

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Barbara and Phillips Gips

vs.

Award No.

94-01601

Name of Respondents

Kidder, Peabody & Co., Incorporated

David Ian Palmer

John Loring Swasey, Jr.

William Francis Kennedy

REPRESENTATION

For Claimants, Barbara and Phillips Gips ("Claimants") appeared Thomas J. Hanrahan, Esq., located in New York City, New York.

For Respondents, Kidder Peabody & Co., Inc. ("Kidder"), David Ian Palmer ("Palmer"), John Loring Swasey, Jr. ("Swasey"), and William Francis Kennedy ("Kennedy") (collectively "Respondents"), appeared Richard Kelly, Esq., in-house counsel located in New York City, New York.

CASE INFORMATION

Statement of Claim filed on: April 28, 1994.

Claimant's Submission Agreement signed on: July 11, 1994.

Joint Statement of Answer filed by Respondents on: September 12, 1994.

Respondent Kidder's Submission Agreement signed on: September 7, 1994.

No Uniform Submission Agreement was filed by Respondent Palmer.

No Uniform Submission Agreement was filed by Respondent Swasey.

No Uniform Submission Agreement was filed by Respondent Kennedy.

HEARING INFORMATION

Hearing Dates/Sessions:	November 9, 1995	-	2 sessions
	November 10, 1995	-	2 sessions

The hearings took place at the National Association of Securities Dealers Inc.'s offices located in New York City, New York.

CASE SUMMARY

Claimants contended that they maintained both a joint account at Kidder opened in February, 1989 and an IRA account opened May 18, 1989. According to the Claimants, Respondents Palmer, Swasey and Kennedy, were all employed by and under the control of Kidder.

Claimants alleged that they had limited experience as investors prior to February 1989. Claimants' IRA account, as alleged by the Claimants, first consisted of limited partnerships and then included trading of options in August 1989. The Claimants maintained that the limited partnerships were an undue concentration of invested funds and constituted a failure to diversify, and were wholly unsuitable for an IRA account. According to the Claimants the \$135,000 total investment in limited partnerships is now virtually worthless. Moreover, the Claimants maintained that they did not discover that the limited partnerships were worthless until 1993 because the monthly statements concealed their true value by using the full purchase price as the basis for reporting and calculating. In addition, the Claimants contended that the Respondents failed to disclose the risks involved in trading options and the risks inherent in investing in limited partnerships. The Claimants also alleged that with respect to the commissions resulting from options trades, between 1989 and 1992 the commission ratio was the same as or greater than the return on the investment in the IRA account.

According to the Claimants the \$100,000 investment in limited partnerships in the joint account is now virtually worthless. Claimants also made the same allegations regarding the joint account's investment in limited partnerships as they averred with respect to that of the IRA account's. In addition, Claimants maintained that the joint account was churned, that it was controlled by Respondent Palmer, and that there was excessive activity in the account in relation to the investment objective. Moreover, the Claimants contended that the investments were unsuitable in light of their financial circumstances and objectives.

Claimants also alleged the following: 1) that the Respondents issued false and misleading statements; 2) that the Respondents' acts, practices, representations and omissions were constructive fraud and constituted a breach of fiduciary duty on the part of the Respondents; and 3) that the handling of the Claimants' securities accounts by the Respondents was outrageous and showed complete indifference to, and reckless disregard of the best interests of the Claimants, and was in derogation of Claimants' rights.

Respondents alleged that there was no factual or legal merit to the claim based upon the following reasons. First, as the Respondents contended, under the law the Respondents are not the Claimants' fiduciaries. In addition, the Respondents contended that the Claimants deliberately omitted critical facts. For example, the Respondents maintained that although the Claimants allege unsuitability, they did not state their investment objective. According to the Respondents the Claimants' investment objectives in 1989 included: income, hedging, trading and speculating. Also, contrary to the Claimants' representations that they had limited experience as investors, the Respondents alleged that they were told by the Claimants that they had 10 years investment experience with stocks and bonds, 10 years experience with a margin account and 5 years experience trading options. With respect to the Claimants' allegations of excessive trading or churning, the Respondents contended that the nature of options trading is short-term and that, therefore, the options are traded more frequently than stocks or bonds and that since there is a commission charge on each transaction, commissions are likely to be higher than with other securities transactions. Moreover, the Respondents maintained that these aspects of options trading is included in

