

AWARD

**NASD, Regulation, Inc.,
Office of Dispute Resolution**

In the Matter of the Arbitration Between

William Killebrew

Claimant

NASD Regulation, Inc.
No. 95-01943

v.

Kidder Peabody & Co., Inc.
Gregory F. Wilbur

Respondents

REPRESENTATION OF PARTIES

William Killebrew ("Claimant") was represented by Lawrence A. Callaghan, Esq., Severson & Werson, San Francisco, California.

Kidder Peabody & Co., Incorporated and Gregory F. Wilbur ("Respondents") were represented by Eric G. Wallis, Esq., Crosby Heafy Roach & May, Oakland, California.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about April 18, 1995. Claimant's Submission Agreement was signed on April 17, 1995. Claimant's First Amended Statement of Claim was filed on or about August 29, 1996.

Respondents Kidder Peabody & Co., Incorporated and Gregory F. Wilbur Joint Statement of Answer was filed on or about June 30, 1995. Respondents Kidder Peabody & Co., Incorporated and Gregory F. Wilbur Joint Statement of Answer to the Amended Claim was filed on or about December 12, 1996.

HEARING INFORMATION

Pre-Hearing Conferences were held on August 16, 1996, December 4th and 5th, 1996. Each lasted one session.

The hearing was held on the following dates:

December 16, 1996	2 sessions;
December 17, 1996	2 sessions;
December 18, 1996	2 sessions;
December 19, 1996	2 sessions;
December 20, 1996	1 sessions;
December 30, 1996	2 sessions;
December 31, 1996	1 session;
January 28, 1997	2 sessions;
January 29, 1997	2 sessions;
February 6, 1997	2 sessions.

CASE SUMMARY

Claimant William Killebrew has stated a claim against respondents Gregory Wilbur and Kidder, Peabody & Co. for violations of Rule 10b-5, fraud, negligent misrepresentation, breach of fiduciary duty, breach of the covenant of good faith and fair dealing and RICO violations. Specifically Wilbur misrepresented the true nature of Delphi shares to Killebrew, causing Killebrew to purchase shares he would not have purchased had he known that Kidder, Peabody, and specifically Wilbur, not only dominated and controlled the market for Delphi, but were actively placing illiquid shares into customer accounts, thereby maintaining the price of Delphi at an artificially high level. Wilbur's and Kidder's failure to disclose these facts was a material omission because, had Killebrew or any other reasonable investor known of these facts, they would not have purchased shares of Delphi. Wilbur's misrepresentations also led Killebrew's second sale of KLA shares on January 17, 1994. Wilbur intentionally misrepresented that the stock was overvalued in order to induce Killebrew to sell his KLA shares and purchase Delphi shares.

Kidder, Peabody is liable for Killebrew's damages because it facilitated and encouraged Wilbur's actions. Branch manager Ray Cyphers knew of Wilbur's activities and did nothing to stop him, despite directives from Kidder's main office that Kidder's position in Delphi was not to increase. Kidder, Peabody allowed Wilbur to continue soliciting purchases of Delphi stock in spite of unbelievably high concentrations and numerous customer complaints against Wilbur.

Killebrew is knowledgeable about some areas of securities, but specifically sought out Wilbur as someone with expertise in the area of high tech stocks. Wilbur held himself out as "Mr. Silicon Valley," and led Killebrew to believe that his recommendations were based on his analysis of a company, rather than his need to place shares whose price would fall if he was unable to locate buyers. Placing his trust in Wilbur's recommendation, Killebrew purchased Delphi stock in June 1991, August 1991 and again in April 1994, investing a portion of funds obtained from a sale of KLA stock made at Wilbur's recommendation in January 1994. As a result of Wilbur's misrepresentations and breaches of fiduciary duty, Killebrew has suffered damages over one million dollars and should be compensated accordingly.

Respondents denied that they made any misstatements to Killebrew concerning the Delphi; to the contrary, they contend they provided Claimant with a variety of accurate information on the company through: (a) quarterly reports, (b) annual reports, (c) bi-monthly telephone conversations,

and (d) meetings for Killebrew with Delphi's senior management including the CEO and the CFO. Respondents further contended that they did not manipulate the market in Delphi share; that the drop in Delphi's price during 1994 was caused by general overall market conditions effected, in part, by the Federal Reserve's raising of short-term interest rates, and negative financial news concerning Delphi during the last six months of 1994; and that Wilbur's advice to sell KLA during early 1994 was consistent with advice he gave other clients. They asserted that Killebrew's claims were barred by the statutes of limitations and the defenses of waiver and estoppel.

RELIEF REQUESTED

Claimant requested unspecified out-of-pocket damages, interest, costs, and fees. Additionally, Claimant requested exemplary damages and treble damages under the RICO statutes. Further, Claimant requested the panel order rescission of the Claimant's purchases of Delphi and the January 17, 1994 sale of KLA.

Respondent requested that the claims asserted against it be denied in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrators have determined that Respondents Kidder Peabody & Co., Incorporated and Gregory F. Wilbur did not file with the NASD properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to §12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing and are bound by the determination of the arbitration panel on all issues submitted.

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 NASD Regulation, Inc., Office of Dispute Resolution.

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. The panel orders the rescission of the Delphi stock purchases by the Claimant. The Claimant is directed to convey to the Respondents 102,000 Delphi shares, Respondents in turn, jointly and severally, shall convey to Claimant the sum of \$757,250.00 an amount inclusive of interest;
2. Each and every claim regarding the KLA stock is denied;
3. All other claims by the Claimant are denied;
4. Claimant's request for punitive damages is denied;
5. Each side to bear their own costs and fees.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each prehearing conference, if any. There were 18 hearing sessions x \$1,000 plus 2 pre-hearing sessions x \$300 = \$18,600 in forum fees. Pursuant to §43(b) of the NASD Regulation, Inc., Office of Dispute Resolution 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 of Arbitration Procedure, the Respondents, jointly and severally, are assessed all forum fees.

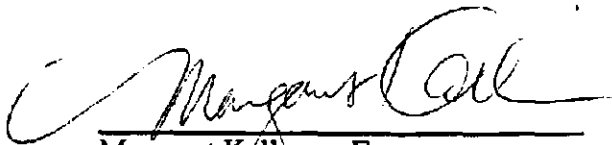
Total Fees

18 Hearing Sessions @ \$1,000.00 =	\$18,000.00
3 Pre-Hearing Conf. @ \$300.00 =	<u>\$ 900.00</u>
Total	<u>\$18,900.00</u>

Pursuant to §43(c) of the Code, NASD Regulation, Inc. shall **retain** the non-refundable filing fee in the amount of \$250 and shall **refund** as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with NASD Regulation, Inc. by the Claimant William Killebrew.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$500 previously paid by Kidder Peabody & Co. Incorporated.

Fees are payable to the NASD, Regulation, Inc.



Margaret Kallman, Esq.
Public Arbitrator, Presiding Chair

John Collentine
Public Arbitrator

Richard Bullock
Industry Arbitrator


Dated:

Feb. 19, 1997

Date served: 2/20/1997

Dated:

Margaret Kallman, Esq.
Public Arbitrator, Presiding Chair


John Collentine
Public Arbitrator

Feb. 11, 1997

Richard Bullock
Industry Arbitrator

Date served: 2/20/1997

Dated:

Margaret Kallman, Esq.
Public Arbitrator, Presiding Chair

John Collettine
Public Arbitrator

Richard E Bullock
Richard Bullock
Industry Arbitrator

2/11/97

Date served: 2/20/1997

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