

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Tontilia S. Johnson

94-00197

Name of Respondents

**Wheat First Securities, Inc. (n/k/a Wheat First Butcher Singer, Inc.)
Walter Lee Clark**

REPRESENTATION

For Claimant Tontilia S. Johnson ("Claimant"): Jeffrey P. Bloom, Esq. of the law firm of Metzger, Hollis, Gordon & Mortimer

For Respondents Wheat First Securities, Inc. ("Wheat, First") and Walter Lee Clark ("Clark"): Jonathan M. Harris, Managing Director and General Counsel.

CASE INFORMATION

Statement of Claim filed: January 17, 1994

Claimant's Submission Agreement signed on: March 23, 1994

Joint Statement of Answer filed by Respondents Wheat, First and Clark (jointly referred to as "Respondents") on: June 8, 1994

Wheat, First's Submission Agreement signed on: June 3, 1994

Clark's Submission Agreement signed on: May 24, 1994

HEARING INFORMATION

**Hearing Dates/Sessions: February 27, 1994 - 2 sessions
February 28, 1994 - 4 sessions**

Hearing Location: Omni Waterside Hotel, Norfolk, Virginia

CASE SUMMARY

Claimant alleged, among other things, that Clark mishandled her account. She alleged that Clark made unauthorized trades, made untrue or misleading statements, made excessive trades in Claimant's account and recommended securities which were unsuitable. Claimant alleged that her investment objectives were made clear to Clark, yet he chose to make investments that were unsuitable and inappropriate. Claimant alleged that Clark treated Claimant's account as a discretionary account, without having the discretionary authority. Claimant alleged that Clark failed to explain to Claimant that he was earning commissions on the account and misled Claimant or omitted material information when discussing with Claimant the status of her account. Claimant alleged that Clark had Claimant open a margin account without explaining the nature of margin trading and the risks involved. Claimant alleged that Clark breached his fiduciary duties he owed to Claimant. Claimant alleged that Clark traded Claimant's account to generate commissions for himself at the expense of Claimant's financial well being. Claimant alleged that when she asked Clark about the losses in her account, Clark misled her and convinced her that the account statements did not show the true nature of the holdings in the account. Claimant alleged that this continuing fraud prevented her from discovering the true nature of the problems in the account until April, 1993. Claimant alleged that the actions of Clark were in violation of NASD Rules, New York Stock Exchange Rules and Rules of 10b-5 and local blue sky rules. Claimant alleged that Clark's actions constituted common law fraud. Claimant alleged that Clark knew or should have known that the unauthorized trading, the unnecessary activity, the unsuitability of the investments and his statements and omissions regarding transactions and margin trading were improper and were false and misleading. Claimant alleged that Clark's action were in breach of the contract between the two parties. Claimant alleged that Respondent Wheat, First is liable on the basis of respondeat superior and that it failed to adequately supervise Clark.

Respondents categorically denied all allegations of wrongdoing asserted by Claimant and specifically maintained that Claimant controlled the account and she dictated the strategies which were employed to achieve her investment objectives. Respondents maintained, among other things, that at no time did Claimant ever assert that she was unaware of events affecting her account or that Clark was operating in a manner inconsistent with her investment objectives. Respondents maintained that Claimant placed artificial pressure on both Clark and her account to provide returns which would accommodate her encroachment on principal, notwithstanding Clark's warnings to Claimant that she was rapidly depleting the account. Respondents maintained that Claimant rejected Clark's advice and now, victimized by her own actions, seeks to impose fault on Respondents. Respondents asserted the following affirmative defenses: Claimant made informed decisions and Respondents may not be held liable for actions beyond their control; Claimant failed to mitigate her losses; Claimant failed to exercise appropriate due care with respect to her investments; Claimant is barred from recovery by assumption of risk and contributory negligence; Claimant's claim is barred by the applicable statute of limitations; Claimant's claim is barred by waiver, laches and estoppel; Claimant has no private right of action for claims predicated on breaches of suitability or other regulatory rules, Claimant has failed to establish a basis for a claim of churning; and Claimant fails to state a cause of

action cognizable in law or equity.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$1,000,000; punitive damages in the amount of \$500,000, plus her costs and attorney's fees.

Respondents requested that Claimant's claim be dismissed in its entirety and that they be awarded their costs and expenses incurred in defending this action.

OTHER ISSUES CONSIDERED & DECIDED

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

Respondents, at various points during the hearing sessions, made Motions to Dismiss Claimant's claim. The Panel after due consideration at the hearing denied Respondents' Motions to Dismiss Claimant's claim.

AWARD

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

1. That Respondent Wheat, First is liable to Claimant and shall pay to the Claimant the sum of \$305,000.00; exclusive of interest.
2. That Respondent Clark is liable to Claimant and shall pay to the Claimant the sum of \$85,000.00; exclusive of interest.
3. That Claimant's claim for punitive damages is denied in its entirety.
4. That the parties shall bear their respective costs, including attorneys' fees.
5. That any damage request not specifically provided for above is denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

6 hearing sessions x \$1,000 = \$6,000

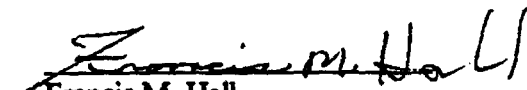
Forum Fees Assessed Against: The hearing session fee of \$1,000 deposited by Claimant shall be retained. The remaining forum fees in the amount of \$5,000 shall be borne by Respondent Wheat, First.

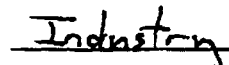
Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrator's Signature

Name

Public/Industry


Francis M. Hall


Industry

NASD Date of Decision: March 31, 1995

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

6 hearing sessions x \$1,000 = \$6,000

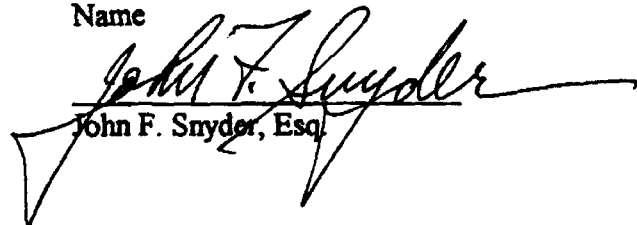
Forum Fees Assessed Against: The hearing session fee of \$1,000 deposited by Claimant shall be retained. The remaining forum fees in the amount of \$5,000 shall be borne by Respondent Wheat, First.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrator's Signature

Name

Public/Industry


John F. Snyder, Esq.

NASD Date of Decision: March 31, 1995