

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

John Kent,

Claimant,

and

No. 95-02066

Berkeley Securities Corporation,
William Baquet, Phyllis A. Henderson,
and Daniel J. Subarsky,

Respondents.

REPRESENTATION OF PARTIES

Claimant John Kent ("Claimant") was represented by Melvin G. Mosely, Jr., Esq. of Warner Norcross & Judd located in Grand Rapids, Michigan.

Respondents Berkeley Securities Corporation ("Berkeley Securities") and William Baquet ("Baquet") were represented by Ezio Scaldaferrì, Esq. of Feder, Kaszovitz, Isaacson, Weber, Skala & Bass located in New York, New York.

Respondent Phyllis A. Henderson ("Henderson") appeared pro se.

Respondent Daniel J. Subarsky ("Subarsky") was represented by David A. Schrader, Esq. of Alpert & Levy located in West Orange, New Jersey.

CASE INFORMATION

The Statement of Claim was filed on or about April 25, 1995.

Claimant's Submission Agreement was signed on April 12, 1995.

The Joint Statement of Answer of Respondents Berkeley Securities, Baquet, and Henderson was filed on or about June 23, 1995.

The Submission Agreement of Respondent Berkeley Securities was signed on June 22, 1995 by William Baquet, President of Berkeley Securities Corporation.

Respondent Baquet's Submission Agreement was signed on June 22, 1995.

Respondent Henderson's Submission Agreement was signed on June 22, 1995.

Respondent Subarsky's Statement of Answer was filed on or about June 9, 1995.

Respondent Subarsky's Amended Statement of Answer was filed on or about June 19, 1995.

Respondent Subarsky's Submission Agreement was signed on June 7, 1995.

HEARING INFORMATION

The telephonic pre-hearing conferences were held on:

December 6, 1995 for one (1) session;
December 13, 1995 for one (1) session;
February 28, 1996 for one (1) session;
March 4, 1996 for one (1) session;
May 30, 1996 for one (1) session;
December 3, 1996 for one (1) session;
April 25, 1997 for one (1) session;
and April 29, 1997 for one (1) session.

The hearing was held on:

August 26, 1996 for two (2) sessions;
August 27, 1996 for two (2) sessions;
June 30, 1997 for two (2) sessions;
July 1, 1997 for two (2) sessions; and
July 2, 1997 for three (3) sessions.

The hearing was held in Grand Rapids, Michigan.

CASE SUMMARY

Claimant brought this action to recover losses on investments in securities accounts that were managed by Respondent Subarsky, a registered representative of Berkeley Securities. Claimant contended that Respondent Baquet was the President of Berkeley Securities and Respondent Henderson was the Vice-President, Secretary, and Treasurer of Berkeley Securities. Claimant asserted Respondents Baquet and Henderson were responsible for the supervision of the firm's registered representatives and the formulation of policies and procedures governing the firm's market-marking activities.

Claimant alleged that during 1994 he suffered nearly \$120,000 in losses on investments in securities accounts that were managed by Respondent Subarsky. Claimant contended that most of the losses were in speculative stocks in which Berkeley Securities made a market. Claimant maintained that these speculative investments included stocks such as: Biomune Sys. Inc; Partech Holdings Corp; SCE Corp; Classics Int'l Entertainment; Sam & Libby Inc; Bitwise Designs Inc; Florida West Airlines; Simtek Corp; Eagle Hardware; and WTS Grand Toys. Claimant contended that these speculative investments were totally unsuitable for an elderly person whose primary objective was to preserve his savings. Claimant maintained that he lacked the financial sophistication necessary to understand the risks associated with the speculative investments that were purchased for his accounts. Claimant asserted that, as a broker-dealer responsible for supervising Respondent Subarsky, Berkeley Securities is legally responsible for his misconduct. Claimant also alleged that the principals of Berkeley Securities improperly encouraged their brokers to push the stocks in question on unsuspecting customers.

Respondents Berkeley Securities, Baquet, and Henderson denied all liability to Claimant in the Joint Statement of Answer. Respondents Berkeley Securities, Baquet, and Henderson alleged that Claimant had a net worth in excess of \$300,000 and an annual income in excess of \$100,000. Respondents Berkeley Securities, Baquet, and Henderson contended that Claimant cited long-term growth, income, and trading profits as his stated investment objectives and specifically declared that he made his own investment decisions. Respondents Berkeley Securities, Baquet, and Henderson asserted that Respondent Subarsky reconfirmed to them that the Claimant was an active, sophisticated investor that maintained accounts at other brokerage firms. Respondents Berkeley Securities, Baquet, and Henderson maintained that all transactions were consistent with Claimant's historical trading practices and in conformity with his stated investment objectives. Respondents Berkeley Securities, Baquet, and Henderson alleged that all transactions executed for or on behalf of Claimant's account were done with Claimant's full knowledge and consent. Respondents Berkeley Securities, Baquet, and Henderson contended that they and Respondent Subarsky at all times acted responsibly and properly with respect to Claimant. Respondents Berkeley Securities, Baquet, and Henderson alleged that Respondents properly discharged their duties, responsibilities, and obligations, and in all respects acted in accordance with applicable law as well as accepted industry standards and practices.

