

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimants

Timothy and Susan McGough

and

99-01769
Scottsdale, Arizona

Name of Respondents

New England Securities Corporation
Peter Russell Kolesar

REPRESENTATION OF PARTIES

Claimants Timothy and Susan McGough were represented by John J. Nicgorski, Esq. and Carolyn R. Matthews, Esq., Mohr, Hackett, Pederson, Blakley & Randolph, P.C., 2800 North Central Avenue, Suite 1100, Phoenix, Arizona 85004.

Respondent New England Securities Corporation was represented by James A. Ryan, Esq. and Robert N. Mann, Esq., Streich Lang, Two North Central Avenue, Phoenix, Arizona 85004-2391.

Respondent Peter Russell Kolesar was represented by John R. Tellier, Esq., Titus, Brueckner & Berry, P.C., 7373 North Scottsdale Road, Suite B-252, Scottsdale, Arizona 85253.

CASE INFORMATION

The Statement of Claim was filed on or about April 15, 1999. Submission Agreement of Claimant Timothy and Susan McGough was signed on April 12, 1999.

Answer of New England Securities Corporation to Statement of Claim was filed on or about August 17, 1999. Submission Agreement of Respondent New England Securities Corporation was signed on August 13, 1999 by Molly Diggins.

Answer of Respondent Peter Russell Kolesar was filed on or about June 30, 1999. Submission Agreement of Respondent Peter Russell Kolesar was signed on June 24, 1999.

CASE SUMMARY

Claimants submitted the following summary:

Claimants filed a Statement of Claim seeking recovery of not less than \$100,000 for damages that Claimants have suffered as a result of certain practices by Respondents. During the period that Claimants' investments were managed and maintained by Respondents, Respondents engaged in a series of actions in contravention of legal and industry standards including:

- (a) failing to use reasonable diligence in its supervision of Kolesar and others in connection with the investments sold to Claimants by Kolesar;
- (b) misrepresenting and failing to disclose material facts to Claimants regarding the securities recommended to Claimants and the investment strategies employed by Respondents; and
- (c) directing and effecting unsuitable investments in speculative and fraudulent notes and limited partnerships in Claimants' accounts.

Timothy McGough is a landscape architect who initially met Kolesar when he performed some services for Kolesar. Susan McGough is a residential real estate agent. Claimants have little prior experience in investing. Prior to the investment in Roadrunner Trail Limited Partnership ("Roadrunner Trail"), claimants had invested only in life insurance and variable annuities. Claimants relied on Kolesar and his affiliation with New England as a reputable company owned by New England Financial Corporation ("New England Financial") which was touted as safe and secure, being in business over 100 years. Prior to the investments set forth on page four of the Statement of Claim ("the investments"), Claimants had purchased life insurance and annuities through Kolesar and New England. Kolesar led Claimants to believe that the investments were backed by New England and New England Financial.

Kolesar first approached Claimants telling them that Roadrunner Trail was a great deal and a good investment for them. Kolesar never informed the McGoughs of any of the risks associated with limited partnership investments. Instead, Kolesar assured the Claimants that the Roadrunner Trail investment was safe and secure because the one general partner was United Devcor, Inc. ("United Devcor") and that Roadrunner Trail would also own property in the Las Sendas Development area called Falcon Ridge near other well-known developments in the east valley, such as Red Mountain Ranch. Claimants never received any offering memorandum prior to the purchase of Roadrunner Trail, nor did Kolesar review with Claimants any of the risks in the offering memorandum.

With regard to the purchase of the notes, Kolesar assured Claimants that the notes were safe and secure – telling Tim and Susan that the notes were "secured and guaranteed by the Las Sendas Development" project. Kolesar never mentioned any risks associated with the notes.

At the time of their purchase of the investments, the claimants had a net worth, exclusive of home and vehicles, of less than \$100,000. The speculative investments represented more

than seventy percent of their net worth. To make the payment on Roadrunner Trail, Claimants gave up their vacation. Kolesar recommended these investments despite the fact that Claimants had expressed their desire to invest in more conservative investments with their goals being growth, safety and preservation of the principal investment for the purposes of saving for the children's education and retirement.

Kolesar, as an employee of New England, holds himself out as an experienced, capable broker and financial planner with substantial experience in managing retirement assets. Kolesar, as an employee of New England, recommended and made the following investments which included a limited partnership and speculative private placement notes ("the notes") on Claimants' behalf:

	<u>Amount</u>	<u>Date</u>
UDI Promissory Note T-A	\$23,440.40	5/15/98
UDI Promissory Note S-A	\$34,660.83	7/25/98
Roadrunner Trail Limited Partnership	\$13,204.73	approximately 4/15/94
TOTAL	<u>\$71,305.96</u>	

Respondent New England Securities, Corp. Submitted the following summary:

