

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

William M. Goodman

Claimant,

v.

No. 95-03284

Oppenheimer & Co., Inc. and
Kidder, Peabody & Co., Inc.
n/k/a PaineWebber, Inc.

Respondents.

REPRESENTATION OF PARTIES

Claimant William M. Goodman ("Claimant") was represented by Joseph H. Spiegel, Esq. of Southfield, Michigan.

Respondent Oppenheimer & Co., Inc. ("Oppenheimer") was represented by Joseph C. Pickard, Esq. of Oppenheimer & Co., Inc. located in New York, New York.

Respondent Kidder, Peabody & Co., Inc. ("Kidder") was represented by Richard Kelly, Esq. of Kidder, Peabody & Co., Inc. located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about July 7, 1995. Claimant's Submission Agreement was signed on June 29, 1995.

Respondent Oppenheimer's Statement of Answer was filed on or about August 28, 1995.

Respondent Oppenheimer's Submission Agreement was signed on August 28, 1995 by Joseph C. Pickard, Senior Vice President of Oppenheimer & Co., Inc.

Respondent Kidder's Statement of Answer was filed on or about October 12, 1995. Respondent Kidder's Submission Agreement was signed on October 12, 1995 by Pamela G. Armstrong, Vice President and Associate General Counsel of Kidder, Peabody & Co., Inc.

HEARING INFORMATION

The telephonic pre-hearing conference was held on July 12, 1996 for one (1) session.

The Hearing was held on January 27, 1997 for two (2) sessions and January 28, 1997 for three (3) sessions. The Hearing location was Southfield, Michigan.

CASE SUMMARY

Claimant William M. Goodman alleged that he purchased 10,000 shares of Acton Corp. stock through Respondent Kidder, Peabody & Co., Inc. Claimant contended that, while the Claimant's account was at Kidder, Claimant's Acton stock, which was held in street name, was tendered and new stock issued in the name of Sunstates Corp. Claimant asserted that Kidder held the Sunstates stock in street name, and the monthly statements did not indicate whether it was common or preferred. Claimant maintained that on May 13, 1994, the Sunstates units were delivered out of the account to Claimant who kept them in his possession. Claimant alleged that it appeared that a preferred certificate in the amount of 10,000 shares was issued by First Union Brokerage Services, Inc. ("First Union") on May 5, 1994. Claimant contended that the certificate was eventually delivered to Respondent Oppenheimer & Co., Inc. in October 1994 where the stock was held in street name for Claimant's account. Claimant asserted that First Union admitted it was in error when it issued a common stock certificate printed on a preferred stock certificate. Claimant maintained that Respondent Oppenheimer sold 10,000 shares of preferred stock resulting in a credit to Claimant. Claimant alleged that he notified Respondent Oppenheimer that this was incorrect. Claimant contended that when the stock certificate was to be delivered by Oppenheimer for clearance it was rejected on the grounds that Claimant was to have common and not preferred stock. Claimant alleged that Respondent Oppenheimer then maintained a short position in its error account for that 10,000 shares of preferred stock. Claimant maintained that, contrary to his wishes, the 10,000 shares of preferred stock was bought back in by Oppenheimer at prices higher than those at which it was sold resulting in a debt to Claimant of \$64,073.10. Claimant asserted various claims against Respondents, including negligence and breach of contract.

Respondent Oppenheimer & Co., Inc. denied all liability to Claimant in its Statement of Answer. Respondent Oppenheimer asserted various affirmative defenses, including, but not limited to: that the Respondent acted in compliance with all applicable rules and regulations; that the damages allegedly suffered have no causal relationship with any act attributable to Respondent; that the claims are barred by the doctrines of waiver and ratification; that Respondent discharged its responsibilities in a professional and ethical manner; that the claims are barred by the

doctrines of contributory/ comparative negligence; and that the Claimant failed to mitigate any damages.

