

AWARD

**NASD, Regulation, Inc.,
Office of Dispute Resolution**

In the Matter of the Arbitration Between

Gunter Klein

Claimant

NASD Regulation, Inc.
No. 96-01262

v.

PCM Securities Ltd.
Roland I. Greenspan
Jeffrey Silverstein
Alex DeMars

Respondents

REPRESENTATION OF PARTIES

Gunter Klien ("**Claimant**") was represented by Theodore R. Chavez, Esq., Law Offices of Theodore R. Chavez, Campbell, California.

PCM Securities Ltd., Roland I. Greenspan, and Jeffery Silverstein were represented by Jeffrey Rosen, Esq., De Martino Finkelstein Rosen & Virga, Washington, D.C..

Alex DeMars represented himself pro se.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about March 19, 1996. Claimants Submission Agreement was signed on March 19, 1996. Claimant's Answer to the CounterClaim was filed on or about June 25, 1996.

The Joint Statement of Answer and CounterClaim against Gunter Klein for PCM Securities, Roland I. Greenspan and Jeffery Silverstein was filed on or about May 20, 1996. The Submission Agreement for PCM Securities LTD. was signed on May 17, 1996. The Submission Agreements for Roland I Greenspan and Jeffery Sivilverstein were signed on May 17, 1996. Respondents PCM Securities, Roland I. Greenspan and Jeffery Silverstein filed a Cross-Claim against Alex DeMars on or about June 7, 1996.

The Statement of Answer for Alex DeMars was filed on or about May 14, 1996. The Submission Agreement for Alex DeMars was signed on May 14, 1996. Alex DeMars filed an Answer to the Cross-Claim on or about June 15, 1996.

HEARING INFORMATION

A pre-hearing conference (1 session) was held on Friday December 13, 1996.

CASE SUMMARY

See the attached decision by the arbitrator.

RELIEF REQUESTED

Claimant requested rescission of the Tech Electro trade and a restoration of positions in Bay Networks, Inc., Equity Marketing, Inc. and Jones Medical Industries as well as all costs involved with this claim. Additionally, the Claimant requested unspecified damages for lost opportunity. Claimant further requested unspecified punitive damages.

Respondents PCM Securities, Roland I. Greenspan and Jeffery Silverstein in their Cross-Claim requested indemnification from Alex DeMars in the event of a award in favor of the Claimant.

Respondents PCM Securities, Roland I. Greenspan and Jeffery Silverstein in their CounterClaim requested unspecified damages from the Claimant.

AWARD

See the attached decision by the arbitrator.

OTHER

Pursuant to §43(c) of the Code, NASD Regulation, Inc. shall **retain** the non-refundable filing fee in the amount of \$25 and shall **refund** as forum fees the hearing session deposit in the amount of \$25 previously deposited with NASD Regulation, Inc. by the Claimant Gunter Klien. Additionally, NASD Regulation shall **retain** the non-refundable filing fee submitted by PCM Securities in the amount of \$500 and shall **refund** the hearing session deposit in the amount of \$500.

No additional forum fees are assessed.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$100 previously paid by PCM Securities Ltd..

KLEIN v. PCM SECURITIES, LTD., et al.
NASD Arbitration No. 96-01262

RULING ON MOTION TO DISMISS
and
DISPOSITIVE ARBITRATOR'S AWARD

This is an action brought by Claimant Gunter Klein, against PCM Securities, Ltd. ("PCM"), and various individuals at the pertinent time affiliated in one or another fashion with that firm. All named Respondents have answered; and Respondents PCM, Roland Greenspan and Jeffrey Silverstein (hereinafter collectively "the PCM Respondents") have filed a Counterclaim against the Claimant (which is deemed denied) and a Cross-Claim by way of indemnification and contribution against Respondent Alex DeMars (to which Mr. DeMars has responded). The PCM Respondents have filed a Motion to Dismiss on Grounds of Lack of an Arbitrable Controversy ("Motion to Dismiss"), in which, by oral stipulation, Respondent DeMars has been joined. Respondent Greenspan has filed a separate Motion to Dismiss for Failure to State a Claim Upon Which Relief Might be Granted. Respondent DeMars has submitted a brief letter-request to be dismissed from the proceeding, which is taken as a motion to such effect. Appropriate responses to the motions have been received; and oral argument was held by teleconference on Friday, December 13, 1996.

Finding the PCM Respondents' Motion to Dismiss, construed as a motion for summary judgment (or, perhaps more aptly, an offer in judgment), to be dispositive, an order thereon as hereinafter set forth is entered, concluding the proceeding. The remaining motions are denied.

Although Claimant's papers refer to a separate (and anterior) transaction, that matter was fully remedied prior to Claimant's filing and presents no justiciable controversy. Thus the only active matter concerns the sale by the Respondents to Claimant, in late January of 1996, of securities of a company called Tech Electro Industries, Inc. ("Tech Electro"), in apparent violation of the California Securities Law of 1968.¹ The initial sale to Claimant, an undoubted California resident, was made in connection with an IPO of Tech Electro securities which was not qualified for offering in California. A subsequent sale of Tech Electro securities was made to Claimant in the aftermarket, when, as appears undisputed, California qualification had been achieved. The PCM-offered, and herein-ordered, handling of this additional transaction follows that of the IPO sale.

