

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Joan Salwen, as trustee

AWARD NO.
94-02022

Name of Respondents

Kidder, Peabody & Co., Incorporated
Cashman, Farrell & Associates

REPRESENTATION

For Claimant Joan Salwen Zaitz, Successor Trustee of the Indenture of Trust of Joseph Salwen, ("Salwen") appeared Richard P. Haaz, Esq., of the law offices of Richard P. Haaz located in Philadelphia, Pennsylvania.

For Respondent Kidder Peabody & Co, Inc., ("Kidder") appeared Richard Kelly, Esq., of Kidder located in Philadelphia, Pennsylvania.

For Respondent Cashman Farrell & Associates, ("Cashman") appeared Pauline C. Scalvino of Stradley Ronon Stevens & Young located in Philadelphia, Pennsylvania.

CASE INFORMATION

Statement of Claim filed on: May 31, 1994.

Claimant's Submission Agreement signed on: July 28, 1994.

Statement of Answer filed by Respondent Kidder on: October 25, 1994.

Respondent Kidder's Submission Agreement signed on: October 21, 1994.

Statement of Answer filed by Respondent Cashman on: November 3, 1994.

Respondent Cashman's Submission Agreement signed on: November 15, 1994.

HEARING INFORMATION

Hearing Date/Sessions: October 25, 1995 - 3 sessions

The hearings took place at the Marriott Financial Center located at 85 West Street in New York City, New York 10006.

CASE SUMMARY

Claimant Salwen alleged that pursuant to the Indenture of Trust (the "Trust") established by Joseph Salwen on June 6, 1990, Joan Salwen Zaitz became successor Trustee upon the death of Joseph Salwen. Zaitz stated that on January 30, 1986 Joseph Salwen died. According to Joan Salwen Zaitz ("Zaitz"), without notice to Zaitz, Geraldine Salwen in May 1989 created two brokerage accounts at Respondent Kidder with the assistance of Respondent Cashman. Zaitz contended that Account No. 40L-14023 entitled Geraldine Marcia Salwen, Trust A ("Trust A") was established in the amount of \$174,233.85. In addition, Zaitz maintained that Account No. 40L-14022 entitled Geraldine Marcia Salwen, Trust B ("Trust B") was established with \$70,427.53 in assets. The Claimant also contended that in April 1991 per written request from Geraldine Salwen, Trust A and Trust B were converted into accounts with joint names (Geraldine Salwen and John Rodden). In addition, the Claimant alleged that in September, 1992 the assets from both trust accounts were transferred to Charles-Bush (JW) Securities, Inc., and that Trust A was worth \$100,199.23 and Trust B was worth \$36,258.00.

According to the Claimant the above transactions were unauthorized and illegal. Moreover, the Claimant contended that Kidder had no authorization to dissipate and convert the two trust accounts. In addition, the Claimant alleged that the actions of Kidder and Cashman were not authorized by the trust instrument.

Respondent Kidder alleged that Respondent Cashman managed the trust accounts and had no information whatsoever indicating the existence of the Trust until March 1992. Kidder also contended that because Cashman managed the trust accounts, it was not responsible for the "dissipation" of some of the assets in these accounts. In addition, Kidder maintained that even though no one at Kidder read the Trust or notified the Claimant of any transactions (until the Trust was received in March 1992), Kidder is not liable for the decrease in the accounts' value because it did not even know of the existence of the Trust or of the Claimant. By way of defenses, the Respondent Kidder alleged that the Claimant failed to establish compensable losses; that the Claimant had no authority to bring an NASD arbitration claim against Kidder; and that the Claimant was negligent in exercising her responsibilities as Trustee.

Respondent Cashman alleged that in May 1988 Geraldine Salwen (then known as Geraldine Riker) came into Cashman's offices, instructed Cashman to open three accounts (Trust A, Trust B and a personal account), and retained Cashman to manage the assets (cash and securities) held in the accounts. Respondent Cashman contended that upon Geraldine Salwen terminating Cashman's services and closing her accounts in September 1990, Cashman took no further action on the accounts and had no knowledge of what transpired in the accounts after that time. Cashman further maintained that at the time it managed Geraldine Salwen's accounts it had never heard anything about Joseph Salwen or the Trust. Moreover, Cashman contended that it was not obligated to inquire into the source of the funds it was employed to manage or required any sort of trust document of a trust account in an individual's own name for her own benefit. In addition, Cashman alleged that it did nothing wrong and that during the time it managed the accounts their total value increased by \$17,034.

