

PUBLIC

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Carol J. Freitag

92-02487

Name of Respondents

Josephthal, Lyon & Ross, Incorporated
Rodney M. Kadymir
George Carhart

CASE SUMMARY

In a claim filed by the National Association of Securities Dealers, Inc. on July 28, 1992, Claimant Carol J. Freitag by and through her counsel Joseph Pecora, Esq., of Dierker Bender & Levi, S.C., Watertown, Wisconsin, alleged that she established an account with Respondent Josephthal, Lyon & Ross, Incorporated with an account value of \$5,534.26 as of August 31, 1990 and subsequently on September 10, 1990 Claimant's husband received a telephone call from Respondent Rodney M. Kadymir, an account executive with Respondent Josephthal, Lyon & Ross, Incorporated to sell stocks; however, Claimant's husband explained that the account was an IRA account with no funds available for purchase of additional investments and he did not authorize Respondent Rodney M. Kadymir to make any purchases on Claimant's behalf. Claimant further alleged that she received an account statement which contained unauthorized transactions whereby Claimant's husband wrote a note on the face of the statement that the purchase was not authorized, therefore, Claimant would not pay for the stock and mailed it back to Respondent Josephthal, Lyon & Ross Incorporated. Claimant contended that her husband received a call from Respondent George Carhart, an account executive with Respondent Josephthal, Lyon & Ross, Incorporated, in which the parties discussed the unauthorized purchase of 2,000 shares of stock and that Respondent Rodney M. Kadymir was no longer with Respondent Josephthal, Lyon & Ross, Incorporated. Claimant further contended that she received an account statement for October, 1990 where her original 500 shares of Clinical Technologies had been sold along with the 2,000 shares of stock purchased without her authorization with a value of \$2,370.13, and prior to the unauthorized transactions Claimant's account value totaled \$5,534.26. Claimant further alleged that as a direct result of the actions of Respondents, Claimant suffered a substantial financial loss.

Claimant asserted a Motion to Compel Production of Documents and further asserted a Motion to Preclude, in addition to an Amended Motion to Preclude Respondent Josephthal, Lyon & Ross, Incorporated Statement of Answer pursuant to Section 25(b)(2) of the NASD Code of Arbitration Procedure in that they failed to file their Answer in a timely manner.

Respondent Josephthal, Lyon & Ross, Incorporated, by and through their in-house counsel Donald V. Hanson, Esq., maintained that Claimant Carol J. Freitag established an IRA account and subsequently on September 12, 1992 she purchased 2,000 shares of Clinical Technologies Associates, Inc. (CTAI), whereby Respondent Josephthal, Lyon & Ross, Incorporated denies that order was unauthorized. Respondent Josephthal, Lyon & Ross, Incorporated further alleged that on October 8, 1990, a total of 2,500 shares of CTAI were sold in Claimant's account to cover the debit balance created when Claimant refused to make payment. Respondent Josephthal, Lyon & Ross, Incorporated contended that they had the authority both contractual and regulatory, to liquidate the Claimant's account and Claimant had an obligation to mitigate her damages by buying back the 500 shares at the earliest possible moment.

Respondent Josephthal, Lyon & Ross, Incorporated replied to Claimant's Motion to Preclude in that their Statement of Answer was mailed on September 14, 1992 via Airborne Express and was apparently lost, therefore, Claimant's Motion to Preclude is based on false assumptions and must be denied.

Respondent Josephthal, Lyon & Ross, Incorporated asserted that Claimant's Information Request is totally irrelevant to any issues and requests it be denied.

Respondent Rodney M. Kadymir, by and through his counsel, Arthur S. Marcus, Esq. of Gresten Savage Kaplowitz & Curtin, New York, New York, denied all the allegations contained in the Statement of Claim, including effectuating any unauthorized transactions in Claimant's account; however, Respondent Rodney M. Kadymir acknowledged that he purchased shares for Claimant's account but asserts that the purchase was authorized by Claimant, whereby, Claimant subsequently backed out of the purchase after the stock price fell, in addition to the fact that the sale of 500 shares of stock from Claimant's account was subsequent to his departure.

