

NASD REGULATION, INC. AWARD

Office of Dispute Resolution

In the Matter of the Arbitration Between

Names of Claimants

Ernesta Badolato and Marian Badolato

95-03852

Names of Respondents

J. W. Charles Securities, Inc.
Discount Securities Group
Ted Malkasian

REPRESENTATION OF PARTIES

For Claimants: David A. Pearl, Esq. and Francis S. Sexton, Jr., Esq. of the law firm of Concepcion, Sexton & Urdaneta, Coral Gables, Florida.

For Respondents J. W. Charles Securities, Inc. ("JWC") and Discount Securities Group ("DSC"): Howard Tescher, Esq. of the law firm of Kipnis Tescher Lippman Valinski & Kain, Fort Lauderdale, Florida.

For Respondent Ted Malkasian ("Malkasian"), Michael R. Casey, Esq. of the law firm of Casey and Molchan, Fort Lauderdale, Florida, through the hearings conducted on November 5, 6, and 7, 1996. Thereafter, Mr. Malkasian appeared pro se.

CASE INFORMATION

Statement of Claim was filed on August 8, 1995. Claimants' Submission Agreement was signed on July 24, 1995.

Joint Statement of Answer was filed by Respondents DSC and Malkasian on October 11, 1995. Motion to Dismiss was filed by Respondent JWC on October 11, 1995. Submission Agreements of DSC and JWC were signed on October 11, 1995 by Gregory Tendrich, Assistant General Counsel for DSC and JWC.

Submission Agreement of Malkasian was signed on October 9, 1995.

Claimants Response to JWC's Motion to Dismiss was filed on October 26, 1995.

Respondent JWC did not file a Statement of Answer.

HEARING INFORMATION

The evidentiary hearing was held on November 5, 6, and 7, 1996 and September 22 and 23, 1997 in Fort Lauderdale, Florida for a total of ten (10) sessions.

CASE SUMMARY

Claimants alleged that they were unsophisticated investors, lived on fixed incomes, and could not risk losing principal. Claimants contended that Respondents are liable for losses in their accounts which resulted from Respondents' actions in recommending and selling unsuitable investments; that Respondents solicited investments in the Pilgrim Adjustable Rate Securities Trust 1-A which were unsuitable for Claimants; that Respondents misrepresented that the fund was insured; and, Respondents omitted to state material facts including the fact that this was a new type of volatile fund which consisted exclusively of unrated or subordinated mortgage securities which were highly risky. Claimants averred that DSC and JWC failed to adequately supervise Malkasian and breached their fiduciary duties to Claimants.

Respondents JWC and DSG denied liability on any of the claims alleged in the Statement of Claim. JWC maintained that as a clearing firm it had no duty to or relationship with the Claimants and that its sole role was to process and/or to clear trades for DSG and Malkasian's subsequent employer, Preferred Securities Group, Inc. ("PSG"). DSG maintained that the Pilgrim Fund sold to Marian Badolato was suitable and that if Marian Badolato incurred any losses at all, they amounted to \$870.10 in unrealized losses at the time that her account was transferred to PSG. DSG contended that Ernesta Badolato's purchase of Pilgrim at DSG was an unsolicited purchase and therefore suitability is not an issue; that should the Panel deem the transaction to be solicited, the purchase was suitable; and, if any losses were incurred by Ernesta Badolato for which DSG was responsible, the unrealized losses were \$3,620.55 at the time that Ernesta Badolato's account was transferred to PSG.

Respondent Malkasian denied liability on any of the claims alleged in the Statement of Claim. Malkasian maintained that he was a registered representative of DSG for over five years with a perfect compliance record; that Marian Badolato had years of investment experience and the Pilgrim fund sold to her was suitable; that Ernesta Badolato's purchase of Pilgrim at DSG was an unsolicited purchase and, therefore, suitability is not an issue; that both purchases of Pilgrim were done through a clearing firm and the shares were sent to Pilgrim to hold in the month following each purchase; that as the broker/dealer of record reflected on all statements from Pilgrim, JWC received all statements at its home office; that Malkasian left DSG, joined PSG, and Marian Badolato's account was transferred to PSG; that Ernesta Badolato's account remained with JWC until the fund was sold; and, that Ernesta Badolato never maintained an account with PSG.

In their Answer, Respondents DSG and Malkasian asserted the affirmative defenses of waiver, laches, estoppel, and ratification.

RELIEF REQUESTED

Claimants requested an award in an amount in excess of \$80,000.00; interest at the legal rate of 8% per annum; lost profits; restitution of all commissions; punitive damages; treble actual damages; investigative, expert witness, accounting, and other costs incurred to prosecute this action including filing fees; attorneys' fees; and, costs of this proceeding.

Respondents JWC and DSG requested a specific finding that they were the prevailing parties under Claimants' Section 517.301, Florida Statutes claim and dismissal and costs on the remaining claims, including expert witness costs in the amount of \$6,000.00, attorneys' fees, and that forum fees be assessed against the Claimants.

Respondent Malkasian requested dismissal, costs, and attorney's fees. Further, in his closing argument, he requested that all references to this arbitration proceeding be expunged from his Central Registration Depository ("CRD") record.

OTHER ISSUES CONSIDERED & DECIDED

1. The Respondents' Motion to Dismiss which was filed in response to the Statement of Claim was denied.

2. 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 Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. Respondents are found not liable and, therefore, all claims against them are hereby dismissed.
2. All references to this arbitration proceeding shall be expunged from the CRD record of Respondent Ted Malkasian.
3. Claimants' requests for lost profits; restitution of all commissions; punitive damages; treble actual damages; investigative, expert witness, accounting, and other costs incurred to prosecute this action including filing fees; attorneys' fees; and, costs of this proceeding are denied.
4. Respondents' request for a specific finding that they were the prevailing parties under Claimants' Section 517.301, Florida Statutes is denied. Respondents' requests for attorneys' fees, costs, and expenses are also denied.

FORUM FEES

Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure ("Code"), a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, the panel has assessed forum fees in the amount of \$7,500.00 (10 hearing sessions x \$750.00 per session).

1. Claimants are assessed the sum of \$3,750.00 for which NASD Regulation, Inc. shall retain the \$1,050.00 previously deposited in partial satisfaction thereof, leaving a balance due to NASD Regulation, Inc. of \$2,700.00.

2. Respondents JWC and DSG are assessed the sum of \$3,750.00, jointly and severally, payable to NASD Regulation, Inc.
3. NASD Regulation, Inc. shall retain the non-refundable filing fee of \$200.00 paid by the Claimants.
5. Pursuant to Rule 10333 of the Code, Respondent JWC shall pay to NASD Regulation, Inc. the \$350.00 past due member surcharge which was previously invoiced.

Fees are payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures

/s/
Leo H. Kerns, Esq.
Public Arbitrator, Presiding Chair

/s/
Michael Lau
Public Arbitrator

/s/
David L. Yerkes
Industry Arbitrator

Date of Decision: 10-21-97