

N.A.S.D. REGULATION INC. AWARD**NASD Regulation, Inc., Office of Dispute Resolution**

In the Matter of the Arbitration Between

Names of Claimants

Frank and Patricia I. Musolino

96-00799

Names of Respondents

Kidder, Peabody & Co., Incorporated
Lee Rosen

REPRESENTATION

For Claimants: William J. Schifino, Jr., Esq. and Kenneth G. Turkel, Esq. of Williams Reed Weinstein Schifino & Mangi, Tampa, Florida.

For Respondent Kidder, Peabody & Co., Incorporated ("Kidder"): Robert A. W. Boraks, Esq. of Boraks & Jamnback, Washington, D.C. Prior to May 13, 1997, Kidder was represented by Richard Kelly, Esq. of Kidder, Peabody & Co., Inc.

For Respondent Lee Rosen: George O. Richardson, Esq. of Piliero Goldstein Jenkins & Hall, New York, New York. Respondent Lee Rosen was initially represented by Michael T. Blutrich, Esq. and Paul T. Vink, Esq. of Blutrich Herman & Miller, LLP, New York, New York. On December 26, 1996, Howard I. Blman, Esq. and Robert W. Berand, Esq., of Gold & Wachtel, LLP, New York, New York, entered their appearance on behalf of Rosen. On April 11, 1997, NASD Regulation, Inc. was advised that Charles A. Stillman and Sara Beth Savage, Esq. of Stillman & Friedman, P.C., New York, N.Y. would be substituted for Gold & Wachtel, LLP. Subsequent thereto, on June 5, 1997, Robert A.W. Boraks, Esq., of Boraks & Jamnback entered an appearance on behalf of Rosen.

CASE INFORMATION

Statement of Claim was filed on February 23, 1996.

Claimants' Submission Agreement was signed on February 6, 1996.

Respondent Kidder's Answer was filed on June 5, 1996.

Respondent Kidder's Submission Agreement was signed on May 31, 1996.

Respondent Lee Rosen's Answer was filed on May 28, 1996.

Respondent Lee Rosen's Submission Agreement was signed on May 14, 1996.

Claimants filed a Supplemental Complaint on March 26, 1998.

Respondents filed a Joint Statement of Answer to Claimants' Supplemental Complaint on April 10, 1998.

HEARING INFORMATION

On May 30, 1997, the arbitration panel conducted an initial telephonic pre-hearing conference which lasted one (1) session.

On March 26, 1998, the arbitration panel conducted a telephonic pre-hearing conference which lasted one (1) session.

On April 15 and 16, 1998, and on June 18 and 19, 1998 hearings lasting ten (10) sessions were conducted with the arbitration panel in Tampa, Florida.

CASE SUMMARY

Claimants alleged the following: Rosen began working for Kidder on April 11, 1994 as Kidder's Sr. Vice President. Rosen was also the broker on the Claimants' account. Between April and December 10 1994, Rosen conducted trades in over 400,000 shares of stock in U.S. Alcohol Testing, Inc. n/k/a Substance Abuse Technologies, Inc. ("SAT"), in the Claimants' account along with trades in other securities. Rosen enticed the Claimants to purchase and hold the SAT stock through continuing misrepresentations and omissions. Kidder failed to monitor the Claimants' accounts and to supervise Rosen. In March 1996, based upon Kidder's and Rosen's handling of the Claimants' accounts at Kidder, the Claimants filed a Statement of Claim alleging violation of anti-fraud provisions of the Florida Securities and Investor Protection Act, breach of fiduciary duty, negligence and common law fraud.

Respondents alleged the following: In 1992, while he was with Raymond James, Rosen became Claimants' broker. In 1993, Rosen switched to Shearson and Claimants transferred their accounts to follow him. In April 1994, Rosen switched to Kidder and, again Claimants transferred their accounts to follow him.

When Claimants opened their joint account at Kidder, they had already purchased, jointly, 105,200 shares of U.S. Alcohol. Claimants purchased an additional 218,800 shares at Kidder. In addition, they bought another 138,000 shares at another brokerage house, Rothschild Global, through another broker.

In January 1995, Claimants transferred their Kidder joint account to Rothschild or Shields, where they had an accumulation of 462,00 shares of U.S. Alcohol. In February 1996, Claimants sold 288,000 shares of U.S. Alcohol on the open market and used the proceeds to purchase 8 units of a U.S. Alcohol private placement. At the time, Claimants already had retained counsel to file this arbitration.

Frank Musolino is a professional investor with a degree in accounting. He is, by any measure, an accredited, wealthy, sophisticated investor. Further, Frank Musolino was adequately informed as to the nature of his investment in U.S. Alcohol, including the fact that the stock was risky. He was not misled. He made his own informed decisions as to when to buy the stock and when to sell. There was no breach of any duty owed to him, and, thus, no basis for damages.

RELIEF REQUESTED

The Claimants requested relief in the form of compensatory damages in excess of \$250,000.00, plus interest, attorney's fees, costs and punitive damages.

Respondent Kidder requested the claims be denied in their entirety.

Respondent Lee Rosen requested that all claims be denied and requested reimbursement of administrative arbitration fees and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

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 NASD Regulation, Inc.

Claimants' unopposed Motion for Leave to Amend the Statement of Claim was filed on August 22, 1997 and was granted by the panel on March 26, 1998.

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. Respondents Kidder and Lee Rosen are found jointly and severally liable and shall pay to the Claimants the sum of \$161,201.00 inclusive of pre-award interest.
2. Respondent Kidder shall pay Claimants' attorney's fees, the amount of which shall be determined by a court of competent jurisdiction.
3. Respondent Kidder shall pay to the Claimants a total of \$950.00 representing reimbursement of the hearing session deposit previously paid by the Claimants and the claim filing fee of \$200.00.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure ("Code"), the arbitration panel has assessed forum fees in the sum of \$9,000.00 (two pre-hearing conferences x \$750.00 plus 10 hearing sessions x \$750.00).

Respondent Kidder is assessed the sum of \$9,000.00, less the \$750.00 previously deposited by the Claimants in partial satisfaction thereof, leaving a balance due from Respondents in the sum of \$8,250.00.

Fees are payable to the NASD Regulation, Inc., Office of Dispute Resolution.

OTHER FEES

Pursuant to Rule 10333 of the Code, Respondent Kidder has paid to NASD Regulation, Inc. the \$350.00 member surcharge previously invoiced.

Pursuant to Rule 10319 of the Code, Respondent Kidder has paid \$110.00 of the \$750.00 adjournment fee previously invoiced for the postponement of the hearings scheduled for June 2, 3 and 4, 1997. Therefore, Respondent Kidder shall pay the NASD the remaining balance of \$640.00.

Pursuant to Rule 10332 of the Code, Claimants have paid to NASD Regulation, Inc. the \$200.00 claim filing fee.

Concurring Arbitrators' Signatures:

_____/s/_____
Constance J. Felos, Esq.
Chairperson

Public

_____/s/_____
Harold C. Anders

Industry

_____/s/_____
Donald M. Macdonald

Public

Date of Decision: October 16, 1998