

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

William B. Kimberley

NASD CASE NO. 95-01865

Names of Respondents

Alex. Brown & Sons Incorporated
and Mark Branigan

Name of Third-Party Respondent

Mark Branigan

REPRESENTATION

For Claimant: Kevin P. Conway, Esq. of Conway & Conway, New York, New York filed a Notice of Appearance on September 11, 1996; John G. Vega, Esq. of Vega, Stanley, Martin & Zelman, P.A., Naples, Florida represented Claimant in this matter prior to September 11, 1996.

For Respondent Alex. Brown & Sons Incorporated ("Alex. Brown"): Daniel J. Donovan, Esq., Associate General Counsel of Alex. Brown & Sons Incorporated.

For Respondent/Third-Party Respondent Mark Branigan ("Branigan"): Steven L. Ratner, Esq. of Rosenman & Colin LLP, New York, New York.

CASE INFORMATION

Statement of Claim filed: April 17, 1995. Claimant's Submission Agreement signed on March 17, 1995.

Answer and Counterclaim filed by Respondent Alex. Brown on July 21, 1995. Respondent Alex. Brown's Submission Agreement signed on July 18, 1995 by Robert F. Price, Managing Director of Alex. Brown.

Answer to Counterclaim filed by Claimant on August 7, 1995.

Claimant's Notice of Dismissal of his claims against Respondent Mark Branigan filed on August 9, 1995.

Respondent Alex. Brown's Third Party Claim against Mark Branigan filed on November 2, 1995.

Third-Party Respondent Branigan's Statement of Answer to Third Party Claim filed on November 14, 1995. Third-Party Respondent Branigan's Submission Agreement signed on November 10, 1995.

HEARING INFORMATION

On April 30, 1997, May 1, 1997 and May 30, 1997, telephonic pre-hearing conferences lasting one (1)

session each were conducted with the Chairman of the arbitration panel. On May 5, 6 and 7, 1997, in Fort Lauderdale, Florida and June 2, 3, 4 and 5, 1997 in New York City, New York, hearings lasting fifteen (15) sessions were conducted.

CASE SUMMARY

Claimant alleged that he was an inexperienced investor when he opened his account with Branigan at Shearson Lehman Brothers, Inc. and was persuaded to move his account to Alex. Brown when Branigan became employed there. Claimant alleged that Alex. Brown relied on documents provided by him to Shearson as to his financial objectives although his financial situation had changed dramatically since that time. Claimant further alleged that there were significant losses in his account while at Alex. Brown, many of the losses occurring in investments which were not appropriate for the conservative objectives of an inexperienced investor. Claimant asserted that in February, 1993 he retired and told Branigan to adopt an extremely conservative investment posture, but his account was nonetheless placed on margin by Branigan.

Claimant further asserted that in mid-1993 Branigan represented to him that the Citadel Holding Corporation (CDL) was a "sure thing" stock that could recoup the losses in Claimant's account, and that Alex. Brown consented to Branigan buying CDL stock for his clients although it did not recommend or follow the stock as a firm. Claimant alleged that Branigan urged him to continue buying CDL stock as the stock price fell and as the losses mounted, Claimant began to receive margin calls. Claimant further alleged that as his account deteriorated, he sought help from management at Alex. Brown but his correspondence went unanswered. Claimant also alleged that Alex. Brown authorized Branigan to sell his personal position in CDL stock but instructed him not to inform his clients of this action, after which time Branigan continued to recommend that Claimant purchase this stock. As a result, Claimant asserted causes of action for churning, violation of Florida state law and federal securities laws, violation of suitability requirements, breach of fiduciary duty, breach of contract, negligence, gross negligence and fraud.

Respondent Alex. Brown denied each of the claims asserted by Claimant and alleged that Mr. Kimberly represented himself to Branigan as an experienced investor with a substantial net worth and that in the four years prior to opening his account with Alex. Brown, he engaged in aggressive short term investing with Branigan as his broker. Respondent Alex. Brown alleged that upon opening his account with them, Claimant restated his earlier representations to Branigan regarding his investment objectives, net worth and investment experiences, and that each of the transactions in Claimant's account at Alex. Brown was consistent with these representations. Respondent Alex. Brown further asserted that all transactions recommended to Claimant were consistent with his investment objectives and experience and that Claimant made each of the investment decisions regarding transactions in his account, including the decisions to purchase and hold the CDL stock. Respondent Alex. Brown asserted affirmative defenses to the claim including the doctrine of estoppel and waiver, that each of the transactions in the account were ratified by Claimant and that the claims were barred by the applicable statute(s) of limitations.

Respondent Alex. Brown further asserted a counterclaim against Claimant for a debit balance in his account due to an unpaid margin call. Claimant admitted that there was a debit balance in his account as the result of a margin call but alleged that Branigan, acting on behalf of Alex. Brown, assured him that they would not pursue their claim for the maintenance call as an apology for the devastating losses in his account.

Respondent Alex. Brown subsequently asserted a third party claim against Branigan for contribution and indemnification. While it denied any liability, Alex. Brown asserted that in the event that the panel was to rule in favor of Claimant, Branigan should be directed to contribute to or indemnify Alex. Brown

against all or some portion of the cost of any award against it on the basis of Claimant's allegations that Branigan's conduct violated the federal securities laws and that Branigan failed to manage Claimant's account in an appropriate manner.

