

971206E

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

Gina M. Lombardi and Mark Mathias, Co-TTEE's for the
Gina Marie Lombardi and Mark Russell Mathias Trust

and

Arbitration No.
96-04029

Name of Respondents

*South Coast Financial Securities, Inc.
Gerald H. Klein
Klein Pavlis Financial, Inc.

REPRESENTATION OF PARTIES

Claimants were represented by Arthur Leider, Investors Arbitration Specialists, Inc., San Diego, California.

South Coast Financial Services ("South Coast") was represented by John P. Chamberlain, Esq., Chamberlain & Viau, Newport Beach, California.

Gerald H. Klein ("Klein") and Klein Pavlis Financial, Inc. ("KPF") were represented by W. Douglas Kari, Esq., Orrick, Herrington, & Sutcliffe, Los Angeles, California.

CASE INFORMATION

The Statement of Claim was filed on or about August 28, 1996.

The Submission Agreement for Gina M. Lombardi and Mark Mathias, individually, was signed on August 30, 1996.

The Submission Agreement for the Lombardi/Mathias Trust was signed on September 9, 1996.

The Answer for South Coast was filed on or about December 9, 1996.

The Answer for Klein was filed on or about February 12, 1997.

South Coast's Submission Agreement was signed on December 3, 1996.

Gerald Klein's Submission Agreement was signed on February 15, 1997.

HEARING INFORMATION

Pre-hearing conferences were held on May 19, 1997 and September 17, 1997. Each lasted one session.

The hearing was held on November 18, 1997, November 19, 1997, and November 20, 1997 in San Diego, California. There were 2 hearing sessions per day on November 18th and November 19th, and 1 session on November 20th.

CASE SUMMARY

Claim

The Claimants allege that based upon the representations made on the radio and in person Claimants invested approximately \$100,000 with Klein and KPF and simultaneously gave Klein trading authorization through a limited power of attorney. Claimants further allege that Klein and KPF breached their fiduciary duty to the Claimants and managed their account in a negligent and reckless manner, and was guilty of fraud.

Claimants also allege that South Coast is liable for failing to supervise Klein and liable based on a theory of respondent superior.

Response of South Coast Financial Securities, Inc.

South Coast denies all material allegations in the Statement of Claim and interposed numerous defenses by way of the Statement of Answer. Among these defenses are Failure to State a Claim; Conduct of others (including that of Co-trustees) as having occasioned claimed damage, if any; and Assumption of the Investment Risk by Co-trustees in directing and "Aggressive" strategy be pursued. Central to the baselessness of Co-trustees' claim is that as no direct fraud or misrepresentation is attributed to South Coast, liability for such, if having actually occurred, could attach to South Coast only were the agency of Klein for it proven. However, there is no proof of such agency. Likewise, in the face of Co-trustees' stated investment objective ("Aggressive"), as to the funds in the subject account, together with the documented overseeing of Klein by South Coast as to activity in the account, the claim of Failure to Supervise is not supported by the facts.

Response of Gerald H. Klein and Klein Pavlis Financial, Inc.

In October 1995, Claimants entered into an Investment Advisory Agreement with Respondent KPF. In that agreement, Claimants gave KPF discretion to trade stocks on their behalf and expressly instructed Klein and KPF to take an "aggressive" approach with investments in the account. When some of the stocks selected for Claimants' account declined in value, Claimants closed the account. Klein and KPF alleged by way of defense estoppel, laches, ratification, and assumption of risk.

Claimants contend that Klein somehow misrepresented the nature of the account and that KPF engaged in unauthorized trading and "churning." As the evidence in this arbitration will show, these contentions are false. All the material aspects of the account were disclosed to Claimants, both of whom are professionals and sophisticated investors. Moreover, all the trading in the account was authorized by the express written consent given to KPF by Claimants. Finally, Klein and KPF did not earn any commissions on the account. They therefore had no incentive to churn the account.

Accordingly, Klein and KPF deny each and every allegation of the Statement of Claim, as amended.

RELIEF REQUESTED

Claimant requested an award in the amount of \$31,370 or asked in the alternative that the trades be rescinded. Additionally, Claimants requested an award of \$18,630 in punitive damages and costs and expenses.

At the hearing the Claimants amended their claim to withdraw the punitive damages request.

All Respondents requested that the claims asserted against them be denied in their entirety and asked that they be awarded costs and expenses including attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Klein Pavlis Financial did not file with the 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.

During the hearing and after the Claimants had rested, South Coast made a Motion to Dismiss. After hearing oral argument on the motion the panel determined to take the motion under advisement.

Alfred Monahan, one of the undersigned arbitrators, disclosed that he had recently been retained by an attorney on a case in which Claimants representative Arthur Leider may be involved in as opposition representative. All parties stated on the record their continued acceptance of Mr. Monahan as a member of the panel.

William Merkin disclosed that Claimants' expert witness, Kevin Hoyle, had been involved in at least one other arbitration in which Mr. Merkin had also been involved with as an arbitrator. All parties stated on the record their continued acceptance of Mr. Merkin as a member of the panel.

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. Each and every claim in the Statement of Claim is denied;
2. Each side to bear their own costs, including attorneys' fees.

FORUM FEES

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each pre-hearing conference, if any. There were 5 hearing sessions x \$400 plus 1 pre-hearing conference x \$300 = \$2,300 in total 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) the parties are to pay equal shares of the forum fees. Forum fees chargeable to each party amount to \$766.67.

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 \$120 and shall **retain** as forum fees the hearing session deposit in the amount of \$400 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

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 \$200 previously paid by South Coast.

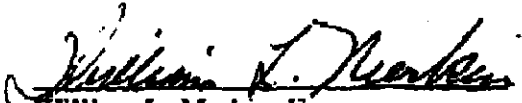
Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

97-3556

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Dated:

11/3/97


William L. Merkin, Esq.
Public Arbitrator, Presiding Chair

Robert W. Vernon, CPA
Public Arbitrator

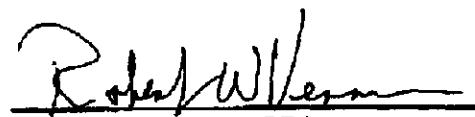
Alfred B. Monahan
Industry Arbitrator

Date Served: December 9, 1997

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Dated:

William L. Merkin, Esq.
Public Arbitrator, Presiding Chair


Robert W. Vernon, CPA
Public Arbitrator

Alfred E. Monahan
Industry Arbitrator

Date Served: December 9, 1997

12/4/97

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Arbitration No.
Award Page 5 of 5

Dated:

William L. Merkin, Esq.
Public Arbitrator, Presiding Chair

Robert W. Vernon, CPA
Public Arbitrator

Alfred E. Monahan
Alfred E. Monahan
Industry Arbitrator

4 December 97

Date Served: December 9, 1997