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In the Matter of the Arbitration among	)	
FLORENCE M. LEWIS	)	
Claimant,	)	Case No. 89-01856
	)	<u>AWARD</u>
v.	)	
BLINDER ROBINSON & CO., INC. and	)	
JOSEPH M. KAHN,	)	
Respondents.	)	
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Case Summary

Claimant Florence Lewis alleged in her claim filed May 1989, that on or about June 23, 1988 respondents Blinder Robinson & Co., Inc. and Joseph M. Kahn, Jr. purchased 100,000 shares of Pasta Via stock for her account without her authorization. Claimant alleged that respondent Kahn told her that the stock had been purchased by another customer and had inadvertently been placed in her account and that the problem would be corrected. Claimant alleged that said respondent provided her with numerous assurances in July and August 1988 that the error would be corrected. Claimant alleged that, in September 1988, though she was aware that the stock had declined in price from its alleged purchase date of June 23, 1988, she felt herself "trapped" into acknowledging purchase of the stock as of June 23, 1988 by respondent Kahn. [He, at that time, was office manager of the

Providence, Rhode Island office of respondent Blinder Robinson.] Claimant alleges that, in a telephone conversation on December 29, 1988 witnessed by Julia Kunic, Kahn admitted that he had purchased the stock without her authority. Claimant seeks return of the price of the stock in the sum of \$2,110, together with interest, punitive damages and counsel fees (of 25 hours at \$125 per hour).

Respondents maintained that Lewis placed an order for the purchase of Pasta Via June 22 or 23, 1988 and that the alleged statements made by Kahn to Lewis thereafter (with respect to the error in her account which would be corrected) were not made and that there was no admission of liability in the telephone conversation of December 29, 1988.

The matter was conferenced with counsel in a telephone conference call on June 21, 1990 and the arbitration was conducted on June 28, 1990 at the NASD, 33 Whitehall St., New York, NY. I heard the testimony of Florence Lewis, Hilda Strasi (by telephone) and Julia Kunic, on behalf of claimant, and the testimony of Joseph M. Kahn, Jr. on behalf of respondents.

#### Relief Requested

Claimant requested damages in the amount of \$2,110.00 plus interest from the date of the allegedly unauthorized trade of June 23, 1988.

Respondents requested that claimant's claim be dismissed in its entirety.

### Findings and Conclusions

On June 28, 1990, in New York NY, I heard the controversy between the parties as set forth in submissions to the arbitrator signed by the claimant on May 13, 1989 and by respondent Blinder Robinson on September 8, 1989 and by respondent Joseph Kahn on August 21, 1989. The initial claim was filed on June 13, 1989. I have considered carefully the pleadings and the testimony, as well as the various documents marked into evidence, and have made the following findings and conclusions.

1. I find credible the testimony of claimant Lewis that she promptly notified respondent Kahn, on or about June 27, 1988, of the error in her account with respect to the 100,000 share purchase of Pasta Via, when she received the confirmation purporting to confirm the alleged purchase.

[In making this finding, I have not relied upon the testimony of Hilda Strasi which was taken by telephone (with consent of the parties), since the testimony of claimant Lewis was sufficiently credible, standing alone. However, it should be noted that the testimony by Ms. Strasi, if ever considered by a reviewing court, tended to corroborate the testimony of claimant Lewis and that respondents conducted a full and effective cross-examination of Ms. Strasi and presented no objection at the hearing with respect to the manner in which such examination was carried out.]

2. I find credible the testimony of claimant Lewis that, upon her having given notice of the error to respondent Kahn, he told her that the purchase had been made for another customer's account and that the error would be corrected.

3. I find credible the testimony of claimant Lewis that, thereafter, repeated assurances were given to her by respondent Kahn in July and August 1988 that the error would be corrected.

4. It is undisputed that, at all times relevant to the particular transaction, respondent Kahn was the office manager of the Providence, Rhode Island office of respondent Blinder Robinson.

5. I find credible claimant's testimony which demonstrates that, from the time that she first complained to respondent Kahn, on or about June 27, 1988, until the events of September 1988, (discussed below), she was under the misapprehension, as a result of the repeated assurances given her by respondent Kahn, that the posting to her account of the alleged purchase of the Pasta Via stock as of June 23, 1988 was in error.

6. I do not find convincing, however, the testimony of claimant Lewis that she "felt trapped" into acknowledging purchase of the Pasta Via stock in September 1988. There is no evidence presented by claimant which would establish duress or any particular misrepresentation made by respondents with respect

to her decision in September 1988 to purchase or acknowledge purchase of the Pasta Via stock.

7. To the contrary, the claim of duress or - in claimant's words, that she "felt trapped" - is specifically rebutted not only by the testimony of respondent Kahn but also by her own subsequent conduct. She continued, even after September 1988, to engage in stock transactions with respondents. She accepted recommendations from respondent Kahn to sell other securities at prices that led her to profit.

8. Further, it is noteworthy that claimant acknowledged her receipt of the August 1988 monthly statement which showed a decline in price of the Pasta Via stock from its June 23, 1988 price. Thus, in September 1988, claimant was on notice that the price of the stock had declined and she could have continued in September 1988 to have insisted that there was an error in her account.

