Oppenheimer & Company, Inc., was signed on May 6, 1994 by John McGuire, Managing Director of Oppenheimer & Company, Inc.

HEARING INFORMATION

The hearing was held on August 15 and 16, 1995 in Houston, Texas for a total of five (5) sessions.

CASE SUMMARY

In their Statement of Claim, Rob Kimbrough ("Kimbrough"), Glenn Mocek and Maleesa Mocek ("Mocek") alleged that Oppenheimer & Company, Inc. ("Oppenheimer") by and through their employee, Kip Herriage ("Herriage"), made materials misrepresentations and omissions of facts

when recommending Microterra, Inc. ("Microterra") stock. As alleged, Herriage recommended that the Claimants purchase large amounts of the stock in approximately December, 1991 and made numerous representations to them including, but, not limited to, that Dr. Ralph Portier ("Portier") had developed the patent on a product which would make Microterra grow, that he knew Portier, that Portier had purchased about 100,000 shares, that Herriage had placed all his money in Microterra, that Microterra was guaranteed and that Microterra had no debt. Allegedly relying on Herriage's representations, the Claimants invested the bulk of their assets in Microterra yet instructed Herriage to sell the stock if the price began to fall. The Claimants contended that, when the price of the stock began to fall, Herriage not only disregarded the Claimants' instructions to sell but continued to recommend Microterra to Claimants. The Claimants made other specific allegations against the Respondents including, but, not limited to, breach of fiduciary duty, unsuitability, statutory fraud, common law fraud, failure to supervise and various violations of SEC Rule 10b-5, NASD Rules of Fair Practice (Article III, Section 2), NYSE Rule 405 and Texas Deceptive Trade Practices-Consumer Protection Act.

In their Statement of Answer, Oppenheimer & Company, Inc. and Kip Herriage denied the allegations set forth in the Statement of Claim. Respondents specifically stated that, after the decline in price, Herriage did not continue to recommend additional purchases but advised caution against increasing their positions yet the Claimants, exercising their own judgement, increased their positions. Respondents contended that the Claimants had not placed a stop loss order and had not given him specific instructions for the liquidation of the position in the event of a decline in price. Respondents further contended that Herriage forwarded to the Claimants public announcements issued by Microterra from August, 1991 through March, 1993 as well as newsletters and articles. Oppenheimer asserted the several affirmative defenses including, but, not limited to, (1) Claimants failed to state a claim upon which relief can be granted; (2) Claimants authorized, consented and acquiesced to the transactions in the accounts and are, therefore, equitable estopped from bringing this action; (3) Claimants waived any claims in their Statement of Claim by continuing the investment strategy after acquiring actual knowledge of the nature of that strategy and the risks inherent; (4) Claimants, by failing to timely object to the transactions complained of, have ratified the transactions and are barred from recovery; (5) Claimants, are barred from any recovery by their failure to exercise that degree of diligence required in the handling and monitoring of the transactions; and (6) the action is barred by the applicable statute of limitations. Finally, the Respondents moved to dismiss Glenn Mocek as a Claimant since he allegedly had no interest in any of the accounts in question.

RELIEF REQUESTED

The Claimants, Rob Kimbrough, Glenn Mocek and Maleesa Mocek, requested an award in the amount of \$32,099.24 in actual damages in behalf of Rob Kimbrough, \$14,909.02 in actual damages on behalf of Glenn and Maleesa Mocek, \$50,000.00 in punitive damages or, alternatively, additional damages in an equal amount pursuant to Section 17.50 of the Texas Business and Commerce Code as well as interest, attorneys' fees of at least \$15,000.00 and costs of arbitration.

Respondents, Oppenheimer & Company, Inc. and Kip Herriage, requested that the claims asserted against them be denied in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

Respondent, Kip Herriage did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

The arbitrators, after reviewing all submissions and after listening to the oral arguments made by the parties at the hearing, decided that the Respondents' Motion to Dismiss Glenn Mocek as a Claimant was denied.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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. Claimants', Rob Kimbrough, Glenn Mocek and Maleesa Mocek, Statement of Claim is hereby denied in its entirety;
2. Claims for damages, including punitive damages, submitted by Rob Kimbrough, Glenn Mocek and Maleesa Mocek are hereby denied in their entirety; and
3. The parties shall bear their own cost, including attorneys' fees except for those specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$500.00 per hearing session. There were five (5) sessions x \$500.00 = \$2,500.00 in forum fees. Pursuant to Section 43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$150.00 and shall retain as forum fees the hearing session deposit in the amount of \$500.00 previously deposited with the NASD by the Claimants. Respondents, Oppenheimer & Company, Inc. and Kip

Herriage, are hereby jointly and severally liable for and shall pay to the NASD the sum of \$2,000.00 in forum fees. Respondents, Oppenheimer & Company, Inc. and Kip Herriage, are hereby jointly and severally liable for and shall pay to the Claimants, Rob Kimbrough, Glenn Mocek and Maleesa Mocek, the sum of \$650.00 as reimbursement.

The NASD shall retain postponement fees in the amount of \$750.00 previously deposited with the NASD by the Respondents, Oppenheimer & Company, Inc. and Kip Herriage, and shall retain the postponement fees in the amount of \$250.00 previously deposited with the NASD by the Claimants, Rob Kimbrough, Glenn Mocek and Maleesa Mocek.

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

Arbitrators Signatures

Date Signed

Alan R. Crain, Jr., Esq.

September 13, 1995

Alan R. Crain, Jr. Esq.

Public Arbitrator, Presiding Chairman

Douglas F. Pierce, Esq.

September 13, 1995

Douglas F. Pierce, Esq.

Public Arbitrator

Victor Montalbano

September 12, 1995

Victor Montalbano

Industry Arbitrator

Date served by the NASD: September 20, 1995