Several months after the filing of the Claim, in July of 1996, PCM offered a rescission of both the IPO and aftermarket sale-and-purchase transactions, and deposited into an interest-bearing cash account, in Claimant's behalf, the sum of \$20,225.00, representing the full principal amounts of Claimant's purchase-price payments. Tender of this account and purchase-price sum was made to Claimant, who however declined to accept, seeking instead to pursue his previously-filed claim for damages, in this proceeding. In their written Motion to Dismiss, the PCM Respondents offered, if necessary for a favorable ruling on the said Motion, to augment the tendered rescission payment by an additional sum

¹ There would appear no basis for Claimant's request that certain securities sold, allegedly in anticipation of the Tech Electro offering, be "restored" to his account.

equal in amount to the interest which would have been earned on the purchase-price sums from the dates of their original payment up until the point of the deposit. That conditional offer, while appropriate and indeed necessary to a proper disposition of the Claim, necessarily removes the Motion from one disposable as a purely procedural matter, and thus the Motion to Dismiss, as stated, must be denied.

Nevertheless, there are not, in the Arbitrator's opinion, any disputed facts which are material to and would preclude consideration of the Motion as one for summary judgment; and, so considered and consonant with the order hereinafter entered, the Motion is granted.

Claimant has opposed and continues to oppose the rescission (and rescission damages) which form(s) the predicate for the Motion to Dismiss, both advancing a claim for punitive damages and proposing a different and presumably greater measure of direct and proximate damages.

Claimant's case for punitive damages is premised on a theory of fraud (or constructive fraud), arising out of a (less than clear) set of circumstances in which a Florida address was established for Claimant, for purposes of the IPO transaction. While the establishment of the Florida address was indisputably erroneous and perhaps (on facts that might be developed) "fraudulent" in some other sense, there is in the Arbitrator's mind a complete failure on Claimant's part to connect this action to any consequential damage occasioned to Claimant -- other than, of course, the sale itself. Even considering the pleadings in the light most favorable to the Claimant, as the decision-maker is obliged to do in a ruling such as this, the Arbitrator is unable to conclude that legally-compensable fraud exists in this case. The very thorough and detailed nature of the written papers belies any reasonable expectation that oral testimony would shed any materially greater light on this aspect.²

Claimant's second basis for opposition to the proposed rescission and rescission damages is his assertion that he should be entitled to present evidence for a greater measure of damages, to wit, profits which Claimant might otherwise have enjoyed from the use of his improperly-invested funds, otherwise invested.

In the Arbitrator's opinion, and contrary to Claimant's position, the matter of awardable damages is, as Respondents urge, directly and dispositively controlled by Sections 25501 et seq., and particularly Section 25503, of the California Corporate Securities Law. The latter Section, specifically dealing with sales of non-qualified securities in California, expressly establishes the compensable remedy as that of rescission, viz., the consideration paid plus interest at the legal rate.

Accordingly, the Arbitrator rules that, consonant with the following specifics, Respondents' Motion to Dismiss, taken as a motion for summary judgment/offer in judgment, is Granted. Specifically, it is ordered:

1. The entirety of the sale of Tech Electro securities to Claimant is rescinded. Pursuant thereto, (a) Claimant shall surrender the certificate(s) in his possession representing the said securities, to Respondent PCM; and (b) Claimant is awarded and shall be paid by Respondent PCM the principal sum of \$20,225.00, with interest thereon at the legal rate prevailing in California, from January 29, 1996, as to \$10,020.00, and from Jan-

² Unnecessary for decision, and indeed improper for such a decision, but also potentially undercutting Claimant's "fraud" claim, should a factual hearing be held, is the extent to which Claimant himself might, wittingly or unwittingly, have directly contributed to the establishment of the Florida address.

uary 30, 1996, as to the balance of \$10,205.00, through the date of actual payment to Claimant in accordance with this order and award and receipt of the certificate(s) to be surrendered.³

2. Respondent PCM shall reimburse Claimant for the cost of Claimant's filing fee in this proceeding.

3. Respondent PCM shall pay to Claimant an amount in attorneys' fees totalling \$500.00.

4. Payment of the items set forth in paragraphs 2 and 3, immediately above, shall be made not later than thirty (30) days from the effective date of this ruling and award. If such payment is not made within said thirty-day period, such unpaid sum(s) shall also thereafter bear interest at the California legal rate on judgments, until paid.

5. Respondent Greenspan's separate Motion for Failure to State a Claim and Respondent DeMars's separate request/motion are denied. The PCM Respondents' Counterclaim against the Claimant and Cross-Claim against Respondent DeMars are dismissed, with prejudice.

6. The case is dismissed.

Dated: This 23d day of December, 1996.



F. Conger Fawcett
Arbitrator

DATE SERVED: FEBRUARY 11, 1997

³ The dates recited in this paragraph correspond to the Trade Dates shown on PCM's sale confirmations. Should dates of actual payment differ, such actual-payment dates shall control.