

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimants

Steven A. Kalin and Janice Kalin

and

99-00644

Name of Respondents

First Asset Management, Inc.

Anthony James Ustica

Leonard A. Neuhaus

Phillip O. Gullo

REPRESENTATION OF PARTIES

Steven A. Kalin and Janice Kalin ("**Claimant**") was represented by Floyd E. Siefferman, Jr., Esq., Saliterman & Siefferman, P.C., Minneapolis, Minnesota.

First Asset Management, Inc. ("**Respondent FAM**") and Leonard A. Neuhaus ("**Respondent Neuhaus**") were represented by Isaac M. Zucker, Esq., Law Office of Isaac M. Zucker, New York, New York.

Anthony James Ustica ("**Respondent Ustica**") was not present at the hearing as a result of the Automatic Stay Order under the United States Bankruptcy Code.

Phillip O. Gullo ("**Respondent Gullo**") appeared *pro se*.

CASE INFORMATION

The Statement of Claim was filed on or about January 12, 1999. Submission Agreement of Claimant Steven A. Kalin and Janice Kalin A. Kalin and Janice Kalin was signed on December 18, 1998.

Statement of Answer was filed by Respondents First Asset Management, Inc., Leonard A. Neuhaus and Anthony James Ustica on or about May 11, 1999.

Statement of Answer was filed by Respondent Phillip O. Gullo on or about April 21, 1999. Submission Agreement of Respondent Phillip O. Gullo was signed on April 20, 1999.

CASE SUMMARY

Claimants submitted the following summary:

Claimants, Steven A. Kalin and his wife Janice Kalin, have long been residents of Minneapolis, Minnesota. Steven Kalin is a Life Insurance CLU and his wife is a homemaker. In early 1997 Mr. Kalin was solicited by long distance telephone by Respondent Anthony Ustica to open an account in the New York Brokerage known as Lew Lieberbuam & Co., Inc. It should be immediately noted that in early 1998 the brokerage changed its name to First Asset Management, Inc., but continued to operate at the same address and with the same personnel. Very shortly after a formal Complaint was made by Claimants as to the handling of their account, First Management, Inc. closed its door and the individual Respondents scattered to various firms. More recently, Respondent Anthony ("Tony") James Ustica sought bankruptcy and no longer may be considered a Respondent herein. Originally named as Respondent, Brian T. Clendenin was able to demonstrate that he was not a control person at the time that the wrongful acts occurred and therefore Claimants voluntarily dismissed him. Thus the matter proceeds at present only against First Asset Management, Inc., individually and as successor to Lew Lieberbuam & Co., Inc., Leonard A. Neuhaus, the Senior Officer of the brokerage, and Mr. Phillip Gullo, Compliance Director. The account of Claimants was opened in February of 1997 and closed on April 2, 1998 a period of less than 14 months. The gist of this Complaint herein is that there was a specific agreement between Mr. Kalin and the brokerage (through Mr. Ustica) that any security purchased was to be sold in the event that at anytime a security lost \$2.00 or more per share in value in a single day, regardless of purchase price. There are a number of witnesses to that agreement and it was confirmed in writing on several occasions. See, for example, Exhibit 7 to the Statement of Claim. Exhibit 1 to the Statement of Claim sets out the details of the majority of the transactions which give rise to the claims made herein.

Claim one is for breach of contract in that Respondents failed to follow the explicit agreement between the parties that provided when a security lost \$2.00 per share in value in any given day under the previous day's close it was to be sold the following day. The total loss resulting from 8 violations of the agreed sale policy are outlined on pages 2 and 3 of Exhibit 2 to the Complaint and show losses amounting to more than \$175,000.00. There were many other smaller losses resulting from the breach of the contract. The actual losses were somewhat greater in that stocks were not to be sold (without the specific direction of Claimants) until they were down at least \$2.00 a share from the previous day. The fact that there may have been a substantial loss over time in a particular security did not give rise to a claim against the Respondents here. For example, if a particular security went down \$1.00 a day for 50 days that did not give rise to claim under the agreement of the parties. As the Statement of Claim will show, a great number of the failures to follow instructions of client were incurred with respect to securities in which the brokerage was a principal and/or market

maker, thus the Respondents violated their fiduciary duty and made excessive trades in light of the Claimants' objectives generating very nearly \$59,000.00 in mark-ups and commissions and over \$6,000.00 in margin interest. Many of the securities were unsuitable for persons of the conservative nature of Claimants. Claimants' stated investment objective was "long term growth". Respondent Ustica changed that instruction to read "growth with risk".

