

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Ronald A. Katz

vs.

Case #

94-01298

Name of Respondent

Kidder, Peabody & Co., Incorporated

vs.

Name of Third-Party Respondent

Steven Crowley

REPRESENTATION

For Claimant, Ronald A. Katz ("Katz"), David E. Shellenberger, Esq. of Law Offices of David Shellenberger.

For Respondent, Kidder Peabody & Co., Inc. ("Kidder"), Peter R. Pendergast, Esq. located in Boston, Massachusetts

For Respondent, Steven Crowley ("Crowley"), Charles N. Sturtevant, Esq, Attorney-at Law located in Braintree, Massachusetts.

CASE INFORMATION

Statement of Claim was filed on April 4, 1994.

Claimant's Submission Agreement was signed on March 23, 1994.

Claimant's Reply to Counterclaim was filed on September 12, 1994.

Statement of Answer was filed by Kidder on August 15, 1994.

Kidder did not execute a Submission Agreement.

Statement of Answer to the Third-Party Claim was filed by Crowley on December 6, 1994.

Crowley's Submission Agreement was signed on January 11, 1995.

HEARING INFORMATION

Hearing Dates/Sessions:	August 7, 1995	-	Two sessions
	August 8, 1995	-	Two sessions
	November 21, 1995	-	Two sessions

November 27, 1995

Two sessions

Hearing Location: National Association of Securities Dealers, Inc.'s offices located at 260 Franklin Street, Boston, Massachusetts.

CASE SUMMARY

Claimant alleges that all relevant times he was a resident of New Hampshire and on or about August 11, 1991, Respondent Crowley solicited Claimant's purchase of 30,000 shares of Camfrey Resources, Ltd., at a price of \$2.81 per share, for a total of \$86,448.00 plus a settlement cost of \$2,148.88. Claimant also alleges that on or about February 1992, he was again solicited by Crowley who advised him to purchase 45,000 shares of Envirotech Systems Corp. securities, at a per share price \$2.65, plus settlement costs of \$3,853.33 for a grand total of \$123,103.33.

Claimant also alleges that on or about June 11, 1992, Respondents notified him that at the time the sale was effectuated, Camfrey Resources' stock was not eligible for sale in New Hampshire and offered to rescind the sale and pay a 10 percent rate of interest on the original purchase. Claimant contends that on July 6, 1992, he sought to exercise his right to rescind the purchase but that on or about July 31, 1992, Respondent Crowley and Herbert Yamane, a manager at Kidder, promised that any shortfalls in Claimant's account would be made good via the profits from the sale of Camfrey Resources stock. Claimant states that on the strength of that representation, he agreed in a letter dated July 31, 1992, to waive his right to rescind the sale of the Camfrey Resources stocks. Claimant further alleges that the agreement to reimburse his account for any loss suffered was reduced to a writing in a letter dated August 8, 1992.

Claimant avers that on December 11, 1992, he directed that his holdings of Camfrey securities be liquidated and the expected deficit of \$50,000.00 be restored to his account pursuant to the agreement. Claimant claims that Respondents refused to honor his request to liquidate, but on or about December 21, 1992, Respondent sold 5,000 shares of Camfrey Resources at a price of \$1.42 per share, minus costs of \$485.78 which resulted in a loss to Claimant of \$7,435.78.

Claimant contends that in the interim, his research revealed that as of February, 1992, the sale of Envirotech stock to him in New Hampshire, was also improper as it was not registered in New Hampshire. Claimant alleges that as of the date of this complaint, Respondent still holds 25,000 shares of Camfrey Resources (now known as Brio Industries) and 45,000 shares of Envirotech Systems Corp. in Claimant's margin account, both of which were not registered in New Hampshire when they were sold to him.

Claimant's seeks rescission and damages based on violations of New Hampshire securities laws; breach of contract and fiduciary duty; and fraudulent and negligent misrepresentations.

Respondent Kidder denies all allegations of wrongdoing made by Claimant and asserts the following defenses: doctrines of unclean hands, mistake, illegality, ultra vires, waiver and estoppel, and statute of limitations. Respondent Kidder denies that the 30,000 shares of Camfrey Resources at issue in the August 1, 1991 transaction, were bought as a result of solicitation by its employee, Crowley. Respondent Kidder also asserts that the circumstances of the purchase and a letter of admission from Claimant, dated April 3, 1993, provides indisputable proof that the sale was not solicited by Kidder. Respondent asserts

that unsolicited purchases of securities are not subject to registration under New Hampshire law, therefore, Claimant is not entitled to a rescission of his purchase.