This arbitration arises out of claimants' desire to recover the proceeds of their voluntary investments in the Road Runner Trails limited partnership in 1994 and promissory notes offered by UDI that were rolled over repeatedly until 1998. Claimants cannot recover damages against respondent New England Securities Corporation ("New England") for at least the following reasons:

1. New England did not know of and should not reasonably have been aware of the existence of the claimants' complained-of investments, or the involvement of respondent Peter Kolesar in the investments.
2. New England had a reasonable compliance system in place and enforced its system of compliance.
3. New England reasonably supervised its registered representatives, including respondent Kolesar, and was unaware of his alleged involvement in unauthorized business activities involving UDI and Roadrunner Trail.
4. Claimants did not reasonably rely on the relationship between respondent Kolesar and New England in purchasing the investments of which they now complain.
5. UDI and/or Roadrunner Trail authorized and recommended the investments of which claimants now complain, not New England.

6. Claimants knew or should have known that New England was not involved with the issuance or sponsorship in any manner of the investments of which they now complain.
7. Claimants' access to the investments of which they now complain was not a result of respondent Kolesar's relationship with New England.
8. Claimants knew or should have known of the risk involved with the purchase of the UDI notes and the Roadrunner Trail limited partnership.

Because the claims against New England are secondary and solely premised on the finding of liability against respondent Kolesar, New England also cannot be liable if respondent Kolesar is not liable. The evidence will establish that claimants actually knew or should have known that, even if respondent Kolesar made certain representations regarding the quality of the UDI and Roadrunner Trail investments, it was not reasonable for claimants to rely on any such representations. Moreover, the investments in UDI and Roadrunner Trail appear to have been suitable investments, based on the information claimants disclosed at the time they chose to purchase the investments.

Respondent Kolesar submitted the following summary:

Claimants complain about two investments. The first was a limited partnership interest in an entity known as Roadrunner Trail Limited Partnership. That investment was made in February, 1994, prior to the time that Claimants did any business with the Respondents, and occurred as a result of dealings directly between Claimants and Buddie Johnson, a representative of Roadrunner Trail Limited Partnership. The sole involvement of Respondents was the fact that Mr. Kolesar introduced Claimants to Mr. Johnson at the request of Claimants. Mr. McGough, a landscape architect, apparently hoped to develop a business relationship with various real estate developments with which Mr. Johnson was associated. Respondents are not insurers of the investments made by Claimants, and can have no responsibility or liability to Claimants for their decision to invest in this limited partnership. Furthermore, any claim Claimants might have had is barred by the applicable statute of limitations.

Claimants next complain about their investments in a series of notes issued by United Development, Inc. (UDI). Those investments began no later than May 31, 1995. The notes in question were short-term, unsecured notes paying interest at the rate of twenty percent (20%) per annum. The Claimants continually allowed the notes to be "rolled over" and paid off by issuance of replacement notes incorporating the principal and accrued interest from the prior notes. The Claimants did, at one point in time, make a partial redemption of Ninety-Six Hundred Dollars (\$9,600.00) off a note. They received that payment in 1996.

Again, the notes in question were acquired by Claimants directly from UDI, without the participation of either of the Respondents. Again, the Respondents are not insurers of the investments made by Claimants, and have no responsibility or liability for the UDI notes. Further, the claims presented on those notes are once again barred by the applicable statute of limitation.

RELIEF REQUESTED

Claimants requested that the arbitration panel award them the following relief against Respondents and each of them:

- a. Award judgment against Respondents for compensatory damages in the amount of not less than \$100,000.00;
- b. Judgment against Respondents for lost profits/loss of opportunity;
- c. Judgment against Respondents for punitive damages in the amount the arbitrators deem appropriate to deter the Respondents from future acts or misconduct such as those giving rise to this claim;
- d. For pre and post-award interest at the maximum rate allowed by law;
- e. For all of Claimants' costs, expenses and disbursements, including reasonable attorney's fees in pursuing this claim pursuant to Rule 10330, NASD, A.R.S. §13-2314, A.R.S. §44-2002, and A.R.S. §12-341.01; and
- f. For such other relief as the panel deems just and proper.

Respondent New England requested that the arbitration panel dismiss it from the present proceeding, and award it all of its costs and reasonable attorneys' fees incurred in defending itself from the claims of the McGoughs pursuant to A.R.S. §12-341-01.

Respondent Kolesar requested that the claim be dismissed and that he be awarded his forum costs and attorneys' fees in defending this matter.

