

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Marlene A. Messin

Claimant,

v.

No. 95-04749

Kidder, Peabody & Co., Inc.

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Securities Dealers, Inc.

Respondent.

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REPRESENTATION OF PARTIES

Claimant Marlene A. Messin was represented by Seth M. Colton, Esq. and Jarrett B. Decker, Esq. of Maun & Simon PLC located in Saint Paul, MN.

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

CASE INFORMATION

Claimant Marlene A. Messin's Statement of Claim was filed on or about October 6, 1995.

Claimant Marlene A. Messin's Submission Agreement was signed on October 2, 1995.

Respondent Kidder, Peabody & Co., Inc.'s Statement, of Answer was filed on or about December 19, 1995.

Respondent Kidder, Peabody & Co., Inc.'s Submission Agreement was signed on December 12, 1995 by Richard Kelly, Vice President / Associate General Counsel for Kidder, Peabody & Co., Inc.

HEARING INFORMATION

The hearing was held on: June 19, 1996 for two (2) sessions; June 20, 1996 for two (2) sessions; and June 21, 1996 for one (1) session in Minneapolis, MN for a total of five (5) sessions.

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CASE SUMMARY

Claimant Marlene A. Messin ("Claimant") alleged that Respondent Ridder, Peabody & Co., Inc. ("Respondent") made false representations to her, which she relied on in deciding to purchase securities on margin. Claimant says that Respondent assured her that the interest payments on General Electric Capital Corporation floating rate notes ("the Notes") she purchased would offset her interest payments on a loan from Respondent such that she would have a positive cash flow of at least \$40,000 per year. Claimant alleges that both parties understood that the interest rate on the loan from Respondent would always fluctuate with the interest on the Notes. Since the interest rates did not fluctuate together, and in fact the interest rate on the loan was at times higher than the interest payments on the Notes, Claimant alleges damages of \$283,000 from net losses and forgone positive cash flows. Claimant further alleges that, due to Respondent's excessive transactions with her \$275,000 general market. transactions account, she suffered additional damages of approximately \$20,000. Based on these alleged actions of Respondent, Claimant made claims for: (1) breach of contract; (2) violations of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.68; (3) breach of fiduciary duty; (4) fraud; (5) violations of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69; (6) violations of the federal Investment Advisors Act, 15 U.S.C. § 80b-6; and (7) punitive damages. Advisors Act, 15 U.S.C.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically denied the all stated that no promise of a positive cash flow was ever made; even if such a promise were made, Respondent contends that Claimant was in a position to know that such a promise could not be relied upon. Respondent further stated that Claimant would not have waited so long to say something had a positive cash flow been promised. As to the general market transactions account, Respondent states that there was no motive to make excessive transactions since no commissions were collected on that account.

RELIEF REQUESTED

Claimant requested an award for damages in an amount commensurate with the losses to her account and loss of promised interest income in the amount of \$40,000 per year, restitution of the commissions and damages for the losses from excessive and inappropriate transactions in the \$275,000 account, attorney's fees, interest, and punitive damages.

Respondent requested that the claim asserted against it be denied in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

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 are 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 were five (5) sessions \times \$750 = \$3,750 in forum fees. 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 the Claimant.

Pursuant to Section 45 of the Code Respondent shall pay its \$350 member surcharge. The Respondent is also assessed the \$750 adjournment fee.

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The remaining forum fees are assessed against Claimant in the amount of \$1,125. and against Respondent in the amount of \$1,875.

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

Dated:

/s/ D. Randall Blohm

8-1-96

**D. Randall Blohm, Esq.
Public Arbitrator, Presiding Chair**

/s/ Phillip I. Finkelstein

8-2-96

**Phillip I. Finkelstein, Esq.
Public Arbitrator**

/s/ Harold H. Goodman

Aug. 2, 1996

**Harold H. Goodman
Industry Arbitrator**