Respondents George Carhart and Rodney M. Kadymir, by and through their counsel, Arthur S. Marcus, Esq., with the permission of Respondent Josephthal, Lyon & Ross, Incorporated, make Respondent Josephthal, Lyon & Ross, Incorporated Statement of Answer their Answer.

RELIEF REQUESTED

Claimant Carol J. Freitag requested \$2,385.00 in actual damages plus \$4,689.50 in lost

appreciation together with \$2,927.50 in Punitive damages and reimbursement of the NASD filing fee plus reasonable attorney's fees.

Respondent Josephthal, Lyon & Ross, Incorporated requested the claim be dismissed in it's entirety with costs assessed against Claimant.

Respondents Rodney M. Kadymir and George Carhart requested the claim be dismissed.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Lee J. Wolf, was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on July 20, 1991, by the Respondent Josephthal, Lyon & Ross, Incorporated on September 22, 1992, by the Respondent Rodney M. Kadymir on September 4, 1992 and by the Respondent George Carhart on September 11, 1992.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

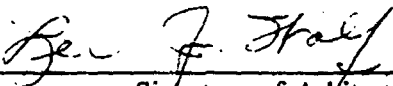
1. Claimant's Motion to Compel Production of Documents and Motion to Preclude Respondent Josephthal, Lyon & Ross, Incorporated are denied.
2. Respondent Josephthal, Lyon & Ross, Incorporated is liable and shall pay to the Claimant Carol J. Freitag the sum of \$7,057.00 in damages.
3. Respondent Josephthal, Lyon & Ross, Incorporated is liable and shall pay to the Claimant Carol J. Freitag the sum of \$955.19, representing attorney's fees.
4. The claims of Claimant Carol J. Freitag against Respondents Rodney M. Kadymir and George Carhart are dismissed.
5. Claimant's request for Punitive damages is denied.
6. The parties shall bear their respective costs.
7. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Carol J.

Page Four
Award 92-02487 .

Freitag shall be retained by the NASD, Inc. Respondent
Josephthal, Lyon & Ross, Incorporated is liable and shall pay to
the Claimant the sum of \$150.00 as reimbursement.

AFFIRMATION

I, LEE J. WOLF, do hereby affirm upon my oath as arbitrator that I am the individual
described herein and who executed this instrument, which is my oath and award.



Signature of Arbitrator

DATE OF DECISION: March 10, 1993

NASD Arbitration Number 92-02487

Carol J. Freitag vs. Josephthal, Lyon & Ross, Inc. Rodney M. Kadyimir, and George Carhart

ISSUES:

1. The principal issue involved is whether the Claimant authorized the purchase of 2000 shares of Clinical Technologies Associates, Inc. stock on 9/19/90 for Claimant's account without authorization.
2. If said purchase was unauthorized and later sold at a loss, should such loss be charged against Claimant's account?

FINDINGS OF FACT:

During July of 1990 Claimant opened an account with Respondent, herein after identified as JLR, by investing \$5000.00 and identified the account as an IRA account.

JLR invested the major part of the investment by the purchase of 500 shares of Clinical Technologies Associates, Inc. stock. According to the account statement on August 31, 1990 the market value of such stock was \$5250.00.

On September 19, 1990 JLR, by its agent purchased an additional 2000 shares of Clinical stock at a price of 10 1/8 per share, at a total cost of \$20,255.00 apparently for Claimant's account.

According to the affidavit of Rolland L. Freitag, who apparently had been and was acting as agent on behalf of Claimant, alleges that on or about September 10, 1990 he received a phone call from the Broker in JLR's office requesting that he authorize the additional purchase of 2000 shares of Clinical stock. He states that this was not authorized.