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that Claimant Steven Kalin is a highly sophisticated investor who has held a number of licenses in the securities industry for more than twenty years. Respondents further stated that Claimants possessed substantial net worth, annual income and liquid net worth, in addition to having more than 20 years experience investing in securities. In addition, Respondents stated that Claimant Steven Kalin and his brokers had numerous communications including many discussions of his investment objectives and goals. Respondents stated that all transactions were discussed with Mr. Kalin prior to the purchase or sale of the securities.

Respondent Gullo denied the allegations set forth in the Statement of Claim. Respondent Gullo stated that the activity in Claimants' account was consistent with their stated financial circumstances and their ability to understand the investments in their account. It was also stated that the trading in the account was within Claimants' stated risk tolerance and objectives. Respondent Gullo further stated that he reasonably discharged his duties as Compliance Director.

RELIEF REQUESTED

Claimant submitted the following description of the relief requested:

Since the contract was so explicit it is really a matter of mathematics to determine the loss resulting from the breaches of the agreement. Paragraph 25 of the Statement of Claim itemizes the contract damages for eight of the major violations in the amount of \$177,828.00. In that the breaches by the Respondents also generated nearly \$59,000.00 in mark ups and commissions and over \$6,000.00 in margin interest for the Respondents, Claimants' seek in addition to the full \$177,828.00 in principal, recoupment of the profits wrongfully generated in the way of commissions and interest by the Respondents. Punitive damages are also sought as allowed by Minnesota Law as well as attorneys' fees in the amount of \$65,000.00, also permitted by Minnesota Securities Law. Copies of the Minnesota Civil Liabilities Provisions are attached to the Statement of Claim as Exhibit 15. The individual Respondents' Neuhaus and Gullo should be held responsible for this matter in view of their failure to supervise in accordance with requirements of NASD Rules and in view of the liability of the Respondents' under subdivision 3 of Minnesota Stat. § 80A.23 ("Controlling Personal Liability") as well as under section 20 and Rule 10b5 of the Securities Exchange Act of 1934, and Section 12(2) ("Civil Liability") and Section 15 ("Liability of Controlling

Persons") of the Securities Act of 1933. As detailed in the Statement of Claim Claimants seek and are entitled to the following award:

1. General and compensatory damages in the amount of \$177,828.00;
2. Recoupment of the commissions charged by Respondents in the amount of \$58,979.00;
3. The costs of these proceedings, including the \$950.00 fees paid by Claimants to the NASD;
4. Punitive damages in the amount of \$100,000.00;
5. Attorneys' fees in the amount of \$65,000.00;
6. Such other and further relief as the panel deems just and appropriate.

The liability award should be made joint and several against the two corporations (Lew Lieberbuam & Co., Inc., and First Asset Management, Inc.) and against the remaining individual respondents, Leonard A. Neuhaus and Phillip Gullo, otherwise Claimants will recover nothing.

Respondents First Asset Management, Inc. and Leonard A. Neuhaus requested that a judgment be entered against Claimants.

Respondent Gullo requested that the claims asserted against him be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

Respondents First Asset Management, Inc. and Leonard A. Neuhaus did not file with the NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are 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 offered testimony at the hearing are bound by the determination of the arbitration panel on all issues submitted.

Prior to the commencement of the hearing the undersigned arbitrators were advised that Respondent Anthony James Ustica had filed for bankruptcy. As a result of the bankruptcy filing all actions against Mr. Ustica were stayed.

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 (the "NASD").

