

## NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Name of Claimant

Oded & Yedida Rudawsky

and

95-01568

Name of Respondent

Michael G. Arcus  
Tamaron Investments, Inc.  
Michael Joseph Kirby  
Baraban Securities, Inc.

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### REPRESENTATION OF PARTIES

Oded & Yedida Rudawsky ("Claimant") was represented by Fred S. Furst, Esq., Krys, Boyle, Golz, Reich, Freedman & Scott, Denver, Colorado.

Michael G. Arcus ("Respondent") appeared *pro se*.

Tamaron Investments, Inc. ("Respondent Tamaron"), Michael Joseph Kirby ("Respondent Kirby") and Baraban Securities, Inc. ("Respondent Baraban") were represented by David A. Zisser, Esq. Berliner, Zisser, Walter & Galegos, P.C., Denver, Colorado.

### CASE INFORMATION

The Statement of Claim was filed on or about March 28, 1995. Submission Agreement of Claimant Oded & Yedida Rudawsky was signed on March 17, 1995.

Statement of Answer and CounterClaim was filed by Respondent Michael G. Arcus on or about July 12, 1995. Submission Agreement of Respondent Michael G. Arcus was signed on July 12, 1995.

Statement of Answer was filed by Respondents Tamaron Investments, Inc. and Michael Joseph Kirby on or about July 11, 1995. Submission Agreement of Respondent Tamaron Investments, Inc. was signed on June 7, 1995 by Charles Kirby. Submission Agreement of Respondent Michael Joseph Kirby was signed on July 26, 1995.

Statement of Answer and Crossclaim was filed by Respondent Baraban Securities, Inc. on or about September 11, 1995. Submission Agreement of Respondent Baraban Securities, Inc. was signed by Paul L. Kessler, President.

### **HEARING INFORMATION**

The hearing was held on Tuesday, April 23, 1996 for two (2) sessions, Wednesday, April 24, 1996 for two (2) sessions and Thursday, April 25, 1996 for one (1) session in Denver, Colorado for a total of five (5) sessions.

### **CASE SUMMARY**

Claimants alleged that Respondent Arcus made unsuitable recommendations and misrepresented material facts in connection with the purchase of Beta Well Services, Inc. ("BWS"). Specifically, Claimants alleged that Respondents:

- ♦ violated the Rules of Fair Practice by recommending securities which were unsuitable for them in light of their financial condition and investment objectives;
- ♦ breached their contract with them;
- ♦ violated the Rules of Fair Practice by manipulating and deceiving them;
- ♦ breached their fiduciary duty to the Claimants by recommending and purchasing unsuitable securities in their account, and misleading and deceiving them;
- ♦ were negligent and negligently supervised Respondent Arcus;
- ♦ violated Federal and State Securities laws; and
- ♦ engaged in active and constructive fraud.

Respondents Tamaron and Kirby denied the allegations set forth in the Statement of Claim. Respondents Tamaron and Kirby stated that there was a significant amount of publicity and/or available information regarding BWS. It was also stated that many of the matters alleged in the Statement of Claim to be misrepresentations, post-dated the Claimants' purchase of BWS. Respondents Tamaron and Kirby further stated that BWS may have failed to make appropriate disclosures, which cannot be attributed to them.

In his Answer, Respondent Arcus denied the allegations set forth in the Statement of Claim. Specifically, Respondent Arcus stated that at no time did he: ever pressure the Claimants to purchase BWS; state that he was privy to inside information; or give any price projections. Respondent Arcus also stated that based upon representations made by the Claimants, it appeared that this investment was suitable for them.

In its Answer, Respondents Baraban denied any liability to Claimants. Respondent Baraban specifically stated that: Respondents Arcus and Kirby were not associated with it during the time period of the transactions which form the basis of the claim asserted in this matter; and that although

it had acquired certain assets of Respondent Tamaron, it did not assume liabilities of Respondent Tamaron. In the Crossclaim, Respondent Baraban alleged that pursuant to the terms of the Asset Purchase Agreement, Respondent Tamaron is required to indemnify it for any expenses associated with defending claims in addition to any amounts awarded to Claimants from Baraban.

### **RELIEF REQUESTED**

Claimant requested an award of unspecified actual damages; interest; attorneys' fees and costs, including expert witness fees; and unspecified punitive damages.

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

Respondent Arcus requested that the claims asserted against him be dismissed.

Respondent Baraban requested that the claims asserted against it in this matter be dismissed. In its Crossclaim, Respondent Baraban requested an award of costs, expenses and fees incurred in this matter against Respondent Tamaron, in addition to indemnification for any award rendered against it.

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

- At the commencement of the hearing, the cross claim of Respondent Baraban was dismissed without prejudice.

At the commencement of the hearing, Respondent Michael G. Arcus advised the arbitration panel that he was withdrawing the cross claim asserted by him.

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. All claims asserted in this matter shall be and hereby are dismissed in their entirety.
2. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter not specifically enumerated herein.

**FORUM FEES**

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each prehearing conference, if any. There were five (5) sessions x \$600 = \$3,000 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 retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with the NASD by the Claimant Oded & Yedida Rudawsky.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$200 and shall retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with the NASD by Baraban Securities, Inc.

Respondent Michael Gerald Arcus shall be and hereby is liable for and shall pay to the NASD the sum of \$600 as forum fees.

Respondent Tamaron Investments, Inc. shall be and hereby is liable for and shall pay to the NASD the sum of \$600 as forum fees.

- Respondent Michael J. Kirby shall be and hereby is liable for and shall pay to the NASD the sum of \$600 as forum fees.

Pursuant to §45 of the NASD Code of Arbitration Procedure, the NASD shall retain the non-refundable member surcharge in the amount of \$350 paid to the NASD by Respondent Tamaron Investments, Inc. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

/s/ James J. Cronin, Esq.  
James J. Cronin, Esq.  
Public Arbitrator, Presiding Chair

May 14, 1996

/s/ John S. Barton  
John H. Barton  
Public Arbitrator

May 13, 1996

/s/ Edward F. Altman, Jr.  
Edward F. Altman, Jr.  
Industry Arbitrator

May 14, 1996