

Award
FINRA Dispute Resolution

In the Matter of the Arbitration Between:

Duckkyu Chang, Kee Chang, and Duckkyu Chang TTEE Cumberland Pathology Associates, LLC (Claimants) vs. McGinn, Smith & Co., Inc., Timothy M. McGinn, David L. Smith, Thomas E. Livingston, Lex & Smith Associates Ltd., William F. Lex, McGinn Smith Advisors, LLC, and McGinn, Smith Capital Holdings Corp. (Respondents)

Case Number: 08-04924

Hearing Site: Philadelphia, Pennsylvania

Nature of the Dispute: Customers vs. Member, Associated Persons, and Non-Members.

REPRESENTATION OF PARTIES

Claimants Duckkyu Chang ("D. Chang"), Kee Chang ("K. Chang"), and Duckkyu Chang TTEE Cumberland Pathology Associates, LLC ("Cumberland"), hereinafter collectively referred to as "Claimants": Jenice L. Malecki, Esq., Malecki Law, New York, NY.

Respondents McGinn, Smith & Co., Inc. ("MS & Co."), Timothy M. McGinn ("McGinn"), David L. Smith ("Smith"), Thomas E. Livingston ("Livingston"), Lex & Smith Associates Ltd. ("Lex & Smith"), William F. Lex ("Lex"), McGinn, Smith Advisors, LLC ("MS Advisors"), and McGinn, Smith Capital Holdings Corp. ("MS Capital"), hereinafter collectively referred to as "Respondents": David C. Franceski, Jr., Esq., Stradley, Ronon, Stevens & Young, LLP, Philadelphia, PA. Previously represented by Christine M. Debevec, Esq., Stradley Ronon Stevens & Young, LLP, Philadelphia, PA.

CASE INFORMATION

Statement of Claim filed on or about: December 22, 2008.

D. Chang signed the Uniform Submission Agreement: December 16, 2008.

K. Chang signed the Uniform Submission Agreement: December 16, 2008.

Cumberland signed the Uniform Submission Agreement: December 16, 2008.

Joint Statement of Answer filed by Respondents MS & Co., Smith, and Lex on or about: March 12, 2009.

MS & Co. signed the Uniform Submission Agreement: March 12, 2009.

Smith signed the Uniform Submission Agreement: March 12, 2009.

Lex signed the Uniform Submission Agreement: March 12, 2009.

McGinn did not file an Answer.

McGinn signed the Uniform Submission Agreement: August 4, 2009.

Livingston did not file an Answer.

Livingston signed the Uniform Submission Agreement: August 5, 2009.

Lex & Smith did not file an Answer or sign the Uniform Submission Agreement.

MS Advisors did not file an Answer or sign the Uniform Submission Agreement.

MS Capital did not file an Answer or sign the Uniform Submission Agreement.

CASE SUMMARY

Claimants asserted the following causes of action: unsuitable investments, negligence, negligent supervision, breach of contract, violations of industry rules, failure to diversify, *respondeat superior*, breach of fiduciary duty, fraud, misrepresentations, and omissions. The causes of action relate to unspecified private placement products, notes, and trusts.

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

RELIEF REQUESTED

In the Statement of Claim, Claimants requested compensatory damages in the amount of \$2,577,000.00, commissions, interest, attorneys' fees, costs, and punitive damages.

Respondents MS & Co., Smith, and Lex requested Claimants' claims be denied in their entirety.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel acknowledges that they have each read the pleadings and other materials filed by the parties.

Respondents Lex & Smith, MS Advisors, and MS Capital are not members or associated persons of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to Claimants' claims against Respondents Lex & Smith, MS Advisors, and MS Capital.

On or about June 30, 2009, Claimants filed a Motion in Support for Default Judgment against Respondents Timothy M. McGinn and Thomas E. Livingston. On or about July 10, 2009, Respondents filed an Opposition to Claimants' Motion. On August 4, 2009 a pre-hearing conference was conducted to address the Motion and the Panel, having considered the submissions and oral arguments of the parties and after due deliberation, denied the Motion.

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.

ARBITRATORS' FINDINGS

The arbitrators have provided an explanation of their decision in this Award, the explanation is for the information of the parties only and is not precedential in nature.

Dr. Chang and his wife as individuals and Dr. Chang in his role as trustee of Cumberland Pathology pension accounts appear to be intelligent, accomplished people. However, the Arbitration Panel finds no logical carryover from being very experienced at the practice of medicine or music theory or the use of Quicken software programs to account for small-business accounts receivable and accounts payable to any understanding of private placement prospectus.

Furthermore, Mr. Lex seems to be a conscientious broker and insurance salesman who is congenial. McGinn, Smith & Company as the supervisor of Mr. Lex had necessary procedures and policies in place to carry out its duties to potential customers as they had standard education programs for brokers and industry-standard supervision procedures for individual broker accounts.