Respondent Kidder states that its June 11, 1992 offer to rescind was based upon the mistaken view that the sale had been solicited by Respondents. In that letter Kidder offered to repurchase the shares at the original price of \$86,448.00 at a 10 percent interest rate. Respondent Kidder alleges that Crowley was informed that he would be held personally liable for the loss associated with the transaction. Respondent Kidder asserts that as a result, Claimant waived his acceptance of the offer of rescission in exchange for an agreement in which Claimant would keep his shares of Camfrey Resources and be reimbursed by Kidder at a date in the future if the price of the shares was not sufficient to make him whole. Respondent argues that the agreement was a conspiracy by Claimant and Crowley to defraud Respondent, to avoid loss by Crowley and to guarantee Claimant against any potential loss. Respondent Kidder further asserts that Claimant knew that Crowley had no authority to execute such an agreement on behalf of Kidder, and as a matter of law, the agreement is not binding on Kidder. Furthermore, Respondent contends that although Camfrey Resources securities are not registered in New Hampshire, the purchase was exempt from registration and from the operation of New Hampshire securities laws since the sale was not solicited by Respondents.

Respondent Kidder admits that Claimant directed that his Camfery shares be sold; but after the initial sale of 5,000 shares, he was informed that the conditions were not suitable to sell and Claimant withdrew his order. Respondent Kidder denies that Claimant is entitled to rescission for his unsolicited purchase of 45,000 shares of Envirotech Systems securities or that the Envirotech stocks were ineligible for sale in New Hampshire. Respondent Kidder asserts that although the Envirotech Systems shares were not registered for sale in New Hampshire, they were nonetheless, eligible for sale since their unsolicited purchase by Claimant rendered them exempt from registration. Moreover, Kidder contends that even if Claimant had been entitled to rescission, his claim is now time barred by the one year statute of limitation.

Respondent Kidder interposes a counterclaim against Claimant and third-party claims against Crowley alleging that they conspired to defraud Kidder by executing the agreement which they both knew was unauthorized by Kidder. Respondent Kidder further asserts that Claimant and Crowley made negligent misrepresentations with respect to Kidder's conduct and that Claimant abused the process by filing complaints against Kidder with the State of New Hampshire and NASD on the basis this fraudulent agreement. Respondent Kidder also maintains that Crowley breached the duty of care and of loyalty which it was owed. Finally, Kidder seeks indemnification from Crowley, for the full amount of any damages awarded Claimant against Kidder.

Respondent Crowley denies liability and denies the allegations of wrongdoing. Specifically, Crowley denies the allegations in the Third-Party Claim that he conspired and attempted to defraud Kidder. Respondent Crowley admits that he owed Kidder a duty of care but denies that he breached that duty.

RELIEF REQUESTED

Claimant requested that the panel award him the following relief:

- a) rescision and damages of the sale of 30,000 shares of Camfrey Resources, Ltd.
- b) return of the purchase price of \$84,300.00 and costs of \$2,148.88, plus interest from the settlement date of the purchase (August 20, 1991) at a rate of 10 percent annually minus the sale price of 5,000 shares of Camfrey Resources (\$6,614.22). Or alternatively, the total damages on the Camfrey

Resources, Ltd. stock as of March 13, 1994 of \$102, 167.27, plus accrued monthly interest of \$720.41.

c) rescission of the sale of 45,000 shares of Envirotech Systems Corp.
d) return of the purchase price of \$119,250.00 and costs of \$3,853.33, plus interest from settlement date of the purchase (February 19, 1992) at 10 percent annually. Or alternatively, total damages on the Envirotech stock as of March 13, 1994 of \$148,749.83, plus monthly interest which continues to accrue at a rate of \$1,025.86 per month.

e) enhanced compensatory damages for fraudulent and negligent misrepresentation and breach of fiduciary duty.

f) an order that Respondent pays Claimant reasonable attorney's fees pursuant to N.H. R.S.A. 421-B 1.

Respondent Kidder requests compensatory and punitive damages against Claimant and Crowley and that it be awarded costs and fees associated with this proceeding.

Respondent Crowley requests that the third-party claim be denied and that the Panel direct Kidder to amend Crowley's Form U-5.

