

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant
Tom Halling

Case Number: 16-00519

vs.

Respondents
Cape Securities Inc.,
Lon Charles Faccini, Jr.,
and Michael Allen Lovett

Hearing Site: Kansas City, Missouri

Nature of the Dispute: Customer vs. Member and Associated Persons

REPRESENTATION OF PARTIES

For Claimant Tom Halling: Jennifer Tarr, Cold Spring Advisory Group, New York, New York.

For Respondents Cape Securities Inc. ("Cape Securities"), Lon Charles Faccini, Jr. ("Faccini"), and Michael Allen Lovett ("Lovett"): Judy A. Newcomb, Esq., Cape Securities, Inc., Foley, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: February 16, 2016.
Claimant signed a Submission Agreement: February 16, 2016.
Claimant filed an Answer to Respondents' Amended Counterclaim on or about: January 10, 2017.

Statement of Answer and Counterclaim filed on or about: April 18, 2016.
Cape Securities signed a Submission Agreement: April 14, 2016.
Faccini signed a Submission Agreement: April 15, 2016.
Lovett signed a Submission Agreement: April 22, 2016.
Amended Answer and Counterclaim filed on or about: November 30, 2016.

CASE SUMMARY

Claimant asserted the following causes of action: unsuitability, failure to supervise, and breach of fiduciary duty. Claimant alleged that Respondents made unsuitable recommendations and over-concentrated his account with various investments, such as FirstHand Technology Value Funds, Amarin Corp., Kior, Inc., and Magic Jack Vocal, and that he lost nearly \$20,000 in only 13 months after opening his account at Cape Securities.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Respondents asserted the following causes of action in their Amended Counterclaim: breach of contract and abuse of process. Respondents alleged that Claimant failed to notify them in a timely fashion after receiving the trade confirmations of any errors, and therefore, Respondents reasonably assumed that the activity in Claimant's account was consistent with Claimant's directions and stock strategy.

Unless specifically admitted in his Answer, Claimant denied the allegations made in the Amended Counterclaim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

Compensatory Damages:	\$ 19,772.00
Punitive Damages:	\$ 27,128.00
Costs:	\$ 2,500.00
Other:	Unspecified

In the Amended Statement of Answer, Respondents requested that each and every claim made by the Claimant be denied, that Claimant take nothing by way of the Statement of Claim, that Respondents be awarded their costs and attorneys' fees, that this matter be expunged from any and all regulatory records of Respondents, that Claimant be assessed all costs and attorneys' fees Respondents will incur to expunge their regulatory records, that all FINRA forum fees be assessed to Claimant, and for such other relief and further as the Arbitrator deems just and proper.

In Respondents' Amended Counterclaim, they requested:

Compensatory Damages:	\$ 40,000.00
Attorneys' Fees:	Unspecified
Costs:	Unspecified
Other Monetary Relief:	Unspecified
Expungement	

In the Claimant's Answer, he requested that the Arbitrator deny the relief sought by Respondents in their Amended Answer and Counterclaim.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges that she has read the pleadings and other materials filed by the parties.

On or about June 22, 2016, Respondents submitted a Summary of Additional Submission of Evidence. On or about June 22, 2016, Claimant filed a Final Submission.

On or about July 25, 2016, the Arbitrator requested that the parties provide any additional or supplementary materials to support their requests for fees on or before August 3, 2016. On or about August 3, 2016, Claimant filed a Request for Fees and Damages. On or about August 3, 2016, Respondents filed an Itemization of Damages.

On or about September 12, 2016, FINRA informed the parties that it had received the Arbitrator's ruling on the merits of Claimant's claim, but that a hearing was needed to determine Respondents' requests for expungement. On or about October 17, 2016, Respondents notified FINRA that they were no longer requesting expungement in this matter.

On November 1, 2016, FINRA notified the parties that because Respondents' Counterclaim requested unspecified monetary damages, a panel of three arbitrators would be appointed pursuant to Rule 12401(c) unless the parties agreed to have this case proceed with a single arbitrator.

On or about November 2, 2016, Claimant requested a hearing and for three arbitrators to be appointed in this matter. On or about November 11, 2016, Respondents filed a Motion to Serve and Publish the Award and/or Conform the Pleadings to the Evidence ("Motion to Serve Award"). On or about November 16, 2016, Claimant filed an Opposition to Respondents' Motion to Serve Award and requested sanctions against Respondents. On or about December 6, 2016, Respondents' filed a Reply in Support of the Motion to Serve Award and objected to Claimant's request for sanctions.