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 (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. The parties had a full opportunity to present all evidence regarding the issue of New England Securities' and Peter R. Kolesar's compliance with Rules, Regulations and laws for the regulation of securities and New England Securities' supervision of Peter R. Kolesar. These issues have been fully and completely litigated. The Panel intends this decision to preclude relitigation of these issues by collateral estoppel. The Panel has relied on its evaluation of the demeanor and credibility of witnesses in rendering this decision. The Panel finds that the testimony of Peter R. Kolesar was not credible.
2. The Panel finds that New England Securities' supervision of Peter R. Kolesar was inadequate and negligent. The Panel finds that New England Securities Corporation cloaked Peter R. Kolesar with apparent authority as to the Roadrunner Trail Limited Partnership and the UDI notes.
3. The Panel finds that registered representative Peter R. Kolesar was a "seller" of the UDI notes and the Roadrunner Trail Limited Partnership. The Panel finds that Peter R. Kolesar intentionally committed acts that constitute fraud, as defined by Arizona law and intentionally violated NASD Rules. The Panel finds that Peter R. Kolesar's conduct committing fraud is non-dischargeable in bankruptcy.
4. Claimants Timothy and Susan McGough are awarded against Peter R. Kolesar and New England Securities Corporation in the sum \$82,467.45 (**Eighty Two Thousand Four Hundred Sixty Seven Dollars and Forty Five Cents**) as damages for the UDI notes, with additional interest at the rate of 20%, compounded quarterly, from April 15, 2000, until paid and the sum of \$19,678.51 (**Nineteen Thousand Six Hundred Seventy Eight Dollars and Fifty One Cents**) for their Roadrunner Trail Limited Partnership investment, with additional interest at 10% per annum from April 10, 2000.
5. The Panel orders that upon receipt of payment in full, Claimants Timothy and Susan McGough are ordered to assign all of their interest in the UDI notes and the Roadrunner Limited Partnership, including, but not limited to, all claims pending in bankruptcy.
6. The Panel awards costs of expert witness Butler and attorneys' fees in the amount of \$15,000.00 (**Fifteen Thousand Dollars**) against Peter R. Kolesar and New England Securities Corporation.

7. The Panel is also referring the following individuals to NASD Regulation, Inc. for disciplinary action:

Peter R. Kolesar
Charles R. Kolesar
Stephen M. Kolesar
Buddie Johnson
Gary Walker

8. 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.
9. 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 = \$300.00

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 New England Securities Corporation.

Member surcharge = \$1,500.00
Pre-hearing process fee = \$ 600.00
Hearing process fee = \$2,500.00

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:

Number (#) Pre-hearing session(s) with a single arbitrator x \$450.00	= \$ 450.00
Pre-hearing conference(s): April 10, 2000	1 session
Number (#) Pre-hearing session(s) with Panel x \$1,125.00	= \$ 1,125.00
Pre-hearing conference(s): December 2, 1999	1 session
Twelve (12) Hearing sessions x \$1,125.00	= \$13,500.00
Hearing Date(s): April 11, 2000	2 sessions
April 12, 2000	2 sessions
April 24, 2000	2 sessions
April 25, 2000	2 sessions
April 26, 2000	2 sessions
<u>April 27, 2000</u>	<u>2 sessions</u>
Total Forum Fees	= \$15,075.00

The Arbitration Panel has assessed \$15,075.00 of the forum fees jointly and severally to New England Securities Corporation and Peter Russell Kolesar.

Fee Summary

Claimants, Timothy and Susan McGough, shall be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$ 0.00</u>
Total Fees	= \$ 300.00
<u>Less payments</u>	<u>= \$1,425.00</u>
Balance to be refunded by NASD Regulation, Inc.	= \$1,125.00

Respondent, New England Securities Corporation, shall be and hereby is liable for:

<u>Member Fees</u>	<u>= \$4,600.00</u>
Total Fees	= \$4,600.00
<u>Less payments</u>	<u>= \$3,600.00</u>
Balance Due NASD Regulation, Inc.	= \$1,000.00

Respondents, New England Securities Corporation and Peter Russell Kolesar, shall be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$15,075.00
<u>Total Fees</u>	= \$15,075.00
<u>Less payments from Peter R. Kolesar</u>	= \$ 2,175.00
Balance Due NASD Regulation, Inc.	= \$12,900.00

All balances are due to NASD Regulation, Inc.

Dated:

/s/ Bruce R. Heurlin
Bruce R. Heurlin, Esq.
Public Arbitrator, Presiding Chair

April 27, 2000

/s/ James H. Shikany
James H. Shikany
Public Arbitrator

April 27, 2000

/s/ Thomas P. Delnoce
Thomas P. Delnoce
Industry Arbitrator

April 27, 2000

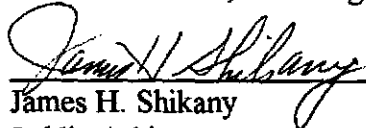
All balances are due to NASD Regulation, Inc.

Dated:



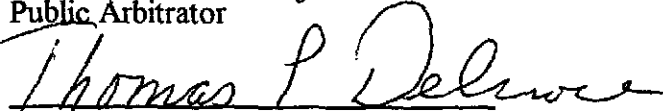
Bruce R. Heurlin, Esq.
Public Arbitrator, Presiding Chair

4-27-00



James H. Shikany
Public Arbitrator

4-27-00



Thomas P. Delnoce
Industry Arbitrator

4-27-00