OTHER ISSUES CONSIDERED & DECIDED

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.

At the close of the hearing Kidder moved to dismiss all claims which arise under the New Hampshire statute as lacking subject matter jurisdiction. The Panel denied this motion after hearing all parties. The Panel reserved decision on Crowley's Motion to Dismiss.

The Panel allowed all parties until January 19, 1996 to simultaneously submit post-hearing memorandum. Subsequent to the filing of these memorandums and by letter dated February 5, 1996, Claimant filed a Motion for Leave to File Reply to Kidder's Post Arbitration Hearing Memorandum and actually attached his Reply. Respondent Crowley also filed on February 8, 1996, a Response to Ronald A. Katz' Reply to Kidder Peabody's Post Arbitration Hearing Memorandum. The Panel considered these submissions and declined to accept them as part of the record for its deliberations.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and Kidder's post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Kidder Peabody & Co. Inc. and Steven Crowley are jointly and severally liable to Claimant for losses he incurred with respect to the investment in Camfrey Resources Ltd. investment but are not liable to Claimant with respect to the Envirotech Systems Corp. investment.

2. Respondent Kidder Peabody & Co. Inc. is liable to Claimant in the amount of **SEVENTY**

THREE THOUSAND TWO HUNDRED AND FORTY-EIGHT DOLLARS AND ZERO CENTS (\$73,248.00), which represents Claimant's investment in Camfrey Resources, less the proceeds he received from the initial sale of 5,000 shares plus interest.

3. Respondents Kidder Peabody & Co., Inc. and Steven Crowley were both equally liable for Claimant's damages. Therefore Respondent Crowley shall pay Respondent Kidder Peabody & Co., Inc. half of the award to Claimant, **THIRTY SIX THOUSAND SIX HUNDRED AND TWENTY FOUR DOALLARS AND ZERO CENTS (\$36,624.00)**.

4. Respondent Kidder Peabody & Co., Inc. Counterclaim is denied.

5. All parties' requests for attorneys' fees are denied.

6. All other motions upon which decision was reserved are denied and all other reliefs, including Claimant's request for pre-award interest, are denied.

FORUM FEES

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

Non-refundable Filing Fee	-	\$200.00
Non-refundable Counterclaim and Third-Party Filing Fee	-	500.00
Hearing Session Fees	-	6,000.00 (8 sessions at \$750.00 per session)
Total Fees	-	\$6,700.00

1. Claimant is assessed a \$200.00 non-refundable filing fee. Claimant is also assessed \$2,000.00 in hearing session fees. Claimant previously paid \$950.00 and owes a balance of \$1,250.00.

2. Respondent Kidder Peabody & Co., Inc. is assessed a non-refundable Counterclaim and Third-Party Claim filing fee in the amount of \$500.00. Said Respondent is also assessed \$2,000.00 in hearing session fees. Said Respondent previously paid \$1,250.00 and owes a balance of \$1,250.00.

3. Respondent, Steven L. Crowley, is assessed \$2,000.00 in hearing session fees.

4. Claimant requested a copy of the tapes and incurred costs totalling \$225.00. Claimant paid \$135.00 and owes a balance of \$90.00.

5. Respondent Steven L. Crowley also request a copy of the tapes and incurred a cost of \$135.00, which has not been paid.

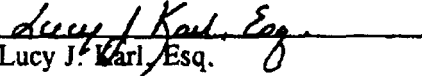
Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

Lucy J. Karl, Esq.	-	Public Chairperson
Robert D. Banz	-	Public Panelist
Stephen J. Sussman, CPA	-	Industry Panelist

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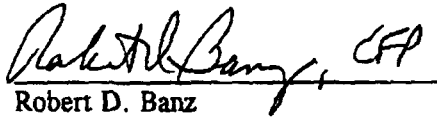
Concurring Arbitrator's Signature


Lucy J. Karl Esq.

Date of Decision: April 18, 1996

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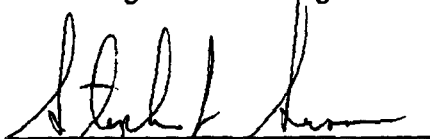
Concurring Arbitrator's Signature


Robert D. Banz

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Concurring Arbitrator's Signature

A handwritten signature in black ink, appearing to read 'Stephen J. Sussman', written over a horizontal line.

Stephen J. Sussman, CPA

Date of Decision: April 18, 1996