The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn, Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. At the risk of being redundant, this arbitration decision does not affect any contractual responsibility Mr. Livingston and Mr. McGinn may have, if any, to reimburse McGinn, Smith & Co. for damages McGinn, Smith & Co. ultimately provides the Claimants. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGinn.

The quantitative reasoning and reason for the assignment of fault is set out immediately below.

Dr. Chang and Kee Mann Chang are found to be responsible for the consequences of their own investment decisions after their stating repeatedly verbally and in writing that they had the opportunity to read investment literature and query resources such as Mr. Lex about the risks and rewards of the subject private placement notes.

The fault of Mr. Lex, Mr. Smith, and McGinn, Smith & Company is derived from the overconcentration of the Claimants' investments in these private placement notes. While Mr. Lex is certainly not responsible for preventing the Claimants from investing all of their funds into a single instrument, Mr. Lex and McGinn, Smith & Co. through Mr. David Smith [because Mr. David Smith oversaw Mr. Lex as the compliance officer for a large majority of the time period in question] could have just told Dr. Chang and Kee Mann Chang that McGinn, Smith & Co. would not play a part in these disproportionate investment actions as they developed. Mr. Lex and/or McGinn, Smith & Co. could have declined to conduct the sale of any more of these notes once the over-concentration

reached a critical mass.

As to some counter-arguments presented to the arbitration Panel, the Panel finds the line of reasoning that these private placement notes were both diversified within each note, and the five or more notes were separately varied so there was not concentration, to be disingenuous. There are about a dozen or maybe two dozen small to moderately capitalized LLCs within these notes that are all either consumer service companies like residential alarm companies or discretionary-consumer goods companies like swimming pool supply firms or golf club accessory supply firms. A truly diversified portfolio would have some selections of small, mid and large capitalized businesses among the number of business areas such as some greater number of the 98 categories of businesses that Value Line created. Another counterpoint raised in the arbitration hearing with colored "pie-charts" depicting the percentage of the Chang's assets that were invested in these private placements, was that the Respondents concluded that the subject private placement notes were only 40 to 60% of the Claimants' total assets; this statement by the Respondents rings hollow. Of the liquid or near liquid assets Dr. Chang and Kee Mann Chang had, these subject notes were close to 90% of their net worth, and this aspect of the over-concentration is exacerbated by Mr. Lex only knowing a fraction of Dr. Chang's and Kee Mann Chang's total liquid/near liquid assets.

As to one other counterpoint raised by the Respondents in this case, the Panel finds that the Respondents' argument, that rescission is impossible because the "wrong" parties were sued, to be a fiction. Even while the Respondents referenced briefly and vaguely to regulatory prohibitions at the end of the Arbitration Hearing, this Panel finds that it is within regulatory parameters for Mr. Lex and/or Mr. David Smith to own the notes as individuals if McGinn, Smith & Co. believes it cannot do so. As a result of the Panel's award being joint and several, McGinn, Smith & Co. could compensate Mr. Lex and/or Mr. David Smith if McGinn, Smith & Co. chose to do so in the possible ownership interest in the subject notes ordered here to be returned by the Claimants.

In determining the Award of \$805,110.00, the Arbitration Panel has accounted for in a partial rescission of the purchase of the subject notes: (1) the interest earned by the notes while the Claimants actually held these notes, (2) an imputed interest the Claimants would have conservatively earned with the \$805,110.00 if they had never purchased some of these notes, and (3) there is no purposeful assault on the public good by the Respondents so NO punitive damages are awarded.

AWARD

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

1. Respondents McGinn, Smith & Co., Inc., William Lex, and David Smith are jointly and severally liable for and shall pay to Claimants \$805,110.00 in compensatory damages. Concurrently Dr. Chang, Kee Mann Chang, and Cumberland Pathology Associates are to provide ownership rights to the Respondents of 45% of the face value of the initial value of private placement notes as defined below.
 - a. Payment of \$805,110.00 shall be made within 30 days of the issuance

of this Award, and any amount paid after 30 days from the Award issuance date will be subject to post-judgment interest of 6% per Pennsylvania statutes.

- b. Concurrently with the payment of the full amount of funds to the Claimants in the amount of \$805,110.00, the Claimants shall sign over to the specific Respondent party(s) [designated before hand by the Respondents] all ownership rights the Claimants have to 45% of the face value of the "notes" to the Respondents [the particular private placement notes will be chosen by the Claimants].
- c. The 45% shall be that percentage of the face value [initial purchase value before commissions are deducted] of the total subject "notes" value when initially purchased by the Claimants.
- d. The universe of these "notes" are defined as: all FEIN, FIIN, TAIN, notes held by Dr. Chang on December 11, 2009; and all FAIN, FIRST LINE, INEX notes held by Dr. Chang's IRA as of December 11, 2009; and all FIIN, FAIN, FEIN notes held by Kee Mann Chang as of December 11, 2009; and all INEX and FAIN notes held by Cumberland Pathology Associates, LLC as of December 11, 2009.
- e. In addition, if any interest/return of principal of the universe of notes as set out above occurs from the date of this Award until the funds are actually received by the Claimants, then the amount of the interest/return of principal shall also be returned to the Respondents immediately.