Claimant received a statement of her account as of September 28, 1990 which showed the purchase of the additional shares. Rolland L. Freitag stated that he wrote on the statement that the purchase was unauthorized and immediately returned the statement to JLR. This fact is suspect, as

Claimant's signature on the statement does not match her signature, as evidenced on her "Submission Statement".

The question as to whether the purchase was unauthorized is controverted by JLR contending that a trade confirmation was sent to Claimant on September 12, 1990 and apparently Claimant remained silent as to this purchase until early October. The contention by JLR is that if the purchase was really unauthorized, Claimant could have called earlier and voiced the unauthorized purchase statement, but rather chose to wait see how the market developed for the Clinical stock.

The additional purchase of 2000 shares of Clinical stock was not paid for, so JLR, according to regulations, sold the 2000 shares, plus the 500 shares of Clinical stock in the Claimant's account on 10/15/90 at a price of 8 15/16, resulting in a loss of \$2385.00, which loss was charged against Claimant's account.

By statement in Freitag's affidavit, Freitag alleges that he received a phone call from a different agent in the JLR office relative to this matter, but the exact date of this conversation is missing, nor is there any comment as to whether the alleged unauthorized purchase, or subsequent sale was discussed.

Under date of Feb. 4d, 1991 Robert A. Bender, as attorney for Claimant requested JLR to replace the 500 shares of Clinical stock in Claimant's account. This request was again made on March 6, 1991. On March 8, 1991 a JLR representative replied to Mr. Bender stating that the matter had been referred to the firm's compliance officer.

Another item of correspondence that may be important is a letter by Rolland Freitag to JLR stating "that wife is of retirement age and is desirous of withdrawing cash from the account.

On July 2nd., 1992 the value of 500 shares of Clinical stock was stated at \$9937.50.

The file submitted for arbitration contains a good deal of correspondence relative to precluding JLR's answer because of late response, which is not being considered by the Arbitrator as being relative to the Arbitrator's decision.

CONCLUSIONS AND DECISION

Based on the Pleadings there is no clear weight of evidence in favor of Claimant or Respondent on the question of whether the purchase of the 2000 Clinical Technologies stock was authorized, or unauthorized. Claimant's casual handling of a response to the notice of the 2000 share purchase, involving an expenditure of \$20,255, does not appear to qualify as an action by a "reasonable, prudent person". The copy of the September 28, 1990 account statement, with the handwritten notation by Claimant, "acc't. has no available cash" and "refusal" does not appear to be credible, in view of the fact that Carol J. Friedag's signature is substantially different than her signature on the "Submission Form".

On the other side, Respondent's Agent's action and lack of any documentary proof that the purchase of the 2000 shares was authorized can also be questioned. Further, the fact that it was an IRA account, with the normal reasoning that future deposits to the account would be related to claimant's compensation, was either known, or should have been known by Respondent's Agent and should have prompted an inquiry with some documentation before the purchase of the additional shares.

Thus, the controverted, or disputed comments as, to this subject in the Pleadings can be dismissed and the question of authorization, or unauthorization, be decided as to what the reasonable behavior would be in a situation such as this. It is the Arbiter's opinion that on this basis the Respondent's Agent did not act in a reasonable prudent manner in the purchase of the additional shares without some positive confirmation, or documentation supporting his action.

DECISION:

Respondent's Agent's irresponsible action in the purchase of the 2000 additional shares and subsequent sale of the 500 shares held in Claimant's account, with the loss debited to Claimant's account was an act that was damageable to Claimant's interest.

The proper amount of damages to be assessed against the Respondent firm should be based on the premises that said Respondent firm was and is liable for the

characterized as being "malicious, or oppressive to support a claim for punitive action."

Claimant's attorney's fees are allowed as

Claimant's attorney's fees are allowed as submitted in the amount of \$255.10

Total of award and costs - \$8,012.19.

7. *Fe 7 Hoef*
reiter