

## AWARD

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Name of Claimant

Bruce W. Young

and

96-01455

Name of Respondent

Everen Securities, Inc., f/k/a

Kemper Securities, Inc.

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### REPRESENTATION OF PARTIES

Bruce W. Young ("Claimant") was represented by Michael Salcido, Esq., Phoenix, Arizona.

Everen Securities, Inc., f/k/a Kemper Securities, Inc. ("Respondent") was represented by Don Andrews, Esq., Everen Securities, Inc., Chicago, Illinois.

### CASE INFORMATION

Claimant filed the Statement of Claim on or about April 1, 1996, and signed the Submission Agreement of Claimant on or about April 1, 1996.

Respondent filed a Statement of Answer on or about June 12, 1996. The Office of Dispute Resolution does not have a Submission Agreement on file.

### HEARING INFORMATION

The Arbitration Panel held a hearing on January 14, 1998 in Scottsdale, Arizona for a total of two (2) sessions.

### **CASE SUMMARY**

Claimant made the following legal claims: Breach of fiduciary duty; bad faith; breach of contract; and negligence. Claimant also alleged that: He had, prior to March 30, 1994, previously been authorized for level 3 trading in his IRA account; on March 30, 1994, Claimant attempted to formally open his option account with Level 4 trading authority to enable him to purchase protective puts to offset long call positions in his IRA account consisting of 35 April 420 OEX calls; Claimant met all of the requirements for level 4 trading authority; instead of granting approval for Level 4 trading, Respondent reduced Claimant's trading authority to Level 2 which meant that Claimant could not buy puts or calls on common stocks or indexes in common stocks; Respondent contradicted its own IRA booklet when it told Claimant that option purchases were not allowed in IRA accounts and refused to allow Claimant to move the IRA to another custodian; Respondent's refusal prevented Claimant from hedging to protect an open position in the IRA and trading out of the negative position; and Respondent's actions were motivated by malice, ill will and spite, and were improperly retaliatory and punitive.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically stated that: It was never Claimant's intention to make the trades in question in his IRA account but to open a separate options account, due to the fact that the IRA account did not have sufficient capital to purchase the options in question, and there were restrictions against contributing the sufficient capital to make the transaction; while Claimant stated that it was his intention to purchase certain Standard & Poor's 100 OEX (OEXPE) "puts" for his account, he actually purchased OEXPE "calls" during the same time frame; and the firm has the right to establish Policy and govern procedure with respect to its options accounts. Respondent asserted the following affirmative defenses: Claimant failed to state a claim upon which relief can be granted; Claimant has unclean hands, in that he failed to disclose certain material facts relevant to this matter; Claimant suffered no damages; and Claimant failed to take steps to mitigate any alleged losses.

### **RELIEF REQUESTED**

In his Statement of Claim, Claimant requested an award in the amount of the following: Compensatory damages in an amount to be determined at the arbitration hearing, but not less than \$45,000; punitive damages in an amount to be determined at the hearing in this matter; costs and attorney's fees incurred herein, including all NASD expert witness fees; pre and post judgment interest as allowed by law; and such other and further relief as is deemed just and proper.

Respondent moved that this matter be dismissed in its entirety, and further requested that it be awarded the reasonable costs of defending this action, including attorney's fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondent made a Motion to Dismiss the Statement of Claim, and a Motion to Bar documents and witnesses. After reviewing the parties' respective documents, hearing arguments, and deliberation, the motions were denied.

Respondent did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

### **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:

Respondent is liable for, and shall pay to the Claimant the following: \$10,000 for an award of compensatory damages; and \$520 as reimbursement of Claimant's filing fees.

All other requests for relief/claims for damages not specifically set forth herein are, and each of them, denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each prehearing conference, if any. There were two (2) sessions x \$400 = \$800 in forum fees. Pursuant to Rule 10332(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332© of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$120 and shall **retain** as forum fees the hearing session deposit in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to Rule 10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$200 previously paid by Respondent.

Additional forum fees in the amount of \$400 are assessed by the arbitrators against Respondent.

NASD Regulation, Inc. Office of Dispute Resolution shall retain postponement fees in the amount of \$400 previously deposited by the Claimant. **Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Dated:

Mark D. Chester  
Mark D. Chester  
Public Arbitrator, Presiding Chair

/s/

March 5, 1998

Seymour A. Kolman  
Seymour A. Kolman  
Public Arbitrator

/s/

February 22, 1998

Maureen Beyers  
Maureen Beyers  
Industry Arbitrator

/s/

February 25, 1998