

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Dr. Kathryn Rezek

No. 91-03882

Name of Respondents

Whale Securities Co.
Heywood Brody
Elliot J. Smith

REPRESENTATION OF PARTIES

Dr. Kathryn Rezek appeared pro se.

Respondents Whale Securities Co. and Elliot Smith appeared by telephone and were represented by John P. Bevilacqua, Esq. of Tenzer, Greenblatt, Fallon & Kaplan, New York, New York.

Respondent Heywood Brody appeared by telephone and was represented by Katherine Nathan, Esq. of Brandeis, Bernstein & Wasserman, New York, New York.

CASE INFORMATION

Statement of Claim filed: December 6, 1991.

Claimant's Submission Agreement signed on: December 4, 1991.

Statement of Answer filed by Respondent, Elliot J. Smith and Whale Securities Co.
on: February 25, 1992.

Respondent Elliot J. Smith's Submission Agreement signed on:
March 9, 1992.

Respondent Whale Securities Co.'s Submission Agreement signed on:
March 9, 1992.

Respondent Heywood Brody's Statement of Answer filed on:
March 16, 1992.

Respondent Heywood Brody's Submission Agreement signed on:
April 20, 1992.

Revised Statement of Answer by Respondent Heywood Brody filed on:
April 20, 1992.

HEARING INFORMATION

Hearing date: May 20, 1992. 1 Session.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant, Dr. Kathryn Rezek ("Claimant") alleged unauthorized trading by Respondents Heywood Brody ("Brody"), Elliot J. Smith ("Smith") and Whale Securities Co. ("WSC"). The allegations arose out of transactions in the following securities: Sage Analytics Intl. (SAI), Unitronix, and RT Acquisitions. Claimant had alleged that on October 9, 1989, Brody purchased, on margin, SAI for the Claimant at 6 and 6 1/8. Claimant alleged that she did not authorize the purchase of SAI at 6 1/8. Claimant next alleged that on December 27, 1989, Brody sold all of her Sage at 6 and purchased Unitronix without her consent or authorization. On May 7, 1990, Claimant alleged that her RT Acquisitions stock was sold, and the \$4,200.00 proceeds were alleged to have disappeared. Further, Claimant alleged that every time she had dealt with Smith or WSC to get her money back, she never received a response. Claimant went on to allege that she was sent a document to sign in order to get her money back from the SAI investments, and also alleged that by signing the document she had not realized she had signed away her rights to do anything else. Lastly, Claimant alleged that the \$4,200.00 loss in RT Acquisitions caused by Brody has never been resolved, and that WSC still owes her money for 130 shares of SAI she never purchased.

In their Joint Statement of Answer, Respondents WSC and Smith alleged that in 1990, Claimant raised the claims contained in her current Statement of Claim. In response to Claimant's request, it was alleged that WSC agreed to cancel certain transactions effected by Brody, and a settlement was alleged to have been reached. WSC further alleged that the Claimant freely and willfully entered into an agreement and executed a release releasing Respondents from all liability. Respondents asserted that where, as here, Claimant voluntarily and knowingly executed a clear and unambiguous release, that agreement should not be disregarded.

For his Answer to the Statement of Claim, Respondent Brody denied the assertions set forth in the Statement of Claim. In addition Brody asserted the following affirmative defenses:

1. On August 2, 1990, Claimant signed a general release releasing Brody from any and all liability arising from their contact with each other. There was no doubt Claimant understood the terms of the release, Claimant received compensation from Brody and WSC in connection with the receipt, and the release bars this action.

2. Claimant's claims are barred by waiver.

3. Claimant's claims are barred by estoppel.

4. Claimant's claims are barred by the doctrine of ratification.

In Respondent Brody's Revised Statement of Answer filed with the NASD on April 20, 1992, Brody denied all of the allegations contained in the Statement of Claim and alleged that Claimant's allegations of unauthorized transactions resulted in profits for Claimant's account rather than the losses Claimant has alleged. Brody further alleged that a clerical error was made on October 9, 1989, when 1,660 SAI shares were sold. This was immediately corrected by a "purchase" of 130 shares of SAI. Brody also alleged that Claimant did not have any losses from the Unitronix transaction. Moreover, Brody alleged that this pattern of speculative short-term trading was precisely the type of transactions anticipated by Claimant when she opened the account. Brody also asserted that Claimant had signed a release, releasing Brody and WSC from all liability.

RELIEF REQUESTED

Claimant requested that she be awarded the sum of \$5,901.23.

Respondents WSC and Smith requested that Claimants claims should be dismissed and Respondents WSC and Smith should be awarded their costs in responding to this claim.

Respondent Brody demanded an award dismissing the claim against him and granting him the costs of this action, including reasonable attorneys' fees.

In his revised request, Brody requested that the Statement of Claim be dismissed. Brody also requested that Claimant be assessed the costs of this proceeding as well as all legal and travel expenses incurred by Brody should a hearing be required to defend against this claim.

OTHER ISSUES CONSIDERED & DECIDED

On April 23, 1992, the NASD received a request from Brody requesting the arbitrator make a decision on his motion to

dismiss, or in the alternative to be allowed to testify by telephone. After reviewing the response and motion, and deliberation, the undersigned arbitrator ruled to take the motion under advisement, and granted Brody's request to testify by telephone.

On May 15, 1992 a motion to dismiss and a request to hold a pre-hearing conference on May 20, 1992 in place of the scheduled hearing. After reviewing the motion, the undersigned arbitrator ruled that the motion would be taken under advisement. Respondents WSC and Smith were also allowed to appear at the hearing by telephone.

The parties have agreed that the Award in this matter may be executed by a counterpart copy 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 remains on file with the NASD.

AWARD

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

1. Claimant's claims against Respondents Heywood Brody, Whale Securities Co. and Elliot J. Smith are hereby denied and dismissed with prejudice.
2. Each party shall bear its own costs of this arbitration.

FORUM FEES

Pursuant to Section 43 (c) of the NASD Code of Arbitration Procedure, the following forum fees are assessed:

one hearing session X \$ 200.00 = \$ 200.00

Pursuant to Section 43 (c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$ 75.00, and shall retain the hearing session deposit in the amount of \$ 200.00 previously paid to the NASD by the Claimant.

Dated:

May 26, 1992

/s/James D. Adducci
James D. Adducci
Presiding Chair