On or about November 30, 2016, Respondents filed an Answer and Amended Counterclaim. On or about December 1, 2016, Claimant filed an Objection to Respondent's Filing of an Amended Answer and Counterclaim.

On December 21, 2016, the Arbitrator entered the following Order:

- 1) Respondents' Motion to Accept the Amended Answer and Counterclaim is granted.
- 2) Claimant's request for sanctions is denied.
- 3) Claimant is provided 20 days to file a written response to Respondents' Amended Answer and Counterclaim.
- 4) Claimant's request for a hearing is granted.
- 5) The Simplified Arbitration Case seeks damages by the parties for less than \$50,000, and as such will remain with a single arbitrator and the only arbitrator chosen by the parties in this matter, and not a three-arbitrator panel.
- 6) A telephonic hearing will be held with the goal of minimizing additional expenses to all parties.
- 7) The sole issue to be discussed during this hearing pertains to conforming the evidence to the pleadings, which will now include the Original Claim, Amended Answer and Counterclaim, and Response to Counterclaim.
- 8) It is further noted that Claimant failed to file a written response to the originally filed Answer and Counterclaim.
- 9) Parties are to submit three (3) mutually agreed upon hearing dates and times to FINRA, within 20 days of the response date.

- 10) Respondents' Motion to Serve Award is taken under advisement, pending disposition following the telephonic hearing.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims, each and all, are denied in their entirety.
2. Respondents' Counterclaim is denied in its entirety.

Based upon review of all pleadings and documents submitted by both Claimant and Respondents, and after consideration of the arguments presented, the sole public arbitrator is issuing this Explained Decision:

The Arbitrator found that as both parties requested less than \$50,000.00 in damages, the case would remain as a simplified case. No party requested additional discovery following the filing of Respondents' Amended Answer and Counterclaim.

Pursuant to Claimant's request for a hearing, the Arbitrator ordered that a telephonic hearing be held to conform the pleadings to the evidence.

On February 2, 2017, at the start of the recorded telephonic hearing, Jennifer Tarr, the Representative from Cold Spring Advisory Group requested, an in-person hearing. FINRA Case Administrator Patrick Walsh directed Ms. Tarr to the Arbitrator's Order, dated December 21, 2016, indicating the hearing would be telephonic and that this was the opportunity for parties to present witness testimony to support the pleadings. Respondents' counsel, Ms. Judy Newcomb, reported that she was prepared to call two witnesses, if necessary. Neither party called witnesses during the hearing.

Findings and Conclusions on Claimant's Claims and Respondents' Counterclaim

On January 19, 2012, Claimant, Tom Halling, a highly experienced active investor and successful farmer, opened a new non-discretionary account at Cape Securities with Faccini. At the time, he had four open brokerage accounts at different firms. Prior to opening the account, he told Faccini of his 30+ years of general investment experience, 15 years of stock trading, and experience margin trading. This Account Form shows: previous investment experience, "high" investment objective, "speculative," risk tolerance, "aggressive (high degree of risk/high activity)", and investment time horizon, "short (0-5 years)." The new account was to be funded by "income."

Claimant did not want fixed-income products or a diversified investment account at Cape Securities; he wanted to trade speculative investments. Claimant opened the account in January 2012, added margin privileges in March, stopped adding outside funds in May 2012, ceased trading in December 2012, and closed

the account in March 2013. Claimant engaged in stock purchases, mostly on margin, with twelve companies. These trades were funded by checks, wire transfers, and trades.

Claim of Unsuitability

Under the applicable law, Claimant has not met his burden of proving unsuitability because he supplied no legal, or statutory authority or evidence to support qualitative unsuitability or quantitative unsuitability. The credible evidence in the record shows that Faccini made recommendations based on Claimant's age, employment background, financial profile, investment objective (speculative), risk tolerance (aggressive), investment experience (high), and trading experience (30+ years of investment, 15+ years of trading and sophisticated knowledge of margins). Faccini knew this account constituted only a small percentage of Claimant's overall investments. Claimant shared his margin trading experience, indicated his other accounts were currently trading on margin, and disclosed that he was actively trading elsewhere. He expressed awareness of risks posed by this kind of trading, which were also defined in the New Account and Margin applications.

