

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Kemper Securities, Inc.

Claimant,

95-00874

John C. Padelford III,
Patricia J. Padelford,
Phoenix Pacific Properties, Ltd.

Respondent,

and

John C. Pandelford III,
Patricia J. Pandelford

Counterclaimant,

v.

Kemper Securities, Inc.

Counterrespondent,

REPRESENTATION OF PARTIES

Kemper Securities, Inc., ("**Claimant**") was represented by Jesse B. Simpson, Esq., of Lewis and Roca, L.L.P., Phoenix, Arizona.

John C. Pandelford III and Patricia J. Padelford ("**Padelfords**"), and Phoenix Pacific Properties ("**PPP**") (jointly referred to as "**Respondents**") were represented by Jon R. Pozgay, Esq., Phoenix, Arizona.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about February 21, 1995. Claimant's Submission Agreement was signed on February 17, 1995. Claimant's Reply to Respondents' Counterclaim was filed on or about June 19, 1995.

Respondents' Statement of Answer and Counterclaim was filed on or about May 16, 1995. Respondents' Submission Agreement was signed on May 5, 1995.

HEARING INFORMATION

A telephonic pre-hearing conference was held on January 16, 1996 for one (1) session.

The hearing was held on December 4 and 5, 1995 and January 4, 5, and 18, 1996. Excluding January 4, 1996 where three (3) sessions were held, each hearing day consisted two (2) sessions for a total of eleven (11) sessions.

CASE SUMMARY

Claimant alleged that Respondents were in breach of contract and were liable for deficiencies in their account. Claimant specifically alleged that: in June and July, 1994, Claimant was forced to sell Respondents' holdings of Solv-Ex in the PPP and joint account in order to meet margin calls which respondent refused to satisfy; Respondents have refused to satisfy the remaining deficiencies of \$49,152.70 and \$5,855.90 in the PPP and joint account, respectively; in June 1994, Respondent John Padelford refused to pay for 41,800 shares of Solv-Ex; the margin contracts provide that Mr. Padelford would be liable for any deficiencies in the margin account; and Respondents are in breach of contract for their failure to satisfy margin deficiencies and failure to pay for shares purchased on John Padelford's behalf.

Respondents denied all material allegations set forth in the Statement of Claim. Respondents asserted the following affirmative defenses: Claimant has breached its contract with Respondents; Claimant has committed fraud in its dealing with Solv-Ex stock; Claimant has acted unconscionably under the contract with Respondents; due to circumstances, Claimant is estopped from recovering; Claimant has waived any right of claim for deficiencies; and Claimant has failed to mitigate damages.

For their Counterclaim, the Padelfords asserted that: Due to John Padelford's lack of experience and illiquid financial status, Claimant's investment recommendations were unsuitable; Claimant's actions, misrepresentations and omissions with respect to the Solv-Ex stock transactions constituted securities fraud under Arizona law (A.R.S. Section 44-1991), federal law (SEC Rule 10b-5, section 10(b) of the 1934 Act, 12(2) and 17(a) of the 1933 Act), and Claimant's manipulation through the short selling of Solv-Ex violated the anti-fraud and anti-manipulation provisions of Arizona law (A.R.S. Section 44-1991, Section 9(a)(2)) and federal law (section 10(b) of the 1934 Act and sections 12(2) and 17(a) of the 1933 Act); Claimant engaged in unauthorized trading in Respondent's cash account; Claimants acts were in violation of Arizona's Racketeering law (A.R.S. Sections 13-2101, 13-2314.04); Claimant breached its fiduciary duty to Respondents; Claimant undertook to defraud John Padelford in connection with his purchase of Solv-Ex in violation of Arizona Consumer Fraud Act, (A.R.S. Sect 14-1522); through Claimant's omissions and misrepresentations, Claimant negligently misrepresented facts which induced Respondent's material reliance; Claimant misappropriated opportunities with regard to Solv-Ex stock; Claimant breached the covenant of good faith and fair dealing implied in its contract with Respondents; as Respondents' investment advisor, Claimant was negligent in its supervision of Respondents' accounts.

Claimant has denied all material allegations set forth in Respondents' counterclaim. Claimant asserted that: Mr. Padelford is an experienced investor and his investment in Solv-Ex was of his own volition; there was no manipulation of Solv-ex stock; the Solv-ex recommendation was suitable; many of the Solv-ex purchases, including the 100,000 restricted shares, were not solicited by Claimant; there was no fraud or RICO; there was no unauthorized trading; Claimant is not a fiduciary; Claimant did not violate the Consumer Fraud Statute, make negligent misrepresentations,

misappropriate opportunities, breach the implied covenant of good faith or perform negligently; and that there is not legitimate reason why Respondents should be allowed not to pay a bill they legitimately owe to Claimant.

RELIEF REQUESTED

Claimant requested an award in the amount of \$170,000 plus interest for deficiencies owed by Respondent. In its response to Respondents' counterclaim, Claimant asserted that: It be awarded damages as set forth in its Statement of Claim; and all relief requested by Respondents be denied.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees.

In their counterclaim, Respondents requested an award in the amount of not less than \$1,250,000 for compensatory damages and an award of not less than \$250,000 for emotional distress damages. Pursuant to A.R.S. Sect 13-2314.04, Respondent requested that these awards be trebled. In addition, Respondents requested an award in an amount not less than \$500,000 for punitive damages and attorneys fees.

OTHER ISSUES CONSIDERED & DECIDED

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 and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Claimant's request for \$170,000.00 for deficiencies plus interest is denied and dismissed in its entirety with prejudice.

Claimant is liable for, and shall pay to Respondents \$400,000.00 for their claim for actual damages with respect to Solv-Ex stock. Respondents' claims for RICO damages, attorneys' fees, punitive damages, and emotional distress damages are, and each of them, denied and dismissed with prejudice.

Each claim/request for an award/damages not specifically set forth herein are, and each of them, denied with prejudice.

Each party will bear its own costs and expenses associated with this arbitration, including attorney's fees, except set forth more specifically below.

Forum fees will be paid 50% by Claimant Kemper Securities, and 50% by Respondents John Padelford III, Patricia Padelford, and Phoenix Pacific Properties, Inc.

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300 for each pre-hearing conference, if any. There were sessions 11 x \$750.00 plus one (1) pre-hearing session = \$8550.00 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 \$500.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable Counterclaim filing fee in the amount of \$250.00 and shall **retain** as forum fees the Counterclaim hearing session deposit in the amount of \$1000.00 previously deposited with the NASD by the Respondents.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$350 previously paid by Claimant.

Additional forum fees in the amount of \$3525 are assessed against the Claimant.

Additional forum fees in the amount of \$3275 are assessed against the Respondents.

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

Dated:

Howard R. Gaines

s/s

March 14, 1996

Howard R. Gaines

Public Arbitrator, Presiding Chair

Daniel J. Danvir

s/s

March 15, 1996

Daniel J. Danvir

Public Arbitrator

David W. Martin

s/s

March 20, 1996

David W. Martin

Industry Arbitrator