

## AWARD

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

James J. Pellicciotti and  
Sandra M. Pellicciotti,  
Claimants,

vs.

Barron Chase Securities, Inc.  
and Richard William Maily, Jr.,  
Respondents

And

No. 96-04949

Barron Chase Securities, Inc.,  
Cross-Claimant,

vs.

Kurt Novey and  
I.S.N., Inc.,  
Third Party Respondents.

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### REPRESENTATION OF PARTIES

James J. Pellicciotti and Sandra M. Pellicciotti ("**Claimants**") were represented by Robert D. Mitchell, Esq., Phoenix, Arizona.

Barron Chase Securities, Inc. ("**BCS**") and Richard William Maily, Jr. ("**Maily**") (jointly referred to as "**Respondents**") were represented by Eugene Michael Kennedy, Esq., Fort Lauderdale, Florida.

Kurt Novey ("**Novey**") and I.S.N., Inc. ("**I.S.N.**") were represented by David A. Zisser, Esq., of Berlinger, Zisser Walter & Gallegos, P.C., Denver, Colorado.

### CASE INFORMATION

Claimants' Statement of Claim on or about November 2, 1996. Claimants' Submission Agreement was signed on November 2, 1996 and November 4, 1996 respectively.

BCS' Statement of Answer and Third Party Claim was filed on or about January 22, 1997. BCS' Submission Agreement was signed on January 22, 1997.

Maily's Statement of Answer was filed on or about March 17, 1997. Maily's Submission Agreement was signed on March 14, 1997.

Novey's Third Party Statement of Answer was filed on or about April 25, 1997. Novey's Submission Agreement was signed on April 9, 1997.

I.S.N.'s Third Party Statement of Answer was filed on or about May 29, 1997. NASD Regulation Office of Dispute Resolution does not have a Submission Agreement on file for I.S.N.

### **HEARING INFORMATION**

A telephonic motion hearing was held on May 27, 1997 for one (1) session.

The hearing on the merits was held on June 3, 1997 for two (2) sessions, and June 4, 1997 for three (3) sessions in Scottsdale, Arizona for a total of five (5) sessions.

### **CASE SUMMARY**

Claimants alleged that Respondents: Were negligent through their advice to invest in the unsuitable and improper securities purchased in their portfolio, and by failing to conservatively invest their funds in accordance with Claimants' needs and objectives; made unsuitable investments in violation of NASD and NYSE Rules in that the investments sold to them, and the excessive discretionary trading on margin of the investments, were not suitable for Claimants' needs and circumstances; made unauthorized trades; committed fraud in violation of A.R.S. § 44-1991; churned Claimants' accounts; committed federal securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5; breached their fiduciary duty to Claimants; breached their contract with Claimants; committed common law fraud and intentional misrepresentations; and made negligent misrepresentations. Claimants alleged that BCS failed to supervise the activities of Maily with respect to Claimants' brokerage accounts. The allegations arose out of transactions in securities more fully presented during the course of the hearing.

Unless otherwise admitted therein, BCS denied the allegations contained in the Statement of Claim. BCS asserted the following affirmative defenses: Claimants with full knowledge of the material facts consented, directed, ordered and instructed the transactions in question as effected by Maily in the Claimants' accounts; Claimants are not entitled to receive any damages because allegations in the Statement of Claim are inconsistent with Claimants' alleged non-involvement and unsolicited use of options trades and margin leverage in the account; BCS did not wilfully or knowingly participate in any violations of law nor did it act negligently in connection with Claimants' purchases and sales of securities through BCS; BCS did not violate any NASD Rule, but, in any event, no private right of action for damages exists for any violation of NASD Rules; at all times material, BCS acted in good faith, did not directly or indirectly induce the acts or omissions and had no knowledge of, nor reasonable grounds to believe in, the existence of any facts by reason

of which BCS' liability for the acts or omissions of employees in this proceeding is wrongfully alleged to exist; to the extent that any affiliate of BCS may be shown to have acted outside the scope of their affiliation, or without actual or apparent authority from BCS, BCS has no liability to the Claimants; and relied upon any other matter constituting an avoidance or affirmative defense.

Unless otherwise admitted therein, Maily denied the allegations contained in the Statement of Claim. Maily asserted the following affirmative defenses: Claimants with full knowledge of the material facts consented, directed, ordered and instructed the transactions in question as effected by Maily in the Claimants' accounts; Claimants are not entitled to receive any damages because allegations in the Statement of Claim are inconsistent with Claimants' alleged non-involvement and unsolicited use of options trades and margin leverage in the account; Maily did not wilfully or knowingly participate in any violations of law nor did it act negligently in connection with Claimants' purchases and sales of securities through Maily; Maily did not violate any NASD Rule, but, in any event, no private right of action for damages exists for any violation of NASD Rules; at all times material, Maily acted in good faith, did not do any of the acts or omissions alleged in the Statement of Claim; at all times material, Maily had explicit instructions and prior authorizations for all transactions effected by him in Claimants' accounts; at all times material, Claimants received confirmations and account statements reflecting all of the transactions ordered by the Claimants; at no time during the months prior to Maily's resignation, did Claimants raise any of the allegations in the Statement of Claim; the Claimants knew for a period of months that all of the transactions ordered by Claimants at BCS had been executed since multiple confirmations and accounts statements were received and reviewed by Claimants; the allegations in the Statement of Claim only arose after Claimants' attempt at a 20% annual rate of return trading strategy turned against them in the market; and this claim is nothing more than an attempt to recover when the risk of Claimants' own trading program manifested itself in losses attributable to Claimants' sole and individual decisions.

