

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

John Harvison

Claimant,

v.

No. 95-03549

Oppenheimer & Co., Inc. and Jay F. Dingee

Respondents.

REPRESENTATION OF PARTIES

Claimant John Harvison was represented by Edward W. Russey, III, Esquire of Law Offices of Jeff Ferentz, located in Newport Beach, CA.

Respondents Oppenheimer & Co., Inc. and Jay F. Dingee were represented by Eugene L. Small, Esquire of Oppenheimer & Co., Inc., located in New York, NY.

CASE INFORMATION

Claimant John Harvison's Statement of Claim was filed on or about July 21, 1995.

Claimant John Harvison's Submission Agreement was signed on July 12, 1995.

Respondent Oppenheimer & Co., Inc. and Jay F. Dingee's Statement of Answer was filed on or about September 29, 1995.

Respondent Oppenheimer & Co., Inc.'s Submission Agreement was signed on September 28, 1995 by Eugene L. Small, Senior Vice President of Oppenheimer & Co., Inc.

The NASD has no record of a properly executed Submission Agreement from Respondent Jay F. Dingee.

HEARING INFORMATION

A prehearing conference was held on July 12, 1996 for one (1) session.

The hearing was held on: July 16, 1996 for two (2) sessions; July 17, 1996 for two (2) sessions; July 18, 1996 for two (2) sessions; and July 19, 1996 for two (2) sessions. The hearing was held in Dallas, TX for the total of eight (8) sessions.

CASE SUMMARY

Claimant John Harvison ("Claimant") alleged that Respondents Oppenheimer & Co., Inc. and Jay Dingee ("Respondents") solicited him to buy shares of stock in Scorpion Technologies, that he did not know were unregistered, charged him excessive commissions, failed to sell his stock when instructed to do so, and failed to inform him of a pending lawsuit against Scorpion Technologies that led to a sharp decline in the value of its stock. Claimant asserted the following legal claims: (1) fraud, deceit, misrepresentation, and omission of material facts, (2) violation of Texas Blue Sky laws; (3) negligence; (4) excessive commissions; and (5) breach of implied covenant of good faith and fair dealing.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that no misrepresentations were made to Claimant in regard to his purchase of stocks in Scorpion Technologies and that this purchase was unsolicited. Respondents asserted that Claimant is a substantial sophisticated investor, that he was advised that purchasing the Scorpion Technologies stocks was speculative, and that he could have liquidated his position at any time if he was uncomfortable with the risk. Respondents made the following affirmative defenses: (1) Claimant fails to state a claim upon which relief can be granted; (2) Claimant authorized, consented to or acquiesced in the execution of each transaction in his account and is therefore equitably estopped from bringing his claim; (3) Claimant waived any and all claims alleged by continuing to pursue his investment after receiving knowledge of the risks involved; (4) Claimant, by failing to make a timely objection to the transactions complained of, has ratified the transactions and is barred from recovery; (5) Claimant is barred from recovery for failure to exercise the degree of diligence required in handling and monitoring his securities transactions; (6) Claimant was aware of the risk involved and voluntarily assumed such risk; (7) because Claimant failed to notify Respondent of the alleged acts or omissions, Claimant is barred from recovering from Respondent under the doctrines of ratification, estoppel, waiver and laches; (8) Claimant is barred from recovery under the doctrines of unclean hands and *in pari delicto*; (9) Claimant failed to mitigate his damages; (10) Claimant's losses were proximately caused by his own conduct and negligence and is therefore precluded from recovery; (11) Claimant failed to notify Respondent of any investment performance not meeting his expectations and is therefore barred from recovery; (12) Claimant's statutory securities fraud claims are barred because his broker did not act with the requisite *scienter*; (13) Claimant's claims are barred by the applicable statute of limitations; (14) Claimant's demand for a judgment involving punitive damages is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and (15) the arbitration panel is without jurisdiction to award attorneys' fees.

RELIEF REQUESTED

Claimant John Harvison requested: rescission of his purchase of Scorpion Technologies stocks, or in the alternative, compensatory damages of not less than \$194,835; pre-judgment and post-judgment interest at the statutory rate from the date of the original investment; attorney's fees and costs; and punitive damages.

Respondents Oppenheimer & Co., Inc. and Jay Dingee requested that the claims asserted against them be denied in their entirety and that they be awarded their costs.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Jay Dingee did not file with the NASD a properly executed submission to arbitration but is 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 is 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 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) That the Statement of Claim is denied in its entirety with prejudice; and
- (2) That other than forum fees, which are addressed below, all other relief not specifically awarded here are, and each of them, hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There was one (1) prehearing session x \$300 = \$300 and there were eight (8) hearing sessions x \$750 = \$6,000 in forum fees. Total hearing fees are \$300 + \$6,000 = \$6,300. Pursuant to §43(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 prehearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the 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 \$750 previously deposited with the NASD by Claimant John Harvison.

Pursuant to §45 of the Code, the NASD shall **retain** the member surcharge fee in the amount of \$350 previously paid by Respondent Oppenheimer & Co., Inc.

Additional forum fees in the amount of \$2400 are assessed against Claimant John Harvison.

Additional forum fees in the amount of \$3150 are assessed jointly and severally against Respondents Oppenheimer & Co., Inc. and Jay Dingee.

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

Dated:

/s/ Howard V. Tygrett
Howard V. Tygrett, Jr., Esquire
Public Arbitrator, Presiding Chair

8-7-96

/s/ L.E. Machin
L. E. Machin
Public Arbitrator

August 24, 1996

/s/ Frank B. Merchant
Frank B. Merchant
Industry Arbitrator

8-8-96

For NASD Use Only

Date of Service by the NASD: September 6, 1996