

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Securities America, Incorporated

and

NASD Case Number 94-01474

Nick Kmezich

REPRESENTATION OF PARTIES

Claimant, Securities America, Inc. was represented by Kelly R. Dahl, Esq. of Baird, Holm, McEachen, Pedersen, Hamann & Strawn, located in Omaha, Nebraska.

Respondent, Nick Kmezich was represented by James R. Place, Esq. of The Place Law Offices located in Omaha, Nebraska.

CASE INFORMATION

The Statement of Claim was filed on or about April 18, 1994.

The Submission Agreement of Claimant, Securities Americas, Inc. was signed on April 5, 1994 by Steven McWhorter, Senior Vice President and General Counsel of Securities America, Inc.

The Statement of Answer and Counter-Claim was filed by Respondent, Nick Kmezich on or about on or about April 14, 1995.

The Reply to the Counter-Claim was filed by Claimant, Securities America, Inc. on or about August 15, 1995.

HEARING INFORMATION

The hearing was held on August 16, 1995 in Omaha, Nebraska for a total of one (1) session.

CASE SUMMARY

In the Statement of Claim, Securities America, Incorporated ("Securities America") alleged that they were entitled to adjust the Respondent's commission rate under the terms of an agreement between the parties. As alleged, Securities America and Nick Kmezich ("Kmezich") entered into a Representative Agreement (the "Agreement") on July 31, 1991 which provided, in part, that the Respondent would receive 45% of the Gross Commission yet that Securities America reserved the right to change or amend at any time and from time to time, all fees and the percentage of Gross Commission. According to the Claim, Kmezich, as a representative of the Claimant, sold securities through First Community Investment Center ("First Community"). By letter dated January 31, 1992, Kmezich was allegedly notified by First Community that his commission would be adjusted to 40% of Gross Commission to be effective on February 1, 1992. On February 1, 1992, Securities America allegedly provided Kmezich with a commission form reflecting the change and serving as an addendum to the agreement. According to the Claim, Kmezich filed a lawsuit against Securities America in July 22, 1993 in District Court claiming that he was entitled to recover \$6,442.81 due to the reduction in the commission rate. By filing this arbitration, Securities America sought to resolve this dispute and to obtain a declaration the Kmezich's claim was without merit.

In the Statement of Answer and Counter-Claim, Nick Kmezich denied the allegations asserted by Securities America. Kmezich specifically denied that he sold securities through First Community Investment Center claiming that he only rented office space from First Community while all sales were made through the Claimant. The Respondent claimed that the Agreement required Securities America to obtain the Respondent's signature authorizing the change in his gross commission percentages. Kmezich alleged that the Claimant breached their Agreement and owed him monies for commissions earned in accordance with the Agreement.

RELIEF REQUESTED

Claimant, Securities America, Incorporated requested a declaratory judgement that it made a proper adjustment to the Respondent's gross commission and is not obligated to pay the Respondent any additional sums as compensation.

Respondent, Nick Kmezich requested an award in the amount of \$6,442.82 in actual damages plus any additional damages in an amount to be determined.

OTHER ISSUES CONSIDERED & DECIDED

Respondent, Nick Kmezich 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.

On or about August 14, 1995, Claimant, Securities America submitted a Motion to Exclude Nick Kmezich's Answer and Counter-Claim Pursuant to Section 25 of the NASD Code of Arbitration Procedure. After reviewing the Motion and following the hearing in this matter, the arbitrator decided that the Motion was denied.

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 arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Securities America, Incorporated's request for a declaratory judgement that it made a proper adjustment to Nick Kmezich's Gross Commissions under the terms of the parties' Agreement on February 1, 1992 and that it is not obligated to pay Nick Kmezich any additional sums as compensation is hereby granted;
2. The Counter-Claim submitted by Nick Kmezich is hereby denied in its entirety;
3. Any requests for relief not specifically granted herein are hereby denied in their entirety;
4. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter except for those specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$300.00 per hearing session. There was one (1) session x \$300.00 = \$300.00 in forum fees. Pursuant to Section 44(b) of the Code, 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 44(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 \$500.00 and shall retain as forum fees the hearing session deposit in the amount of \$300.00 previously deposited with the NASD by the Claimant, Securities America, Inc. Claimant, Securities America, Inc. is hereby liable for and shall pay to the NASD the surcharge in the amount of \$200.00 in accordance with Section 45 of the Code.

Pursuant to Section 44(c) of the NASD Code of Arbitration Procedure, Nick Kmezich is liable for and shall pay to the NASD the amount of \$500.00 for the claim filing fee in connection with the

Counter-Claim. In addition, Nick Kmezich is liable for and shall pay to the Claimant, Securities America, Inc. the sum of \$150.00 as reimbursement.

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

Arbitrator's Signature:

Dated:

James S. Allen, Jr., Esq.
James S. Allen, Jr., Esq.
Industry Arbitrator, Chairman

December 6, 1995

Date served by the NASD: December 6, 1995