At no time before November 2015, did Halling complain to Respondents of unauthorized, unapproved, or dissatisfied trading activity or strategies or change his investment objective. During the hearing, Claimant relied upon an expert report; however, this report was never provided to FINRA, the arbitrator, or referenced specifically as an Exhibit in the Statement of Claim or any other filed pleading. Thus, this report and any reliance upon it by Claimant will not be considered.

A review of the record shows Claimant knowingly executed and understood all forms. Respondents showed this account was reviewed daily, each position was recommended based on the objective and risk tolerance, and each trade was reviewed on its merit. Claimant's trading pattern was within the parameters of a highly experienced customer seeking a speculative objective in a short-term time horizon, and who expected to take on a high degree of risk. Claimant's trade authorizations were evidenced through outside payments to fund transactions, and receipt of trade confirmations and monthly statements. Based on this record, Claimant, an experienced stock trader and stock speculator, knowingly engaged in this trading and all transactions and activity generated from this account were suitable.

Claim of Failure to Supervise

Based on the above facts, evidence, conclusions and applicable law, Claimant failed to meet his burden of proving that Cape Securities failed to supervise this brokerage account and Respondent's Compliance Officer, Lovett failed to supervise the Registered Representative Faccini. Respondents produced the firm's written supervisory procedures, explained how these procedures were followed both with the representative and the account, and demonstrated how the representative acted in good faith in making recommendations. Claimant responds with broad accusations, and no law or statutory authority. Claimant

provided no rational connection between Lovett's attached BrokerCheck® report and this account to demonstrate any failure to supervise.

Claim of Breach of Fiduciary Duty

Claimant failed to submit any common law or statutory authority explaining how Respondents owed Claimant a fiduciary duty. Claimant also failed to produce evidence demonstrating how Respondents breached any fiduciary duty. The unrefuted record shows Claimant to be a knowledgeable, highly experienced and successful investor and entrepreneur, who maintained a non-discretionary brokerage account. Although Claimant received personalized recommendations, he made his own independent investment decisions about when to trade on margin. He received trade confirmations after each transaction and monthly statements. He never complained about trades until years after he closed this account. Based on the circumstances describing the opening of Claimant's account, when coupled with the frequent firm communications between the representative and Claimant, the record shows nothing to establish any misconduct or breach of fiduciary duty.

Claimant requests the Arbitrator make a referral to FINRA Department of Enforcement for further investigation of potential forgery on the new account forms for Halling. After unsuccessfully attempting to resolve this matter with Claimant, Respondents filed a written response supported by statements from a Cape Securities supervisor and copies of the relevant documents directly refuting the allegation. The supervisor explained, consistent with FINRA Rule 4512 and SEC Rule 17a-3(a)17, how Cape Securities initially opens trading accounts without a signed customer contract so long as the firm has certain details, noting neither FINRA nor SEC require a customer to sign a contract to open an account. Next, Cape Securities requires every customer, within two weeks of opening the account, to return a signed application verifying his information and acknowledging the terms and conditions. Then, a supervisor verifies the verbal representations were consistent with the signed document received. Here, Faccini faxed the unsigned initial account application to the firm's home office where the Cape Securities supervisor verified Claimant's identity and opened the account. Next, Faccini sent the customer the application for signature and placed the returned signed application in Claimant's file. The Cape Securities supervisor approved the application after verifying for suitability that the information had not changed. Claimant produced nothing, in the form of evidence or argument, to refute this response or support this serious allegation. Based on careful examination of all submitted materials, Claimant's request for referral to FINRA is denied.

Respondents' contend Claimant's Statement of Claim was not properly signed or executed by a person lawfully representing Halling, a Kansas resident, or by Claimant as established by FINRA Rules because Claimant's non-attorney representative, Cold Spring Advisory Group, is a non-attorney limited liability corporation. Respondents argue that although FINRA Rules permit a party in arbitration to be represented by a non-attorney person, where allowed by law, FINRA Rules do not permit a corporation to represent a party. Respondents assert no pleading was signed by a person on behalf of Halling and at no time

was any request made to cure this defect in the pleadings by a subsequent pleading, document or statement. Respondents raise this issue in every filed pleading and during the hearing. During oral argument, Respondents' counsel also claimed this case was frivolous.

