

**AWARD  
NASD Regulation, Inc.**

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In the Matter of the Arbitration Between

Name of Claimant

The Harvey and Violet Kaplan Family Limited Partnership

and

99-02381  
Scottsdale, Arizona

Name of Respondents

Sutro & Co., Incorporated  
Mark Horace Love

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**REPRESENTATION OF PARTIES**

The Harvey and Violet Kaplan Family Limited Partnership ("**Claimant**") was represented by Thomas M. Pace, Esq., Tucson, Arizona.

Sutro & Co., Incorporated ("**Respondent Sutro**") and Mark Horace Love ("**Respondent Love**") were represented by Thomas Galbraith, Esq., Meyer Hendricks & Bivens, P.A., Phoenix, Arizona.

**CASE INFORMATION**

*The Statement of Claim was filed on or about May 24, 1999. Submission Agreement of Claimant The Harvey and Violet Kaplan Family Limited Partnership was signed on April 29, 1999 by Harvey and Violet Kaplan.*

Statement of Answer was filed by Respondents Sutro & Co., Incorporated and Mark Horace Love on or about August 16, 1999. Submission Agreement of Respondent Sutro & Co., Incorporated was signed on August 25, 1999 by Abe Lampert.

**CASE SUMMARY**

Claimant submitted the following summary:

This is a claim brought by the Harvey and Violet Kaplan Family Limited Partnership and the Violet Kaplan IRA. The principals are Harvey and Violet Kaplan. This claim is brought against Mark Love and Sutro & Company, Inc., alleging misrepresentation and breach of fiduciary duty, primarily in the sale of the Davis Convertible Securities Fund. The accounts in question were under what is known as an Investment Management Services Agreement

wherein Sutro & Company was paid a fixed fee of 1.5% of assets and Sutro & Company was granted complete and unlimited discretionary trading authority on the assets in the account. Mr. Love made an investment of over \$500,000 in the Davis Convertible Securities Fund, which is a convertible securities fund holding mostly convertible preferred stocks and non-investment grade bonds. In doing so, Mr. Love advised the Kaplans that the fund was like a money market fund and that he would not be receiving a commission. In fact, Mr. Love selected Class B shares which carried substantial Rule 12b-1 fees and would pay Sutro & Company substantial commissions over time. This was done despite the fact that, in a wrap account, the Kaplans would have been entitled to another class of shares (Class Y shares) or, alternatively, would have been able to purchase Class A shares and, because of the price break of the \$500,000 invested, pay only a very small commission. Only after counsel wrote and threatened to commence this arbitration proceeding did Sutro & Company respond by reversing the wrap account fees on this fund.

Prior to encountering Mr. Love, the Kaplans had always invested only in bonds and money market funds and were very conservative investors, having raised their funds as entrepreneurs in small businesses. The Kaplans authorized Mr. Love to invest approximately \$100,000 in stocks to take some risks in the stock market. Mr. Love, in fact, invested \$140,000 in stocks (instead of \$100,000) and these stocks also lost money, however, the Kaplans have not brought a claim seeking damages for these losses because they acknowledge that they were aware that the funds were placed in stocks and that they were taking a risk with this money.

The Kaplans did not receive a prospectus on the Davis Convertible Securities Fund until they repeatedly requested one from Kay Stroehle, Mark Love's assistant. They were finally overnighted via Federal Express a prospectus in approximately August of 1997. Soon thereafter, the Kaplans closed their account at Sutro & Company and were charged substantial redemption fees for closing the Davis Convertible Securities Fund. In total, the investment in the Davis Convertible Securities Fund lost approximately \$70,000.

Respondents submitted the following summary:

Respondents denied the allegations set forth in the Statement of Claim, and raised the following affirmative defenses: that the Claimants cannot demonstrate loss causation; that Claimants failed to mitigate their damages in June 1998 when they made a second investment decision to remain in the Davis Fund; and that Sutro and Mr. Love acted in good faith and did not intend to defraud, injure or improperly profit from its relationship with Claimants. Respondents did admit that due to a bookkeeping mistake, Sutro & Company, Inc. for one month included the value of Claimants' Davis Fund holdings with their managed equities for purposes of computing Sutro's management fee. When this was discovered,

Sutro immediately reversed the incorrect charge, and took measures to assure that it did not reoccur.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$70,000, a reasonable amount for attorneys' fees and punitive damages in an amount to be determined by the Arbitration Panel.

Respondents requested that the statement of claim be dismissed in its entirety with prejudice, that they be awarded their attorneys' fees, costs and that Claimants be required to reimburse them for all filing fees, forum fees and other costs of every kind.

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

Respondent Mark Horace Love 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.

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 claim of Violet Kaplan, IRA, is dismissed, having been withdrawn at the hearing.
2. Respondents shall be and hereby are jointly and severally liable for and shall pay to Claimant the Kaplan Family Limited Partnership the sum of \$20,000.00 (**Twenty Thousand Dollars**).
3. 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.

4. 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 = \$225.00

#### **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 Sutro & Co., Incorporated.

Member surcharge = \$1,000.00  
Pre-hearing process fee = \$ 600.00  
Hearing process fee = \$1,500.00

#### **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 Panel x \$750.00 = \$ 750.00  
Pre-hearing conference(s): January 7, 2000 1 session  
  
Four (4) Hearing sessions x \$750.00 = \$3,000.00  
Hearing Date(s): May 25, 2000 2 sessions  
May 26, 2000 2 sessions  
Total Forum Fees = \$3,750.00

The Arbitration Panel has assessed \$3,750.00 of the forum fees jointly and severally to Sutro & Co., Incorporated and Mark Horace Love.

**Fee Summary**

Claimant, The Harvey and Violet Kaplan Family Limited Partnership, shall be and hereby is liable for:

<u>Initial Filing Fee</u>	= \$ 225.00
Total Fees	= \$ 225.00
<u>Less payments</u>	= \$ 975.00
Balance to be refunded by NASD Regulation, Inc.	= \$ 750.00

Respondent, Sutro & Co., Incorporated, shall be and hereby is liable for:

<u>Member Fees</u>	= \$3,100.00
Total Fees	= \$3,100.00
<u>Less payments</u>	= \$3,100.00
Balance Due NASD Regulation, Inc.	= \$ 0.00

Respondents, Sutro & Co., Incorporated and Mark Horace Love, shall be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$3,750.00
Balance Due NASD Regulation, Inc.	= \$3,750.00

**All balances are due to NASD Regulation, Inc.**

Dated:

/s/ Frederick K. Steiner, Jr.

Frederick K. Steiner, Jr.  
Public Arbitrator, Presiding Chair

May 31, 2000

/s/ John V. Marian

John V. Marian  
Public Arbitrator

June 1, 2000

/s/ David M. Seidner

David M. Seidner  
Industry Arbitrator

June 1, 2000

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Dated:



Frederick K. Steiner, Jr.  
 Public Arbitrator, Presiding Chair

John V. Marian  
 Public Arbitrator

David M. Seidner  
 Industry Arbitrator

JUN. 1. 2000 12:59PM

NASD ARBITRATION

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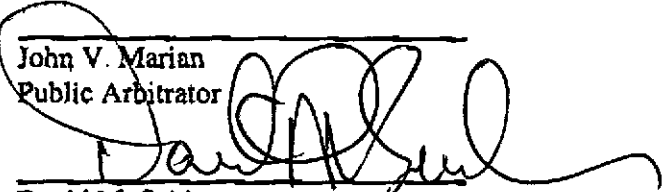
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