In its Third Party Claim, BCS asserts that: Its Phoenix, Arizona office was an office of supervisory jurisdiction, which was operated by Novey under a Branch Office Independent Contractor Management Agreement (the "Agreement"); the Agreement re-affirms Novey's and I.S.N.'s obligations to comply with all applicable securities laws of the State of Arizona and all applicable rules, regulations, interpretations and directives issued by the NASD; the Agreement obligates Novey for direct personal responsibility for review of the activities of registered representatives and persons associated with BCS' Phoenix, Arizona office; the Agreement obliges Novey and I.S.N. to bear complete financial responsibility for the operation of the Phoenix office including, but not limited to, all costs of any litigation, including attorneys' fees, fines or judgement; the Agreement obliges Novey and I.S.N. to indemnify and hold BCS harmless from any loss, damages, liability, claim, costs and expense arising out of Novey's operation of the Phoenix office or arising out of Novey's breach of the Agreement; and the Statement of Claim arises solely out of Novey's operation of the Phoenix office.

Unless admitted in his Answer, Novey denied the allegations in the Third Party Claim. Novey also asserted the following affirmative defenses: The independent contractor agreement does not impose liability on Mr. Novey, personally, for the matters at issue here; the Agreement is void and unenforceable as being contrary to public policy; the indemnification requested here goes beyond anything contained in the Agreement, since there is nothing in the Agreement which requires anyone to indemnify BCS for liability arising out of its own misfeasance or nonfeasance; and the right to indemnification claimed by BCS has been released by operation of law by the failure of BCS to give timely notice of the claim, and to allow any alleged indemnitor to control efforts to resolve or defend a claim.

Unless admitted in its Answer, I.S.N. denied the allegations in the Third Party Claim. I.S.N. also asserted the following affirmative defenses: This tribunal lacks subject matter jurisdiction over I.S.N. because it has not consented to arbitrate; the Agreement is void and unenforceable as being contrary to public policy; the indemnification requested here goes beyond anything contained in the Agreement, since there is nothing in the Agreement which requires anyone to indemnify BCS for liability arising out of its own misfeasance or nonfeasance; and the right to indemnification claimed by BCS has been released by operation of law by the failure of BCS to give timely notice of the claim, and to allow any alleged indemnitor to control efforts to resolve or defend a claim.

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### **RELIEF REQUESTED**

Claimants requested an award against the respondents of the following: Compensatory damages of at least \$67,697.43, plus interest; recovery of commissions, margin interest and other fees charged by Respondents; recovery of their filing fees and such other costs and expenses as may be incurred in bringing this arbitration; attorneys' fees pursuant to A.R.S. §§ 12-341.01 and 44-2001; punitive damages of at least \$25,000 in a specific amount that the arbitrators deem appropriate; and such other relief in favor of Claimants as the arbitrators deem just and appropriate under the circumstances.

BCS demanded dismissal of the claim with prejudice and an award of its reasonable attorneys' fees and costs against Claimants. BCS, in its Third Party Claim, also requested an award against Novey and I.S.N. of the following: In the event that the panel should determine liability against BCS, such liability and consequent award of damages, if any, should be charged solely against Novey and I.S.N. and in any event the BCS should be awarded its reasonable attorneys' fees costs and expenses in this matter against Novey and I.S.N.

Maily demanded dismissal of the claim with prejudice and an award of its reasonable attorneys' fees and costs against Claimants.

Novey requested that the Third Party Claim be dismissed, and that he be awarded his costs, including reasonable attorneys' fees, incurred in defending against it.

I.S.N. requested that the Third Party Claim against it be dismissed, and that it be awarded its costs, including reasonable attorneys' fees, incurred in defending against it.

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

On or about April 25, 1997, I.S.N. filed a Motion to Dismiss for lack of jurisdiction. After consideration of the parties written responses, as well as oral argument during a motion hearing held on May 27, 1997, the arbitrators denied the motion. During the same motion hearing, the arbitrators heard argument on Novey's request to continue the arbitration date, as well as Claimants Motion to Compel discovery against the Respondents. After considering the parties' written submissions and oral argument, the arbitrators denied Novey's request, and made rulings with respect to Claimants' Motion to Compel.

I.S.N. 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 §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:

1. Claimants' claims against Barron Chase Securities, Inc. and Richard W. Mailly, Jr., are denied in their entirety;
2. The Third Party Claim of Barron Chase Securities, Inc. against Kurt Novey is denied as being moot in light of the denial of the Claimants' claims;
3. The Third Party Claim of Barron Chase Securities, Inc. against I.S.N., Inc. is dismissed as being outside the jurisdiction of this tribunal; and
4. Costs of this proceeding, including forum fees and legal fees are to be borne by the respective parties.

### **FORUM FEES**

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each prehearing conference, if any. There were six (6) sessions x \$500 = \$3,000 in forum fees. Pursuant to §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 §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$150 and shall **retain** as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable Third Party Claim filing fee in the amount of \$250 and shall **retain** as forum fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Barron Chase Securities, Inc.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, Barron Chase Securities, Inc. is liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution a member surcharge in the amount of \$300.

Additional forum fees in the amount of \$1,900 are assessed by the arbitrators against Barron Chase Securities.

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

Dated:

I. Douglas Dunipace  
I. Douglas Dunipace  
Public Arbitrator, Presiding Chair

/s/

June 18, 1997

John V. Marion  
John V. Marion  
Public Arbitrator

/s/

June 17, 1997

Seth M. Schindler  
Seth M. Schindler  
Industry Arbitrator

/s/

June 19, 1997