Claimant's representative submitted no written response in a subsequent filed pleading authorizing the representation of Claimant, discussing this signature issue or seeking to withdraw as Claimant's representative. During the telephonic hearing, Ms. Tarr replied that her firm was "a new element in FINRA," and stated, without citing any authority, that a signature was not required.

Claimant's Submission Agreement in the Electronic Signature section states: "By entering your electronic signature below, you are one of the following: (1) the claimant; or (2) a person with legal authority to bind the claimant; or (3) a person with firsthand knowledge of the facts and actual or implied authority to act on behalf of the claimant; or (4) an attorney who has actual or implied written or verbal power of attorney from the claimant to sign on the claimant's belief and thus, bind the claimant to the terms of the Submission Agreement as if the claimant signed the form personally." The Electronic Signature Section of this Submission Agreement identifies Claimant as, "Mr. Tom Halling." The signature section indicates, "/Tom Halling th/." The capacity section, indicates, "Representative."

To initiate an arbitration, FINRA Rules require every claimant properly sign the Submission Agreement and the Statement of Claim. The signatory section denotes Halling is not representing himself. No particular individual in this section is named as his "representative," and no explanation is provided how this representative has the authority to bind Claimant to the terms of this Submission Agreement. In examining the beginning of the on-line Submission Agreement, Claimant's representative is identified as Jennifer Tarr, a non-lawyer employee of a company, not a law firm, which represents customers in FINRA arbitrations. Cold Spring Advisory Group is not a member of FINRA. However, Jennifer Tarr is not specified as Claimant's representative on the Statement of Claim.

FINRA Dispute Resolution operates the largest securities dispute resolution forum in the world. FINRA Dispute Resolution facilitates efficient resolution of monetary, business, and employment disputes among investors, securities firms, and employees of securities firms. FINRA provides the first line of oversight for brokers-dealers and the first line of defense for investors by virtue of its comprehensive oversight program. FINRA Dispute resolution handles intra-industry employment and business disputes and investor/investment disputes involving stocks, bonds, mutual funds, and other types of securities.

FINRA's website provides investors with several options for investors to resolve securities-related disputes. In the section of How to Find an Attorney, FINRA states "You should consider hiring an attorney to represent you during the arbitration or mediation proceedings to provide direction and advice. Even if you do not choose to hire an attorney, brokerage firms are generally represented by

an attorney. If you cannot afford an attorney, some law schools provide legal representation through securities arbitration clinics.” The website goes on to say, The Office of Dispute Resolution staff members cannot provide specific recommendations for finding an attorney or other legal representative, but offers general advice on how to find an attorney who specializes in resolving securities complaints.

Effective December 24, 2007, Rule 12208(c) of the FINRA Code of Arbitration Procedure for Customer Disputes was amended to provide that, “[p]arties to a FINRA arbitration maybe represented by a person who is not an attorney, **unless state law prohibits such representation**, the person is currently suspended or barred from the securities industry in any capacity, or the person is currently suspended from the practice of law or disbarred.” The purpose behind these changes was to simplify the process, provide parties more flexibility and control over the arbitration process and to provide straight-forward procedures and rules for parties to follow. The changes also added a provision requiring every Customer Statement of Claim and pleading be signed by a person.

The FINRA website, in discussing the Rule for possible non-lawyer representation, states one should, “[p]lease be aware that representation by a non-attorney might be considered to be the unauthorized practice of law in some jurisdictions, so please check with the State Bar (or similar organization) for more information.”

Jurisdictions prohibiting non-lawyers from representing parties provide the following reasons supporting their restriction: non-lawyers are not bound by the rules of professional conduct lawyers required by the jurisdiction, professional rules are designed to protect clients from abusive practices of regulated lawyers; representation by non-lawyers may promote frivolous litigation or litigation that should never have been filed.

The Kansas Supreme Court and the Rules of Professional Conduct have consistently and firmly held non-attorney representatives are not authorized to practice law in its jurisdiction and individuals can only be represented by a lawyer, if they are not representing themselves www.law.cornell.edu/ethics/KS_CODE.HTM. The Kansas Supreme Court recognizes only four categories of individuals who may appear in the courts of the state: (1) members of the bar who have licenses to practice law; (2) individuals who have graduated from an accredited law school and have a temporary permit to practice law; (3) legal interns; and (4) non-lawyers, who may represent only themselves and not others. State ex rel. Stephen v. Adam, 243 Kan. 619, 623, 760 P.2d 683 (1988); see State ex rel. Stephen v. Williams, 246 Kan. 681, 690-691, 793 P.2d 234 (1990). Kansas lawyers are given a special franchise to appear in Kansas Courts because of their education, standards of character and fitness, examination, and standards of ethics and professional conduct. Rules of the Kansas Supreme Court. Rules 226, 706, 707, 709. These distinctions of education and special abilities authorize lawyers to represent and appear for others in Court.

