

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Chilcott Entertainment Corporation

and

96-02057

Name of Respondents

John G. Kinnard and Company, Inc.

Arthur Obermeier

Alex. Brown & Sons Incorporated

REPRESENTATION OF PARTIES

Chilcott Entertainment Corporation ("**Claimant**") was represented by Thomas, R. Bromberg, Esq., Brenman Key & Bromberg, P.C., Denver, Colorado.

John G. Kinnard and Company, Inc. ("**Respondent Kinnard**") and Arthur Obermeier ("**Respondent Obermeier**") were represented by Ted S. Meikle, Esq., John G. Kinnard and Company, Inc., Minneapolis, Minnesota.

Alex. Brown & Sons Incorporated ("**Respondent Alex. Brown**") was represented by Nancy Palmer, Alex. Brown & Sons Incorporated, Baltimore, Maryland.

CASE INFORMATION

The Statement of Claim was filed on or about May 13, 1996. Submission Agreement of Claimant Chilcott Entertainment Corporation was signed on May 7, 1996 by Arnold S. Gurtler.

Statement of Answer was filed by Respondents John G. Kinnard and Company, Inc. and Arthur Obermeier on or about July 11, 1996. Submission Agreement of Respondent John G. Kinnard and Company, Inc. was signed on July 9, 1996 by Gerald M. Gifford. Submission Agreement of Respondent Arthur Obermeier was signed on July 9, 1996.

Statement of Answer was filed by Respondent Alex. Brown & Sons Incorporated on or about July 10, 1996. Submission Agreement of Respondent Alex. Brown & Sons Incorporated was signed on July 10, 1996 by Robert F. Price.

HEARING INFORMATION

The hearing was held on January 21, 1997 for two (2) sessions, January 22, 1997 for two (2) sessions, January 23, 1997 for two (2) sessions, June 12, 1997 for two (2) sessions, and June 13, 1997 for two (2) sessions in Denver, Colorado for a total of ten (10) sessions.

CASE SUMMARY

Claimant alleged that it was unsophisticated and relied totally on the Respondents investment advice and counsel in connection with the sale of General Electric Co. common stock short against the box in an effort to obtain funds to finance the relocation of its amusement park. Claimant specifically alleged that the actions of Respondents constituted breach of contract, breach of fiduciary duty, and the recommendation of an unsuitable investment strategy. It was also alleged that respondents did not properly disclose the terms of the short against the box transaction, specifically the margin rate and the specifics of the transaction.

Respondents Kinnard and Obermeier denied the allegations set forth in the Statement of Claim. Respondents specifically stated that Claimant was a sophisticated and wealthy business corporation, borrowed a large sum of money on margin, secured by about \$6,000,000 of stock it owned. Respondents stated that the Claimant carefully structured the transaction to maximize the amount that it could borrow and maintained the loan for almost three years, receiving monthly statements showing its interest charges.

Respondent Alex. Brown denied the allegations set forth against it in the Statement of Claim. Specifically, Respondent Alex. Brown stated that as a clearing broker, it cannot be held liable for the short sale against the box decision of Claimant. With respect to the allegation of improper margin interest charges, Alex. Brown denied that it agreed to charge interest only on the funds withdrawn from the account. Respondent Alex. Brown also stated that it is industry practice for margin interest to be charged on the average daily net debit balance.

RELIEF REQUESTED

Claimant requested an award in its favor and against Respondents as follows:

- ▶ for compensatory damages in an amount to be determined by the Panel, of at least \$307,895.89, plus the lost use of such funds, the wasting of Claimant's asset comprised of the G.E. stock and other consequential damages in an amount to be determined by the Panel;
- ▶ for consequential damages, including, but not limited to attorney fees incurred as a consequence of Respondents' actions and/or omissions;
- ▶ for punitive damages in an amount to be determined at the hearing;

- ▶ for an accounting to Claimant of all charges, credits, interest, applicable rates and margin calls to the account;
- ▶ for interest as provided by applicable law;
- ▶ for costs of this proceeding, including expert witness fees and reasonable attorney fees; and
- ▶ for such further relief as the Panel deems just and proper.

Respondents John G. Kinnard and Company, Inc. and Arthur Obermeier requested that the claims asserted against them be denied in their entirety and that all costs of the arbitration be charged to Claimant.

Respondent Alex. Brown & Sons Incorporated requested that the Statement of Claim be denied.

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 original(s) remain on file with the 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:

1. The claims asserted in this matter shall be and hereby are dismissed and denied in their entirety. In making this determination, the undersigned find that the transaction at issue in this matter was recommended by Claimant's attorneys and that Kinnard and Brown only acted in a capacity of carrying out the wishes of Chilcott. The undersigned further find that Claimant failed to meet its' burden of proof on the suitability claims.
2. Although the undersigned have made a determination of no liability in this matter, the undersigned strongly recommend to Respondents that when the use of the broker's call rate is material to the transaction (or material to the client agreement) it should be noted on the face of the monthly account statements. The undersigned further recommend that if there are portions of the "To our customers letter" that are material to a full and complete understanding of the customer agreement, they should be incorporated in the body of the customer account agreement.
3. Each party shall bear its own costs, expenses and fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were ten (10) sessions x \$750 = \$7,500 in forum fees. Pursuant to Rule 10332(b) 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(c) of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution 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 and the additional sum of \$550 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimant Chilcott Entertainment Corporation. Claimant Chilcott Entertainment Corporation shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$3,200 as forum fees. Respondent John G. Kinnard and Company, Inc. shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,875 as forum fees. Respondent Alex. Brown & Sons Incorporated shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,875 as forum fees.

Pursuant to Rule 10333 of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 paid to the NASD Regulation, Inc. Office of Dispute Resolution by Respondent Alex. Brown & Sons Incorporated. **Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.**

/s/ James B. Eichberg
James B. Eichberg
Public Arbitrator, Presiding Chair

Dated: July 2, 1997

/s/ Robert D. Greenlee
Robert D. Greenlee
Public Arbitrator

July 2, 1997

/s/ Donald W. Diones
Donald W. Diones
Industry Arbitrator

July 2, 1997