2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Timothy M. McGinn's (CRD #813935) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to Notice to Members 04-16, Respondent Timothy M. McGinn must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to the Rule 12805 of the Code, the arbitration panel has made the following Rule 2080 affirmative findings of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

The arbitration panel has made the above Rule 2080 finding based on the following reasons:

The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn,

Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGinn.

3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Thomas E. Livingston's (CRD #864264) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to Notice to Members 04-16, Respondent Thomas E. Livingston must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to the Rule 12805 of the Code, the arbitration panel has made the following Rule 2080 affirmative findings of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

The arbitration panel has made the above Rule 2080 finding based on the following reasons:

The Panel has come to a unanimous decision that there is some definitive fault by Dr. Chang and some fault by three of the Respondents - Mr. Lex, Mr. David Smith, and McGinn, Smith & Co. As a preface to this decision, the Panel finds there was no role by the two individuals - Mr. Thomas Livingston or Mr. McGinn. However, in light of this finding being joint and several, and, in light of McGinn, Smith & Co. being liable, it is entirely a matter of the contractual ownership and employment relationship between either Mr. Livingston or Mr. McGinn and McGinn, Smith & Co. as to any contribution these two gentlemen may owe McGinn, Smith & Co. Furthermore, while neither party requested any expungement action by the Panel, after a review of the entire record, which included direct and cross-examination of Mr. Livingston and Mr. McGinn, on its own initiative, the Panel unanimously finds, as a matter of justice and equity, that any mention of this claim, including all allegations originating from this claim, be stricken from all FINRA records and those records FINRA may advise upon concerning both Mr. Thomas Livingston and Mr. McGinn.

4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$1,800.00
--------------------------	--------------

**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, McGinn, Smith & Co., Inc., is assessed the following:

Member surcharge	= \$2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,000.00

Hearing Session Fees and Assessments

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

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: August 11, 2009	1 session

Three (3) Pre-hearing sessions with Panel @ \$1,200.00	= \$3,600.00
Pre-hearing conferences: May 4, 2009	1 session
August 4, 2009	1 session
September 10, 2009	1 session

Twenty (20) Hearing sessions @ \$1,200.00	= \$24,000.00
Hearing Dates:	
October 12, 2009	2 sessions
October 13, 2009	2 sessions
October 14, 2009	2 sessions
October 15, 2009	2 sessions
October 16, 2009	2 sessions
October 19, 2009	2 sessions
October 20, 2009	2 sessions
December 8, 2009	2 sessions
December 10, 2009	2 sessions
December 11, 2009	2 sessions

Total Hearing Session Fees	= \$28,050.00
-----------------------------------	----------------------

1. The Panel has assessed \$14,025.00 of the hearing session fees jointly and severally to Claimants.

2. The Panel has assessed \$14,025.00 of the hearing session fees jointly and severally to Respondents McGinn, Smith & Co., Inc., William F. Lex, and David L. Smith.

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

ARBITRATION PANEL

Thomas B. Salzer	-	Public Arbitrator, Presiding Chairperson
Edward Greer	-	Public Arbitrator
Kenneth J. Beahan	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Thomas B. Salzer
Public Arbitrator, Presiding Chairperson

12-31-09
Signature Date

Edward Greer
Public Arbitrator

Signature Date

Kenneth J. Beahan
Non-Public Arbitrator

Signature Date

December 31, 2009

Date of Service (For FINRA Dispute Resolution use only)

ARBITRATION PANEL

Thomas B. Salzer	-	Public Arbitrator, Presiding Chairperson
Edward Greer	-	Public Arbitrator
Kenneth J. Beahan	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Thomas B. Salzer
Public Arbitrator, Presiding Chairperson

Signature Date

Edward Greer
Edward Greer
Public Arbitrator

12/30/09
Signature Date

Kenneth J. Beahan
Non-Public Arbitrator

Signature Date

December 31, 2009
Date of Service (For FINRA Dispute Resolution use only)

ARBITRATION PANEL

Thomas B. Salzer	-	Public Arbitrator, Presiding Chairperson
Edward Greer	-	Public Arbitrator
Kenneth J. Beahan	-	Non-Public Arbitrator

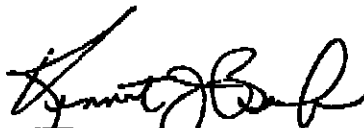
Concurring Arbitrators' Signatures

Thomas B. Salzer
Public Arbitrator, Presiding Chairperson

Signature Date

Edward Greer
Public Arbitrator

Signature Date



Kenneth J. Beahan
Non-Public Arbitrator

12/30/2009

Signature Date

December 31, 2009

Date of Service (For FINRA Dispute Resolution use only)