Third-Party Respondent Branigan denied all allegations of wrongdoing and asserted that Alex. Brown repeatedly stated to him that he had acted properly with respect to Claimant's account. Third-Party Respondent Branigan maintained that he acted within the scope of his employment at all times; his actions were consistent with Alex. Brown's policies and were directed and authorized by Alex. Brown; Alex. Brown was required to supervise him, and it did so; and he did not act in a manner that was knowingly or willfully wrongful. Third-Party Respondent Branigan further asserted that any liability to Claimant is exclusively attributable to Alex. Brown and that the third party claim is baseless.

RELIEF REQUESTED

Claimant requested compensatory damages in an amount between \$600,000.00 and \$675,000.00, the return of the excess commissions generated by the mishandling of his account and that he be awarded his attorney's fees. Claimant further requested that Respondent Alex. Brown's counterclaim be dismissed in its entirety, or in the alternative, that the amount of \$12,806.65 be taken as an offset against his recovery, and that the administrative costs of this proceeding be charged to Respondent Alex. Brown.

Respondent Alex. Brown requested dismissal of the claims asserted by Claimant in their entirety, that the administrative costs of this proceeding be charged to Claimant, and an award on its counterclaim in the sum of \$12,860.65 plus interest and its costs of collection, including reasonable attorney's fees. Respondent Alex. Brown further requested an award on its third party claim directing Third-Party Respondent Branigan to indemnify it for any amount it is required to pay Claimant or directing Third-Party Respondent Branigan to contribute to any award it is required to pay to Claimant, in an appropriate amount, together with any additional relief that is deemed just and proper.

Third-Party Respondent Branigan requested dismissal of the third party claim in its entirety, that he be awarded the costs and expenses of this arbitration and such other and further relief as is just and proper.

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 originals remain on file with the NASD.

On August 9, 1995, Claimant filed a Notice of Dismissal whereby he dismissed his claims against Respondent Branigan. At the hearing, the panel elicited from Claimant that his dismissal of Branigan was without prejudice and had not been given in return for any consideration. At the close of the hearing, the panel requested post-hearing briefs from the parties on the issues of whether under the law of agency, the Third-Party Respondent agent may be held liable to the Respondent principal for contribution or indemnification when the Claimant has dismissed its claims against the Third-Party Respondent agent but the Respondent principal is found liable to the Claimant; and whether the Respondent principal may be held liable to the Claimant for the acts and conduct of the Third-Party Respondent agent when the Claimant has dismissed its claims against the Third-Party Respondent agent.

Subsequent to the conclusion of the hearing, the panel received a letter dated June 6, 1997 from counsel for Respondent Alex. Brown wherein Alex. Brown stipulated that the net realized loss in Claimant's account (exclusive of margin interest, dividends and debit balance) was approximately \$502,000.00.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Alex. Brown is found liable and shall pay compensatory damages to Claimant in the amount of \$167,014.00 plus interest at the rate of 8% per annum from March 17, 1995 to the date of payment of this award.
2. Claimant is found liable to Respondent Alex. Brown on the counterclaim in the amount of \$12,860.65 plus interest at the rate of 8% per annum from March 17, 1995 to the date of payment, which amount is to be taken as an offset against the amount awarded to Claimant as set forth in paragraph 1 above.
3. Third-Party Respondent Branigan is found liable to Respondent Alex. Brown on the third party claim and is hereby directed to indemnify Alex. Brown in the sum of \$83,507.00 plus interest at the rate of 8% per annum from March 17, 1995 to the date of payment.
4. Respondent Alex. Brown and Third-Party Respondent Branigan are both found liable and shall pay the sum of \$125.00 each to Claimant as reimbursement for the initial claim filing fee.
5. All other claims for relief, including requests for attorney's fees, are denied.

OTHER COSTS

Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$15,900.00 (15 sessions X \$1,000.00 per session, plus 3 pre-hearing conferences with one arbitrator X \$300.00) as follows:

1. Claimant is assessed the sum of \$5,300.00, for which NASD Regulation, Inc. shall retain the \$1,000.00 hearing session deposit previously paid in partial satisfaction thereof, leaving a balance due in the amount of \$4,300.00.
2. Respondent Alex. Brown is assessed the sum of \$5,300.00, for which NASD Regulation, Inc. shall retain the \$600.00 counterclaim hearing session deposit and the \$500.00 third party claim hearing session deposit previously paid in partial satisfaction thereof, leaving a balance due in the amount of \$4,200.00.
3. Third-Party Respondent Branigan is assessed the sum of \$5,300.00.
4. The Claimant is liable and shall pay to NASD Regulation, Inc. the sum of \$1,000.00 representing the fee for the postponement of the October 16, 17 and 18, 1996 scheduled hearing dates.
5. NASD Regulation, Inc. shall retain the \$250.00 claim filing fee paid by Claimant as well as the \$500.00 counterclaim filing fee and \$500.00 third party claim filing fee paid by Respondent Alex. Brown.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/s/
Robert J. Hyman, Esq.
Chairperson

Public

/s/
Judy Avey

Public

/s/
David A. Pracker

Industry

Date of Decision: August 29, 1997