Respondent Kidder, Peabody & Co., Inc. also denied all liability to Claimant in its Statement of Answer. Respondent Kidder alleged that it was not, and could not be, responsible for any event that may have contributed to Claimant's loss. Respondent Kidder maintained that the Acton stock was not physically held at Kidder, but rather in street name at the Depository Trust Corporation ("DTC"). Respondent Kidder contended that, pursuant to Acton Corp.'s name change, Kidder instructed the DTC for reissuance in the name of Sunstates Corp. Respondent Kidder asserted that it did not tender the shares itself and did not communicate directly with the company's transfer agent. Respondent Kidder maintained that its role in this matter was limited to instructing DTC. Kidder alleged that the new Sunstates stock was delivered to Claimant by DTC without Kidder having either possessed or having seen the physical certificates. Respondent Kidder contended that, because the securities were held in street name, and Kidder never held or tendered the securities themselves, that nothing Kidder did could have caused Claimant's loss.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$64,073.10; interest from the date of the first repurchase of the Sunstates preferred stock; costs, expenses, reasonable attorney fees and other relief deemed necessary and proper.

Respondents requested that the Statement of Claim be dismissed in its entirety with prejudice.

OTHER ISSUES CONSIDERED & DECIDED

Respondent First Union Brokerage Services, Inc. was dismissed from this matter without prejudice.

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 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 Respondent Kidder, Peabody & Co., Inc. n/k/a PaineWebber, Inc. is liable for and shall pay to Claimant William M. Goodman compensatory damages in the amount of Sixty Four Thousand and Seventy Three Dollars and Ten Cents (\$64,073.10);
- (2) That Respondent Kidder, Peabody & Co., Inc. n/k/a PaineWebber, Inc. is liable for and shall pay to Claimant William M. Goodman interest on the above sum in the amount of Twelve Thousand Nine Hundred and Seventy Four Dollars and Eighty One Cents (\$12,974.81);
- (3) That Respondent Kidder, Peabody & Co., Inc. n/k/a PaineWebber, Inc. is liable for and shall pay to Claimant William M. Goodman his attorney fees incurred in this matter in the amount of Twenty Three Thousand One Hundred and Fourteen Dollars and Thirty Seven Cents (\$23,114.37). The authority for the attorney's fees is found, *inter alia*, at Prince v. Heritage, 109 Mich App 189 (1981) and MCL 451.810;
- (4) That Respondent Oppenheimer & Co., Inc. is dismissed from this matter with prejudice; and
- (5) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby dismissed in their entirety with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each pre-hearing conference, if any. There were five (5) hearing session x \$500 = \$2,500 in forum fees and one (1) pre-hearing conference x \$300 = \$300 in forum fees. Total forum fees = \$2,800. Pursuant to §10332(b) of 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 \$150 and shall refund the hearing session

deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to §10332(c) of the Code, Respondent Kidder, Peabody & Co., Inc. is liable for and shall pay forum fees in the amount of \$2,800. Pursuant to §10332(c) of the Code, Respondent Kidder, Peabody & Co., Inc. is liable for and shall pay postponement fees in the amount of \$500.

Pursuant to §10332(c) of the Code, Respondent Oppenheimer & Co., Inc. is liable for its member surcharge in the amount of \$300. Pursuant to §10332(c) of the Code, Respondent Kidder, Peabody & Co., Inc. is liable for its member surcharge in the amount of \$300. Pursuant to §10332(c) of the Code, Respondent First Union Brokerage Services, Inc. is liable for its member surcharge in the amount of \$300.

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

Concurring Arbitrators' Signatures

/s/ George P. Doom
George P. Doom
Chairperson
Public Arbitrator

February 6, 1997
Dated:

/s/ Howard F. Lynn
Howard F. Lynn
Panelist
Public Arbitrator

February 10, 1997
Dated:

Dissenting Arbitrator's Signature

/s/ David L. Tornga, Esq.
David L. Tornga, Esq.
Panelist
Industry Arbitrator

February 11, 1997
Dated:

For NASD Regulation use only:
Date award served on the parties: February 12, 1997