In *State ex rel. Stephen v. Williams*, 246 Kan. 681 (1990), The Supreme Court held while an individual, “may appear in court on his own behalf...he has no franchise or authority to appear for or on behalf of any other person or entity... or to assist any such person or entity in any manner which requires legal knowledge and training.” In 1993, the Board of Tax Appeals requested guidance and received an opinion from the Kansas Attorney General about what conduct by non-lawyers was permitted in cases before The Board of Tax Appeals, advising them, “a non-attorney representative may not engage in the unauthorized practice of law, and therefore may not examine witnesses, file pleadings, make legal arguments, or perform any functions deemed to be the practice of law. Ks. Atty. Gen. Opin. No. 93-100 (July 26, 1993). Thus, under Kansas law, neither non-attorney representative Jennifer Tarr nor Cold Spring Advisory Group is authorized under the law to represent Claimant.

Kansas heavily regulates the unauthorized practice of law to prevent non-lawyers from representing a person in an arbitration to protect public interest and welfare. It specifically prohibits non-lawyers from appearing on behalf of another person, drafting documents affecting the legal rights of another, representing others in binding arbitration proceedings where opening statements are made, documentary evidence and witness testimony is presented, and arguments are made based upon violations of statutes or common law. In this case, these representatives totally disregarded and/or ignored Kansas law and FINRA Rules believing they were exempt because they were “a new element in FINRA.”

Lastly, Claimant did not attempt to cure the signature violation by having Halling personally sign the pleadings or having an authorized person file an appearance and sign all unsigned submissions. Neither Jennifer Tarr nor Cold Spring Advisory Group ever attempted to define the capacity upon which the representation is based or explain the authority in upon which it is authorized to bind the Claimant without a signature on any pleading.

FINRA Rules of Procedure require an individual person, and not a corporation, to sign the Submission Agreement and Statement of Claim to certify they have read the procedures and Rules of FINRA relating to arbitration, and agree to be bound by them. Ms. Tarr refused to sign the pleadings.

Under FINRA Code of Arbitration Procedure, and as limited by Kansas law, the pleadings are stricken, as neither Cold Spring Advisory Group nor non-attorney Jennifer Tarr can represent Claimant in this arbitration, and even if we were to address the merits, Claimant has not met his burden of proof on any count, so all awards are in favor of Respondents.

If the Arbitrator has provided an explanation of her decision in this award, the explanation is for the information of the parties only and is not precedential in nature.

3. Other than forum fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter.

4. Any and all claims for relief not specifically addressed herein, including punitive damages, attorneys' fees, and expungement, are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee	= \$ 600.00
Counterclaim Filing Fee	= \$ 1,700.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as a party, Cape Securities Inc. is assessed the following:

Member Surcharge	= \$ 750.00
Member Process Fee	= \$ 1,750.00

Hearing Session Fees and Assessments

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

One (1) hearing session @ \$ 450.00/session	= \$ 450.00
Hearing Date: February 3, 2017 1 session	
<hr/> Total Hearing Session Fees	<hr/> = \$ 450.00

The Arbitrator has assessed \$225.00 of the hearing session fees to Tom Halling.

The Arbitrator has assessed \$225.00 of the hearing session fees jointly and severally to Cape Securities Inc., Lon Charles Faccini, Jr., and Michael Allen Lovett.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

ARBITRATOR

Lynn Hirschfeld Brahin

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

Arbitrator's Signature

/s/ Lynn Hirschfeld Brahin

Lynn Hirschfeld Brahin
Sole Public Arbitrator

3/1/17

Signature Date

3/1/17

Date of Service (For FINRA Office of Dispute Resolution office use only)

ARBITRATOR

Lynn Hirschfeld Brahin

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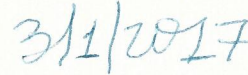
Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

Arbitrator's Signature



Lynn Hirschfeld Brahin
Sole Public Arbitrator



Signature Date

Date of Service (For FINRA Office of Dispute Resolution office use only)