Respondent Subarsky also denied all allegations set forth in the Statement of Claim. Respondent Subarsky alleged that Claimant was a very experienced investor who possessed the financial sophistication to understand all risks, and that he affirmatively sought out speculative, high risk investments. Respondent Subarsky asserted that the Claimant made thousands of dollars from trades Respondent Subarsky placed in securities in which Berkeley Securities made a market. Respondent Subarsky maintained that the \$120,000 in losses allegedly incurred by the Claimant were due in part to investments made by brokers at other firms.

RELIEF REQUESTED

Claimant requested the following relief jointly and severally against all Respondents: \$120,000 as compensatory damages; interest at an annual rate of 10%; all costs incurred by Claimant, including filing fees and expert witness fees; actual attorneys' fees incurred by Claimant; punitive damages; rescission of all transactions; and the award of all monies necessary to make Claimant whole.

Respondents Berkeley Securities, Baquet, and Henderson requested that the claims asserted against them be denied in their entirety. Respondents Berkeley Securities, Baquet, and Henderson also requested an award of the following: undetermined actual damages; punitive damages of at least \$100,000; for all costs, expenses and disbursements, including but not limited to, reasonable attorney's fees, filing fees, and forum fees; for travel and lodging expenses, and for other relief deemed just and proper.

Respondent Subarsky requested that the claims asserted against him be dismissed in their entirety with prejudice and that he recover his actual attorneys' fees and expenses incurred in responding to the Statement of Claim.

OTHER ISSUES CONSIDERED AND DECIDED

Claimant's Motion to Transfer the Hearing Location from Detroit to Grand Rapids was granted.

Respondent Subarsky's Motion to Disqualify Claimant's counsel Warner Norcross & Judd from continuing to represent Claimant in this matter was denied.

Respondent Subarsky's Motion (1) to dismiss the arbitration proceeding as a mistrial; or alternatively (2)(a) to strike the testimony and proceedings which had taken place as of that date; (b) to require that all portions of the proceeding which had already been conducted be redone; and/or (c) to have the current panel recused/disqualified was denied.

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 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) That the Statement of Claim is hereby dismissed in its entirety with prejudice; and
- (2) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically enumerated are hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference before a single arbitrator. There were six (6) pre-hearing conferences before a single arbitrator $\times \$300 = \$1,800$ in forum fees. There were two (2) pre-hearing conferences before the full panel $\times \$750 = \$1,500$ in forum fees. There were eleven (11) hearing sessions $\times \$750 = \$8,250$ in forum fees. Total forum fees = \$11,550. Pursuant to § 10332(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 § 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution 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 \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant.

Pursuant to §§ 10332(c) and 10319(b) of the Code, Respondent Subarsky is liable for and shall pay postponement fees in the amount of \$2,750 which have been assessed in connection with Respondent Subarsky's First, Second, and Third Motions for Postponement.

Pursuant to §§ 10332(c) and 10319(b) of the Code, Respondents Berkeley Securities and Baquet are jointly and severally liable for and shall pay postponement fees in the amount of \$750 assessed in connection with their First Motion for Postponement.

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Pursuant to § 10332(c) of the Code, Claimant Kent is liable for and shall pay forum fees in the amount of \$5,025 (1/2 total forum fees - \$750 hearing session deposit).

Pursuant to § 10332(c) of the Code, Respondents Berkeley Securities Corporation, William Baquet, Phyllis A. Henderson, and Daniel J. Subarsky are jointly and severally liable for and shall pay forum fees in the amount of \$5,775 (1/2 total forum fees).

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

\s\ Barry Goldman, Esq.
Barry Goldman, Esq.
Chairperson
Public Arbitrator

July 20, 1997
Dated:

\s\ Mauricio Kohn
Mauricio Kohn
Panelist
Public Arbitrator

July 24, 1997
Dated:

\s\ Mary Ann Golin
Mary Ann Golin
Panelist
Industry Arbitrator

July 22, 1997
Dated:

For NASD use only:

Date Award was served on the parties: July 25, 1997