

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Theresa Elmer

and

95-00389

Name of Respondent

Reynolds Kendrick Stratton, Inc.
David Feyjin

REPRESENTATION OF PARTIES

Theresa Elmer ("**Claimant**") was represented by Gregory Friedman, Esq., Friedman & Holtz, Chicago, Illinois.

Reynolds Kendrick Stratton, Inc. ("**Respondent RKS**") was represented by Jeffrey S. Kob, Esq., Miller Milove & Kob, San Diego, California.

David Feyjin ("**Respondent Feyjin**") was represented by Michael F. Bachner, Esq., New York, New York. Neither Respondent Feyjin nor his representative were present at the hearing.

CASE INFORMATION

The Statement of Claim was filed on or about January 25, 1995. Submission Agreement of Claimant Theresa Elmer was signed on January 11, 1995.

Statement of Answer was filed by Respondent Reynolds Kendrick Stratton, Inc. on or about October 11, 1995. Submission Agreement of Respondent Reynolds Kendrick Stratton, Inc. was signed on October 5, 1995 by Scott G. Monson, Esq.

Statement of Answer was filed by Respondent David Feyjin on or about March 23, 1995. Submission Agreement of Respondent David Feyjin was signed on March 23, 1995.

HEARING INFORMATION

The hearing was held on Wednesday, January 31, 1996 in Chicago, Illinois for a total of two (2) sessions.

CASE SUMMARY

Claimant alleged the following:

- ▶ that Mr. Elmer had advised Respondent Feyjin that he and his wife wished to invest money in a conservative fashion and would consider opening an account at Respondent Barrett for Mrs. Elmer.
- ▶ that Respondent Feyjin stated that he would handle the account in accordance with the stated investment objectives and specifically offered to open an account and handle an account for the Elmers where he would minimize losses.
- ▶ that as part of the agreement, the Elmer's money was to be invested in conservative investments, losses were to be kept small and the Elmers were to be kept informed of the account status.
- ▶ that on the advice of Respondent Feyjin, the Elmers purchased shares of Jutland Enterprises, Notebook Center and TerraWest Ventures.
- ▶ that on February 22, 1994, Mr. Elmer directed Respondent Feyjin to liquidate the positions in Notebook Center and TerraWest Ventures.
- ▶ that Respondent Feyjin failed to liquidate the positions as directed.
- ▶ that each Respondent is responsible for the acts of the other Respondents.

Claimant alleged that the actions of Respondents constituted breach of contract, breach of fiduciary duty, violations of Federal Securities statutes including §10(b) of the Exchange Act of 1934 and SEC Rule 10b-5, and §20 of the Exchange Act of 1934, and common law fraud.

Respondent Feyjin denied the allegations set forth in the Statement of Claim and asserted the following affirmative defenses:

- ◆ the damages claimed to have been sustained by Claimant were caused solely by or contributed to by her own negligence;
- ◆ the Claimant acted in reckless disregard of facts which it was or should have been aware and failed to exercise the required due care and diligence;
- ◆ Claimant should be estopped from bringing this arbitration;
- ◆ Claimant authorized and directed the execution of all transactions in her account;
- ◆ Claimant authorized and ratified all transactions with full knowledge of all material facts; and

- ◆ Respondent Feyjin in discharging his duties, if any, to the Claimant, acted in good faith and exercised at least that degree of care, diligence and skill which ordinarily prudent men would exercise in similar circumstances.

Respondent Reynolds Kendrick Stratton, Inc. stated that the Claimant had failed to allege any specific activity or involvement concerning or related to it and denied any and all liability related to the allegations set forth in the Statement of Claim.

RELIEF REQUESTED

Claimant requested an award in an amount to be determined at the hearing to be in excess of \$250,000 and exemplary damages in the amount of \$500,000, interest as provided by law, and for such other relief as the arbitrators deem right and just.

Respondent Feyjin requested that the claims asserted against him be denied and that he be awarded his attorneys' fees.

Respondent RKS requested that any and all claims against it be dismissed summarily, and for an order that Claimant shall take nothing as to it. Respondent RKS also requested an award of its' cost, expenses an attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

The claims asserted against Respondent Barrett Day Securities, Inc. in this matter were withdrawn by Claimant as a result of Respondent Barrett Day Securities, Inc. having filed for bankruptcy .

Respondent RKS submitted a Motion to Dismiss which was filed with the NASD on January 30, 1996. At the commencement of the hearing of this matter, the undersigned arbitration panel heard arguments presented on behalf of Respondent RKS and Claimant and considered the motion. The Motion to Dismiss was denied.

At the hearing, Claimant asserted a Motion to prohibit Respondents from introducing documents responsive to her document requests. After considering the arguments presented on behalf of the parties, the undersigned arbitrators denied the motion.

Respondent David Feyjin was not present at the hearing held on Wednesday, January 31, 1996. At the request of the arbitration panel, NASD staff contacted the office of Respondent Feyjin's counsel, Michael Bachner. NASD staff was advised that neither Mr. Bachner nor Mr. Feyjin were going to attend the hearing.

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, other evidence presented at the hearing and arguments of counsel, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All claims asserted against Respondent Reynolds Kendrick Stratton, Inc. shall be and hereby are denied and dismissed.
2. Respondent David Feyjin shall be and hereby is liable for and shall pay to the Claimant Theresa Elmer the sum of **One hundred fifty four thousand five hundred dollars (\$154,500)**.
3. Respondent David Feyjin shall be and hereby is liable for and shall pay to the Claimant Theresa Elmer the sum of **two hundred fifty dollars (\$250)** as reimbursement of the non refundable filing fee previously paid to the NASD by Claimant.
4. Each party shall bear its own costs, expenses and fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session. There were two (2) sessions x \$1,000 = \$2,000 in forum fees. Pursuant to §43(b) 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 NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall **retain** the non-refundable filing fee in the amount of \$250 and shall **refund** the hearing session deposit in the amount of \$1,000 previously deposited with the NASD by the Claimant Theresa Elmer. Respondent David Feyjin shall be and hereby is liable for and shall pay to the NASD the sum of \$2,000 as forum fees.

Pursuant to §45 of the NASD Code of Arbitration Procedure, the NASD shall assess and Respondent Reynolds Kendrick Stratton, Inc. shall pay to the NASD the non-refundable member surcharge in the amount of \$500. Fees are payable to the National Association of Securities Dealers, Inc.

/s/ Robert S. Sugarman, Esq.

Robert S. Sugarman, Esq.
Public Arbitrator, Presiding Chair

Dated:

February 27, 1996

/s/ Herbert S. Channick, Esq.

Herbert S. Channick, Esq.
Public Arbitrator

February 16, 1996

/s/ Daniel C. Kriser

Daniel C. Kriser
Industry Arbitrator

February 20, 1996