

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

George E. Krant  
Don L. Krant

95-04367

Name of Respondents

Wells Fargo Securities  
John D. McKinnon

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**CASE SUMMARY**

In a claim filed with the National Association of Securities Dealer, Inc. on September 13, 1995, Claimants George E. and Don L. Krant, who appeared Pro Se, alleged that Respondent Wells Fargo Securities Inc., ("WFSI"), and its representative, Respondent J. Dallas McKinnon ("McKinnon"), made misrepresentations to them and their deceased father regarding investing. Claimants further alleged that they chose not to purchase a savings account and instead bought securities based on McKinnon's advice at their initial meeting. Claimants also alleged that during the initial meeting with McKinnon, he did not supply written information about the products he recommended. Claimants asserted that McKinnon mailed written information to their blind father but did not send information about the investment to them despite that fact that they were also listed on the account. Claimants further asserted that upon receiving their first quarterly statement, they realized that the return was not what McKinnon stated it would be. Claimants also asserted that subsequent to receiving their account statement, they approached other financial advisors who informed them that the rates McKinnon quoted them could never be attained in a realistic market. Claimants contended that due to the wrongdoing of the Respondents, they suffered damages for which the Respondents should be held liable.

Respondent Wells Fargo Securities, Inc. ("Respondent"), through its representative, Robert T. Sullwold, Esq., of Sullwold and Hughes, located in San Francisco, California, maintained Claimants were customers of Wells Fargo Bank ("WFB") and not customers of WFSI because they purchased a Wells Trust account at WFB. Respondent WFSI further maintained that because the Claimants were customers of WFB, their dispute involved WFB which is not a member of the NASD. Respondent also maintained that the NASD has no jurisdiction over WFB and therefore, it cannot be compelled to submit to this arbitration. Respondent contended that it committed no wrongdoing and requested that the claims against it be dismissed.

Respondent J. Dallas McKinnon ("Respondent"), who appeared Pro Se, maintained that he was referred to the Claimants by an employee of WFB. Respondent further maintained that a WFB employee recommended Wells Trust, a bank product, to suit Mr. Krant's needs. Respondent also maintained that during their initial meeting, he informed the Claimants that he did not want to make investment

recommendations to them but would rather refer them to a trust manager who would invest their funds in suitable investments. Respondent contended that he was involved with Mr. Krant and his sons up to the point that they agreed to go with the trust program and filled out the necessary paperwork. Respondent further contended that after he delivered the Claimant's information to the Bank's Office of Supervisory Jurisdiction, he was no longer privy to information regarding the Claimants' account. Respondent also contended that he committed no wrongdoing and requested that the claims against it be dismissed.

#### **RELIEF REQUESTED**

Claimants George E. and Don L. Krant, requested \$5,946.52 in actual damages, \$150.00 in NASD fees and \$375.00 for financial investment services and fees.

Respondents Wells Fargo Securities, Inc. and J. Dallas McKinnon, requested that the claims of the Claimants be dismissed.

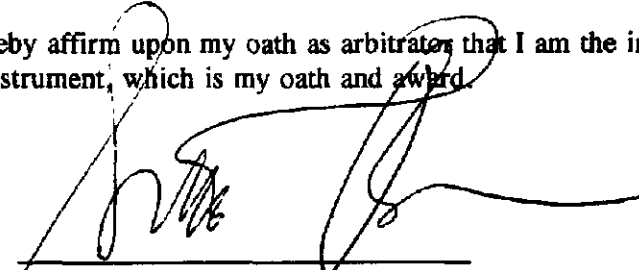
#### **ISSUES CONSIDERED AND DECIDED**

And, the Arbitrator, having considered the proof of the parties, has decided and determined as follows:

1. Respondents Wells Fargo Securities, Inc. and J. Dallas McKinnon requested that the NASD deny jurisdiction because the controversy arose with respect to Claimants' business dealings with Wells Fargo Bank not with WFSI as an NASD member. The arbitrator granted the request.
2. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by Claimants George Krant and Don Krant shall be retained by the NASD, Inc. The Respondent Wells Fargo Securities, Inc. shall pay to the Claimants George E. Krant and Don L. Krant \$150.00 as reimbursement of the filing fee.

#### **AFFIRMATION**

I, **ELLIOTT FINKEL**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



ELLIOTT FINKEL

Date of Decision:      October 4, 1996

## REPORT OF ARBITRATOR

Having carefully reviewed all pleadings, supplemental arguments and points and authorities submitted by the parties, the arbitrator finds the relief for which claimants pray does not lie with the NASD. Consequently, the matter is dismissed for want of jurisdiction.

Claimants are the beneficiaries of the Marvin G. Krant Trust and in that capacity bring this action against Wells Fargo Securities Inc., and its broker, Dallas McKinnon. Claimants allege, inter alia, both respondents negligently induced Marvin Krant into creating a Trust that lost money by investing in mutual funds. Respondents separately denied all allegations of wrongdoing and additionally moved to dismiss the action claiming any alleged misrepresentations as to the future performance of Mr. Krant's Trust would have been made by non NASD member, Wells Fargo Bank, and not its subsidiary, NASD member, Wells Fargo Securities, Inc. Consequently, respondents contend the NASD is without jurisdiction to hear this matter.