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. Respondents First Asset Management and Leonard Neuhaus shall be and hereby are jointly and severally liable for and shall pay to the Claimants Steven A. and Janice Kalin the sum of \$25,000.00 as compensatory damages.
2. Interest at the rate of 7% per annum, from and inclusive of January 1, 1998 to and inclusive of the date this award is paid in full, is awarded on the above stated sum.
3. Respondents First Asset Management and Leonard Neuhaus shall be and hereby are jointly and severally liable for and shall pay to the Claimants Steven A. and Janice Kalin the sum of \$30,000.00 as attorneys' fees.
4. All claims asserted against Philip O. Gullo shall be and hereby are dismissed.
5. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
6. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$200.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is First Asset Management, Inc.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$3,500.00

Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel x \$750.00	= \$ 750.00
Pre-hearing conference(s): August 10, 1999 1 session	
Four (4) Hearing sessions x \$750.00	= \$3,000.00
Hearing Date(s): January 5, 2000 2 sessions	
January 6, 2000 2 sessions	
Total Forum Fees	= \$3,750.00

The Arbitration Panel has assessed \$750.00 of the forum fees to claimants Steven A. Kalin and Janice Kalin.

The Arbitration Panel has assessed \$3,000.00 of the forum fees jointly and severally to First Asset Management and Leonard Neuhaus.

Fee Summary

Claimants, Steven A. Kalin and Janice Kalin, be and hereby are jointly and severally liable be and hereby is solely liable for:

Initial Filing Fee	= \$ 200.00
<u>Forum Fees</u>	<u>= \$ 750.00</u>
Total Fees	= \$ 950.00
<u>Less payments</u>	<u>= \$ 950.00</u>
Balance Due NASD Regulation, Inc.	= \$ 0.00

Respondent, First Asset Management, be and hereby is solely liable for:

<u>Member Fees</u>	= \$5,600.00
Total Fees	= \$5,600.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$ 0.00

Fees have been waived due to the Terminated status of First Asset Management, Inc.

Respondents, First Asset Management, Inc. and Leonard A. Neuhaus, be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$3,000.00
Balance Due NASD Regulation, Inc.	= \$3,000.00

All balances are due to NASD Regulation, Inc.

Dated:

Emily F. Seesel, Esq.
Public Arbitrator, Presiding Chair

David F. Schmitz
Public Arbitrator

Martin D. Munic
Industry Arbitrator

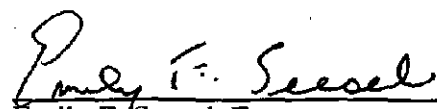
<u>Member Fees</u>	= \$5,600.00
Total Fees	= \$5,600.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$ 0.00

Fees have been waived due to the Terminated status of First Asset Management, Inc.

Respondents, First Asset Management, Inc. and Leonard A. Neuhaus, be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$3,000.00
Balance Due NASD Regulation, Inc.	= \$3,000.00

All balances are due to NASD Regulation, Inc.



Emily F. Seesel, Esq.
Public Arbitrator, Presiding Chair

Dated:

1/17/2000

David F. Schmitz
Public Arbitrator

Martin D. Munic
Industry Arbitrator

<u>Member Fees</u>	= \$5,600.00
Total Fees	= \$5,600.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$ 0.00

Fees have been waived due to the Terminated status of First Asset Management, Inc.

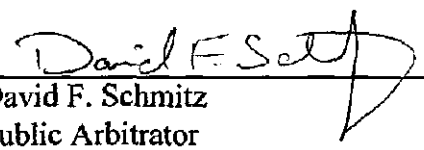
Respondents, First Asset Management, Inc. and Leonard A. Neuhaus, be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$3,000.00
Balance Due NASD Regulation, Inc.	= \$3,000.00

All balances are due to NASD Regulation, Inc.

Dated:

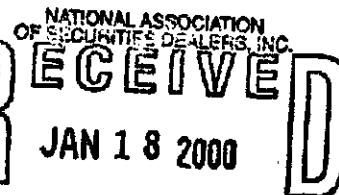
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1-14-00

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Member Fees
Total Fees
Less payments
Balance Due NASD Regulation, Inc.

= \$5,600.00
= \$5,600.00
= \$ 0.00
= \$ 0.00

Fees have been waived due to the Terminated status of First Asset Management, Inc.

Respondents, First Asset Management, Inc. and Leonard A. Neuhaus, be and hereby are jointly and severally liable for:

Forum Fees
Balance Due NASD Regulation, Inc.

= \$3,000.00
= \$3,000.00

All balances are due to NASD Regulation, Inc.

Dated:

Emily F. Seesel, Esq.
Public Arbitrator, Presiding Chair

David F. Schmitz
Public Arbitrator

Martin D. Munic
Martin D. Munic
Industry Arbitrator

Jan. 14, 2000