Respondent Cashman raised the following affirmative defenses: lack of jurisdiction; lack of standing; failure to state a claim upon which relief could be granted; expiration of the statute of limitations; estoppel; failure to mitigate losses; failure to join indispensable parties; claimant's failure to object in a timely fashion to the transactions of which she now complains; to the extent the Claimant incurred any damages, such damages are attributable in whole or in part to Claimant due to her negligence in the exercise of her duties as successor trustee; to the extent Claimant has incurred any damages, such damages are attributable to market conditions and not to any acts or omissions of Cashman; to the extent Claimant has incurred any damages, such damages are attributable to the conduct of third parties over whom Cashman had no control; and claimant may not recover because neither she nor the Trust suffered any losses.

RELIEF REQUESTED

Claimant requested damages for losses associated with the dissipation of assets and brokerage commissions and fees charged pursuant to the above transactions.

Respondent Kidder requested that the Claim be dismissed.

Respondent Cashman requested that the Claimant's request for damages be denied in all respects and that the costs of this proceeding, including reasonable attorneys' fees, be assessed against the Claimant.

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(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. Respondent Kidder is liable to the Claimant Ruth Salwen Zaitz, as Trustee of Trust "B" under the Trust of Joseph Salwen dated June 6, 1990, for the sum of **FORTY FOUR THOUSAND FIVE HUNDRED FOUR DOLLARS** (\$44,504) plus simple interest at the rate of 6% per annum from March 15, 1992 until the date of payment.
- 2. All forum costs and session costs are to be borne equally by Claimant Salwen and Respondent Kidder.
3. All claims against Respondent Cashman are dismissed in their entirety.
4. All other claims and counterclaims of the parties not expressly granted above are dismissed.

FORUM FEES

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


Non-refundable Filing Fee:	\$ 200.00
Hearing Sessions (3 @ \$750 per session):	<u>\$2,250.00</u>
Total Fees:	\$2,450.00

1. Claimant paid \$950.00 and owes \$375.00 to the NASD.
2. Respondent Kidder has paid nothing and owes \$1,125.00 to the NASD.
3. Respondent Cashman has paid nothing and owes nothing.

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

Concurring Arbitrators' Signatures

Name



Joseph B. Russell, Esq.
Chairperson

Public

Mark S. Brody

Industry

Romeo J. Barros, Esq.

Public

AFFIRMATION

I, Joseph B. Russell, Esq. do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.



Joseph B. Russell, Esq.

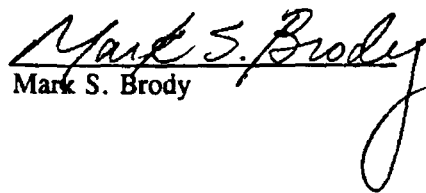
Date of Decision: December 15, 1995

Concurring Arbitrators' Signatures

Name

Joseph B. Russell, Esq.
Chairperson

Public


Mark S. Brody

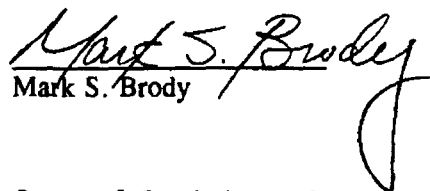
Industry

Romeo J. Barros, Esq.

Public

AFFIRMATION

I, Mark S. Brody, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.


Mark S. Brody

Date of Decision: December 15, 1995

Concurring Arbitrators' Signatures

Name

Joseph B. Russell, Esq.
Chairperson

Public

Mark S. Brody

Industry

Romeo J. Barros
Romeo J. Barros, Esq.

Public

AFFIRMATION

I, Romeo J. Barros, Esq. do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.

Romeo J. Barros
Romeo J. Barros, Esq.

Date of Decision: December 15, 1995