9. Also, while not a "sophisticated investor," claimant is a woman of independent mind and education who possesses both a Bachelor of Science and a Master of Arts degree (albeit, not in the financial area). She is a professional woman who presents herself in an intelligent and forceful manner and who, in the past, had been involved in a dispute with a broker at another brokerage firm and was able to protect her interests in that prior incident.

10. I must, therefore, conclude that the conduct of claimant Lewis from and after September 1988 was, in effect, speculation by her in Pasta Via, the risk of which she now seeks to shift to respondents.

11. With respect to the telephone conversation of December 29, 1988, while I find Julia Kunic, a witness to the conversation, to be truthful, she candidly admitted that she did not understand the substance of the conversation which she overheard. I find credible the explanation of the telephone conversation as presented in the testimony of respondent Kahn, which demonstrates not an admission of liability but, rather, an effort to be diplomatic with an upset customer and bring to an end a telephone conversation in a manner other than by simply hanging up the phone. I conclude that the statement by respondent was not an admission of liability, to which specific words could not be testified to by claimant Lewis or Julia Kunic, but rather the version presented by Mr. Kahn, in the form of, "okay - whatever you say."

12. Even were I to reject Mr. Kahn's version of the telephone conversation, and accept the version testified to by claimant Lewis and Julia Kunic, my award would be the same, because the record as a whole does not support claimant's request for damages from and after September 1988, for the reasons indicated in ¶¶ 6-10.

### Damages Awarded

13. As a consequence, I conclude that claimant has been damaged to the extent of the decline in the value of Pasta Via from June 23, 1988 through the time that she, in effect, purchased the stock in September 1988. This difference in price, as indicated by the monthly statements marked as part of Arbitrator's Exhibit 1, is the difference between \$2,110 (100,000 shares at .021 a share) and \$750 (100,000 shares at .0075 a share), equaling \$1,360.

14. In addition, respondents' counsel acknowledged that a 12% interest factor would be appropriate if liability were found. Therefore, a 12% interest factor to the said \$1,360 will be applied from and after June 23, 1988 to the date of payment of this award, said interest to be computed as compounded daily based upon a 360 day year.

15. Because claimant's damages appear in the nature of a back office error, and because there is no evidence to suggest that respondent Kahn, profited personally in any way with respect to same, the foregoing award in favor of claimant is against respondent Blinder Robinson only, and no award is entered against respondent Kahn.

16. In addition, all costs of this proceeding are assessed against respondent Blinder Robinson, such that Blinder Robinson is assessed costs of \$25.00 for the prehearing conference conducted on June 21, 1990 and an additional \$50.00



for the costs of the double session hearing held on June 28, 1990. Pursuant to Section 43 of the Code of Arbitration Procedure, a total of \$75.00 in costs is assessed against Blinder Robinson: fifty dollars (\$50.00) should be made payable to the NASD, Inc. through its Staff Attorney and twenty-five dollars (\$25.00) should be made payable directly to the claimant.

17. No record was established for the imposition of punitive damages. I do not find fraud on the part of respondents but, rather, I find back office error and negligence in the failure to correct the error (until September 1988 - see ¶¶ 1-10).

18. Ordinarily, I might be inclined to award counsel fees in order to make claimant whole, particularly in a case of this type in which a rather nominal sum of money was involved but in which a claimant was forced to proceed to the extent required here. However, such attorney's fees will not be awarded for the following reasons: (a) counsel for respondents represented that counsel for claimant, William Laviano, had represented to him that claimant was not being charged counsel fees as she apparently had served as a witness in a prior case handled by counsel William Laviano and, therefore, that the Laviano firm was handling the matter as a favor to claimant; (b) the representation made respondents' counsel was not rebutted or contradicted by claimant's counsel; (c) no specific invoices or other supporting documents were presented with respect to a claim

for counsel fees; (d) a windfall would not to appropriate.

#### Miscellaneous

19. Given the fact that more than two years has passed since the issue first arose, and since counsel have indicated that an appeal might be filed by respondent Blinder Robinson wholly apart from the merits of the controversy, I bring to the attention of the parties the Resolution of the NASD Board of Governors, at ¶3744, which provides: "Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award."

20. Here, I specifically direct that the said award (of \$1,260 with interest and costs) shall be paid by respondent Blinder Robinson on or before August 15, 1990, unless prior to that date, said respondent has obtained a stay of the award from any court of competent subject matter and personal jurisdiction. In the absence of such stay, should Blinder Robinson fail to honor the award on or before August 15, 1990, I request that the NASD consider whether Blinder Robinson is in violation of the Rules of Fair Practice of the NASD for which regulatory proceedings may be appropriate.

21. Further, in the event that respondent Blinder Robinson fails to honor the award on or before July 30, 1990, absent a stay from a court of competent jurisdiction, and claimant is forced to engage in further legal proceedings to

\* enforce the award, I recommend to any court which may review these proceedings that an award of counsel fees to claimant be considered for any such additional proceedings.

  
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SHELDON M. FINKELSTEIN, ESQ.  
ARBITRATOR

DATED: July 19, 1990