the Options Agreements signed by the Claimants. Furthermore, the Respondents contended that in both 1989 and 1992 Respondents Swasey and Kennedy sent letters to the Claimants which stated that the number of transactions in their accounts were above average and asked the Claimants to notify them if the activity was not in line with their investment objectives. According to the Respondents, the Claimants did not notify them and, thereby, either waived their rights or ratified the activity and should be estopped from raising this contention years after the fact. The Respondents also contended that they disclosed to the Claimants the risks associated with their investments. In addition, the Respondents maintained that using the original purchase price of limited partnership interests to calculate the account's net worth was industry practice of the time, which was reviewed by the courts and does not constitute a misrepresentation. Furthermore, the Respondents contended that the Claimants overstated their losses and denied that the Claimants' investments in limited partnerships are virtually worthless.

RELIEF REQUESTED

Claimants requested an award to be made in their favor in the amount of \$257,497.00, plus interest from 1989, plus the costs of this proceeding, and attorneys' fees. In addition the Claimants requested that the Panel find that Respondents' conduct was so egregious and shocking that it would award punitive damages if it had the legal authority to do so.

Respondents requested that the claim be dismissed in its entirety.

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 original remains on file with the NASD.

1. The Claimants withdrew their claim against Respondent Kennedy.
2. Respondents' requested that Respondent Swasey's name be withdrawn as a respondent which was granted by the arbitration panel.

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. The claim is dismissed in its entirety.
2. The NASD is to expunge all references to Respondents Swasey and Kennedy with regard to any Central Registration Depository (CRD) filings.
3. The parties are to pay respective costs.
4. The Respondents' request to have withdrawn any references on the U-4 and U-5 as to Swasey is granted.

FORUM FEES

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fee(s) are assessed.

Non-refundable filing fee:	\$ 200.00
Hearing Sessions (4 @ \$750 per session):	<u>\$3,000.00</u>
Total Fees:	\$3,200.00

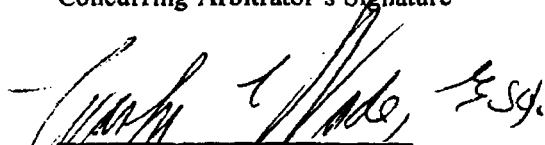
1. The Claimants paid \$950.00 and owe \$750.00 to the NASD
2. The Respondents have paid nothing and owe \$1,500.00 to the NASD.

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

ARBITRATION PANEL

Carolyn E. Wade, Esq.	-	Public Chairperson
Robert E. Tobin	-	Public Panelist
Mark S. Brody	-	Industry Panelist

Concurring Arbitrator's Signature


Carolyn E. Wade, Esq.

NASD's Date of Decision:

February 12, 1996

AFFIRMATION

I, CAROLYN E. WADE do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that I am the individual herein and who executed this instrument which is my award.



FORUM FEES

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fee(s) are assessed.

Non-refundable filing fee:	\$ 200.00
Hearing Sessions (4 @ \$750 per session):	<u>\$3,000.00</u>
Total Fees:	\$3,200.00

1. The Claimants paid \$950.00 and owe \$750.00 to the NASD
2. The Respondents have paid nothing and owe \$1,500.00 to the NASD.

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

ARBITRATION PANEL

Carolyn E. Wade, Esq.	-	Public Chairperson
Robert E. Tobin	-	Public Panelist
Mark S. Brody	-	Industry Panelist

Concurring Arbitrator's Signature

Robert E. Tobin
Robert E. Tobin, Esq.

NASD's Date of Decision:

February 12, 1996

AFFIRMATION

I, Robert E. Tobin, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that I am the individual herein and who executed this instrument which is my award.

Robert E. Tobin

Award No. 94-01601

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FORUM FEES

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fee(s) are assessed.

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Total Fees:	\$3,200.00

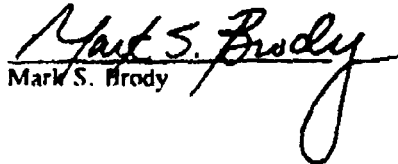
1. The Claimants paid \$950.00 and owe \$750.00 to the NASD
2. The Respondents have paid nothing and owe \$1,500.00 to the NASD.

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

ARBITRATION PANEL

Carolyn E. Wade, Esq.	-	Public Chairperson
Robert E. Topin	-	Public Panelist
Mark S. Brody	-	Industry Panelist

Concurring Arbitrator's Signature


Mark S. Brody

NASD's Date of Decision: Feb 18, 1996

AFFIRMATION

1. Mark S. Brody do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that I am the individual herein and who executed this instrument which is my award.

