

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Ken Kirschenbaum

95-04432

Name of Respondents

A.S. Goldmen & Company
Frederick Fusco

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on September 18, 1995 Claimant Ken Kirschenbaum ("Claimant") who appeared Pro Se, alleged that he held account #JLQ1-4388-0832 with Respondent A.S. Goldmen & Company ("ASGC"). Claimant further alleged that on August 1, 1995, Respondent Frederick Fusco ("Fusco"), the account representative at ASGC, recommended that Claimant should not sell the 2,000 shares of Veritas Music Entertainment ("VMEI") he had purchased on July 20, 1995 because the stock was going higher but agreed with Claimant and sold his 2,000 shares of Veritas Music Entertainment Warrants ("VMEIW"). Claimant contended between August 9, 1995 and September 6, 1995, he sent Fusco written instructions and had several phone conversations with him regarding selling the VMEI shares. Claimant further contended that Fusco advised him that he had not sold the stock but that it would be sold in a day or two and advised him that he should be happy that he ignored the prior instructions because the stock continued to go up. Claimant alleged that after speaking with the Compliance Department at ASGC at the end of August, and then waiting several days, he discovered that September 5, 1995, that the stock had still not been sold. Claimant further alleged that on September 8, 1995 the managing director of ASGC called him and informed him that the stock had been sold as of August 9, 1995, which Claimant indicated would not be acceptable because he wanted the highest price for the stock. Claimant contended that ASGC wrongfully cancelled his purchase of the VMEIW which negated any sale of those warrants, and that as a result of the above, he has suffered a loss for which the Respondents should be held liable.

Respondents A.S. Goldmen & Company and Frederick Fusco, through their representative, Carole R. Bernstein, of Bachner, Tally, Polevoy & Misher, maintained that Claimant told Fusco that he was a "big player in the market; had numerous accounts at various broker-dealers, had extensive experience investing in the stock market; had participated in several private placements; and preferred new issues and was interested in investing in them." Respondents further maintained that Claimant ordered 2,000 shares of VMEI and 2,000 shares of VMEIW and tendered a check which was \$25.00 lower than the confirmation price. Respondents contended that Claimant never paid the difference which resulted in the August 2, 1995 cancellation of the order by their clearing house, Kemper clearing. Respondents further contended that Claimant contacted Fusco on August 1, 1995 and indicated he wanted to sell the VMEI and VMEIW

positions but that at the end of their conversation Claimant unequivocally instructed Fusco not to sell the VMEI. Respondents maintained that Fusco was unaware of the cancellation of the VMEIW purchase so he indicated that the had been sold according to Claimant's instructions.

Respondents contended that Claimant contacted the Compliance Department complaining that Fusco had failed to sell the stock and the department informed him that the VMEI would be sold as of August 9, 1995, which was the date of his fax. Respondents further contended that Claimant's subsequent order nor to sell canceled his order to sell and thus any subsequent loss was at his own risk. Respondents maintained that as a result of the above, they should not be held liable.

RELIEF REQUESTED

Claimant Ken Kirschenbaum, requested \$4,900.00 in actual damages plus costs and attorney's fees.

Respondent A.S. Goldman & Company and Frederick Fusco, requested that the claims of the Claimant be dismissed, plus attorney's fees.

AWARD

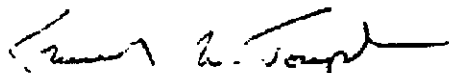
Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Frederick M. Joseph, Esq., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on September 12, 1995 by the Respondents as is required by Sections 12 and 13 of the NASD Code of Arbitration Procedure.

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. The claims of the Claimant Ken Kirschenbaum against Respondents A.S. Goldman & Company and Frederick Fusco are denied in their entirety.
2. The parties shall bear their respective costs.
3. The \$125.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Ken Kirschenbaum shall be retained by the NASD, Inc.
4. All other relief requests are denied.

AFFIRMATION

I, **FREDERICK M. JOSEPH, Esq.**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.



Frederick M. Joseph, Esq.

DATE OF DECISION: February 28, 1996