The original Trust grantor, initially discussed the establishment of a Trust and anticipated trust investments with Mr. McKinnon. McKinnon was then a licensed broker whom both Wells Fargo Bank (hereinafter "BANK") and respondent Wells Fargo Securities, Inc., evidently employed. Thereafter, the grantor established a Trust making BANK the trustee and authorized BANK to "invest the trust fund in any kind of property as allowed under California law, including [BANK'S] Diversified Investment Funds, as [BANK] may select." As alleged in the statement of claim and supporting documents, the trust invested in Mutual Funds resulting in a monetary loss. Neither the trust instrument nor any of the proffered account statements or other written information mentions respondent Wells Fargo Securities, Inc.

Claimants point to several facts that at least superficially show Wells Fargo Securities, Inc. was inextricably involved with the creation and maintenance of the Trust, thus conferring jurisdiction to the NASD. First, the Trust ultimately acquired mutual funds presumably through the actions of a licensed securities broker. Second, Mr. McKinnon's business card states he was a Wells Fargo Securities Inc., representative and Mr. McKinnon received a commission for the Trust fund's mutual fund purchases.

Claimants' arguments fail in the context of all the evidence. First, a distinction must be made between the entity charged with exercising discretion in deciding to prudently invest trust assets (BANK) and the entity merely placing an order. While it is true the brokerage house and its employees have a responsibility to know their customer, here BANK appears to have been the primary customer acting in behalf of the Grantor. Further, there is no direct evidence of any privity between claimants and Wells Fargo Securities, Inc. These facts, coupled with the numerous writings bearing only BANK's name, make it unlikely and unreasonable that the parties ever intended Wells Fargo Securities, Inc., be responsible for the creation and care of the Trust, inclusive of its investments. Again, that is the job of the designated Trustee -- BANK.

Mr. McKinnon's business card clouds the issue. The card contains much information: "J. Dallas McKinnon Personal Financial Officer," followed by "WELLS FARGO BANK" in large bold print. The card next lists "Wells Fargo Bank, N.A., a licensed insurance agency" and "Wells Fargo Securities, Inc. Member NASD/SIPC." Excluding address and telephone number, the card also states in small print: "Securities offered by Wells Fargo Securities, Inc. . . . Wells Fargo Securities Inc. is a wholly-owned subsidiary of Wells Fargo Bank." Mr. McKinnon's business card unassailably permits the conclusion he

acts as a broker for Wells Fargo Securities, Inc. However, as a "financial officer" it is possible he was acting as a BANK employee or both. Reviewing the other undisputed evidence ultimately resolves this ambiguity. All of the writings only mention BANK and do not mention Wells Fargo Securities Inc. Moreover, perhaps the most important document, the trust instrument executed by Mr. Krant, clearly declares BANK to be the one and only Trustee. Lastly, Neither Mr. Krant's age nor his disability warrants the conclusion that he or sons relied on the writings contained on Mr. McKinnon's business card versus the other significant documents contained in the record.

Whether Mr. McKinnon received a "credit for a portion of a referral fee paid by Wells Fargo Bank to Wells Fargo Securities, Inc. as a result of the establishment of the Trust" as argued by respondents or a "commission," as claimants maintain, is troubling. McKinnon's receipt of a commission would indicate he acted as a broker in connection with the sale or purchase of securities, in turn, triggering certain affirmative duties to the customer and possibly making the grievance properly before the NASD. However, there is no evidence Mr. McKinnon personally bought or sold any particular securities or that he personally monitored the purchase of specific securities. Rather, the evidence suggests Mr. McKinnon acted as a Bank employee facilitating the sale of a Bank product that tangentially involved the purchase of securities. The weight of the evidence clearly supports the conclusions that the Grantor invested in a Trust that was a BANK product rather than a security; there was only one Trustee (BANK); and neither Wells Fargo Securities, Inc., nor its purported broker directly participated in the Trust's creation or maintenance.

Even assuming arguendo Mr. McKinnon tortiously induced Mr. Krant to purchase the subject mutual funds, and/or purchased the funds for the Trust, the record presented does not compel a finding that Wells Fargo Securities Inc. knew or should have known the trust investments (mutual funds) were imprudent, unauthorized, or procured by negligence, misrepresentation or other tortious means. In short, the facts presented by this cold record compels the finding that claimants' grievance lies with the Wells Fargo Bank and/or its employees and servants for allegedly failing to fully inform or misinforming Mr. Krant.

Because Wells Fargo Bank is not an NASD member and it has not submitted itself to the NASD's jurisdiction, the NASD is without jurisdiction to consider this matter as to Wells Fargo Bank. Similarly, because the evidence leads to the finding that Mr. McKinnon acted, in this instance, as a sales agent for BANK, rather than a broker, the NASD is without jurisdiction to consider this matter as to Mr. McKinnon.

No findings are made respecting the merits of claimants' allegations other than jurisdiction. The applicable Statutes of Limitation are deemed tolled during the pendency of this action.

Respondent, Wells Fargo Bank, to bear forum fees.

Each party to bear its own attorneys fees.