

## **NASD AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

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In the Matter of the Arbitration Between

Robert L. Hillman, and  
Rosemary Hillman,

Claimants,

v.

No. 95-00161

Kemper Securities, and  
Kevin Bell,

Respondents.

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### **REPRESENTATION OF PARTIES**

Robert L. Hillman, and Rosemary Hillman ("**Claimants**") were represented by J. Michael Vaughan, Esq., of Weisenfels & Vaughan, Kansas City, Missouri.

Kemper Securities ("**Kemper**"), and Kevin Bell ("**Bell**") (collectively referred to as "**Respondents**") were represented by Matthew V. Bartle, Esq., of Bryan Cave, Kansas City, Missouri.

### **CASE INFORMATION**

Claimants' Statement of Claim was filed on or about January 10, 1995. Claimants' Submission Agreement was signed on December 14, 1994.

Respondents' Statement of Answer was filed on or about April 3, 1995. Respondents' Submission Agreements were signed on February 27, 1995 and March 7, 1995, respectively.

### **HEARING INFORMATION**

The hearing was held on July 15, 1996 for two (2) sessions, July 16, 1996 for two (2) sessions, and July 17, 1996 for one (1) session in Kansas City, Missouri for a total of five (5) sessions.

### **CASE SUMMARY**

Claimants alleged that Respondents: Violated §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; violated the Missouri Uniform Securities Act; violated the Kansas Uniform Securities Act; committed common law fraud; breached their fiduciary duty; and committed negligence. The allegations arose out of the purchase of Fannie Mae bonds, collateralized mortgage obligations ("CMO") for Claimants' account.

Respondents denied any and all liability to the Claimants and denied each and every allegation in the Statement of Claim that was not expressly admitted in their Answer. Respondents also asserted the following affirmative defenses: Claimants are not entitled to punitive damages or an award of attorneys' fees as a matter of law, and any award of punitive damages would constitute denial of Due

Process and Equal Protection under both the Federal and State Constitutions; Claimants are barred from recovering from Respondents under the doctrines of ratification, account stated, estoppel, waiver and laches because Respondents relied upon Claimants' silence; even if Respondents made the misrepresentations that Claimants allege, Claimants were sufficiently sophisticated that they were not entitled to reasonably rely on these alleged misrepresentations; Respondents are not liable to Claimants, and Claimants' claims are barred because of Respondents' good faith and due diligence in the conduct of their affairs with Claimants; Claimants failed to act promptly and with due diligence to mitigate their alleged damages after Claimants knew or should have known of the alleged acts and omissions of which Claimants now complain; Claimants' claims fail to state with requisite particularity the circumstances of any fraud allegedly committed by Respondents; Claimants caused or contributed to cause the alleged damages of which they complain, and thus, are barred by their contributory negligence from recovering any such alleged damages from Respondents; Claimants' claims are barred because Respondents' conduct was not the proximate cause of any loss or damages to Claimant; the loss or damages alleged were caused, if at all, by unforeseeable market factors and conditions affecting the value of securities in Claimants' account, for which Respondents are not liable or responsible; the Claimants' knowing and voluntary assumption of risk was the sole and proximate cause of their alleged damages, and their claims are barred in whole or in part because they assumed the risks of the investments they made; Claimants' authorized the alleged conduct of Respondents about which they now complain; and Claimants' Statement of Claim, and all causes of action thereunder, fail to state a claim against Respondents upon which relief may be granted.

### **RELIEF REQUESTED**

Claimants requested an award, against the Respondents, for: Rescission of their investment in the subject CMO in the amount of \$1,000,000 (less any principal received) and all damages necessary to return Claimants to their status quo as though this CMO investment was never made; remuneration for all costs paid by the Claimants for this investment including the commission of \$5,642.14; return of any and all margin interest associated with this investment (net of interest received); alternatively to rescission, the difference between the amount paid for the investment (less returns of principal) and the market value of the investment; punitive damages from Kemper in an amount in excess of \$2,000,000; Claimants' costs and expenses herein incurred, including reasonable attorney's fees; and such other relief as this arbitration panel deemed just and proper under the circumstances.

Respondents requested that Claimants' claims be denied in their entirety and that an award in favor of Respondents be entered together with the costs associated with this proceeding.

### **OTHER ISSUES CONSIDERED & DECIDED**

During the course of the hearing, Respondents made a Motion to Dismiss Claimants' claims. After hearing argument from the parties, and deliberation, the panel overruled Respondents' motion.

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:

Respondents are jointly and severally liable for, and shall pay to the Claimants the sum of \$76,000 as satisfaction for their claims for compensatory damages herein. Respondents are also jointly and severally liable for, and shall pay to the Claimants the sum of \$1,250 as an award of their costs of filing this arbitration.

All other claims/requests for relief not specifically set forth herein are, and each of them, denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There were five (5) sessions x \$1,000 = \$5,000 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (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 §43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD by the Claimants.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$500 previously paid by Kemper.

Additional forum fees in the amount of \$4,000 are assessed jointly and severally against the Respondents.

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

Dated:

David I. Lewin  
David I. Lewin  
Public Arbitrator, Presiding Chair

/s/

July 31, 1996

Keith E. Mattern  
Keith E. Mattern  
Public Arbitrator

/s/

July 29, 1996

George Rinker, Jr.  
George Rinker, Jr.  
Industry Arbitrator

/s/

July 29, 1996