

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Phil S. and Frances Kerber

96-00137

Name of Respondents

Stratton Oakmont, Inc.
Thomas Niemczyk

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on January 10, 1996, Claimants Phil S. and Frances Kerber ("Claimants"), who appeared Pro Se, alleged that Respondent Stratton Oakmont, Inc., through its employee, Thomas Niemczyk ("Niemczyk"), misrepresented material facts, made unauthorized trades in their account and overcharged them on commissions. Claimants further alleged that Niemczyk contacted Mr. Kerber and used high pressured sales pitches to urge him to buy shares in OCTA, but that he told Niemczyk that he was unable make any investment decisions without first consulting his wife. Claimants contended that Niemczyk began to call Mrs. Kerber in an effort to convince her to purchase the OCTA stock. Claimants further contended that Mr. Kerber finally agreed to purchase 1,000 shares of OCTA, on the condition that his wife would first have to consent and that there would be no commission charged. Claimants alleged that they then received confirmation for this transaction indicating that Mrs. Kerber had not been contacted regarding this purchase, that commissions had been charged, and that the price of OCTA had dropped from \$13.00/share to \$8.00/share. Claimants further alleged that they refused to pay for the trade because they were suspicious that the Respondents were dumping their own stock, but that after Respondents threatened to destroy their credit rating, they did pay for the shares of OCTA. Claimants contended that Niemczyk did not ask Claimants about their investment strategies, or provide information regarding risk and suitability prior to the this transaction, and that as a result of the foregoing, they have suffered a loss for which the Respondents should be held liable.

Respondents Stratton Oakmont, Inc. and Thomas Niemczyk, through their representative and in-house counsel, Gregg R. Evangelist, of Ormsten & Evangelist, located in Jericho, N.Y., maintained that Claimants opened a joint account with the Respondents. Respondents further maintained that Claimants authorized, but did not pay for, the purchase of OCTA, and that by their own admission, Claimants refused to pay, in part, because the stock had declined in value. Respondents contended that Claimants had previously filed complaints with the SEC and NASD regarding Respondents' action, and because they were unsuccessful with those complaints, they now seek arbitration. Respondents further contended that they made certain that Claimants fully understood the risks of investing and that they had the financial capacity to bear the risk of loss, and therefore, they should not be held liable for Claimants' loss.

RELIEF REQUESTED

Claimants Phil S. and Frances Kerber, requested \$4,770.00 in actual damages, plus \$1,500.00 in attorneys' fees and costs.

Respondents Stratton Oakmont, Inc. and Thomas Niemczyk, requested that the claims of the Claimant be dismissed in their entirety.

AWARD

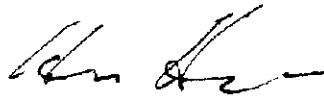
Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Herbert Neuer, Esq., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimants Phil S. and Frances Kerber, on June 7, 1996, and by the Respondent Thomas Niemczyk, on February 2, 1996, and not by Respondent Stratton Oakmont, Inc.

And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of the Claimants Phil S. and Frances Kerber, against the Respondents Stratton Oakmont, Inc. and Thomas Niemczyk, are dismissed in their entirety.
2. The parties shall bear their respective costs.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimants Phil S. and Frances Kerber, shall be retained by the NASD, Inc. Respondents Stratton Oakmont, Inc. and Thomas Niemczyk shall pay to the Claimants Phil S. and Frances Kerber, \$75.00 as reimbursement of the filing fee.

AFFIRMATION

I, **HERBERT NEUER, ESQ.**, 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.

A handwritten signature in dark ink, appearing to read 'Herb Neuer', is written above a horizontal line.

HERBERT NEUER, ESQ.

DATE OF DECISION: July 8, 1996