

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Leilani J. Witt,
Claimant,

and

No. 96-00708

Birkelbach Investment Securities, Inc.
and Frank Miya,
Respondents.

Consolidated with:

In the Matter of Arbitration Between

Birkelbach Investment Securities, Inc.,
Claimant,

and

No. 96-01186

Leilani Witt and Peter Dau,
Respondents.

REPRESENTATION OF PARTIES

Case Number 96-00708

For Claimant: Leilani J. Witt ("Witt") was represented by Dennis A. Bell, Esq., of McConnell Mendelson, and James A. McGurk, Esq. of the Law Offices of James A. McGurk, both located in Chicago, Illinois.

For Respondents: Birkelbach Investment Securities, Inc. ("Birkelbach") and Frank Miya ("Miya") were represented by James J. Moylan, Esq. of Arnstein & Lehr, located in Chicago, Illinois.

Case Number 96-01186

For Claimant: Birkelbach Investment Securities, Inc. ("Birkelbach") was represented by James J.

Moylan, Esq. of Arnstein & Lehr, located in Chicago, Illinois.

For Respondents: Leilani Witt ("Witt") and Peter Dau ("Dau") were represented by Dennis A. Bell, Esq. of McConnell Mendelson, and James A. McGurk, Esq. of the Law Offices of James A. McGurk, located in Chicago, Illinois.

CASE INFORMATION

Case Number 96-00708

Witt's Statement of Claim was filed on: February 13, 1996.
Witt's Submission Agreement was signed on: January 9, 1996.

Birkelbach's Statement of Answer was filed on: July 2, 1996.
Birkelbach's Submission Agreement was signed by Carl Birkelbach, CEO of Birkelbach Investment Securities, Inc.

Miya's Statement of Answer was filed on: May 15, 1996.
Miya's Submission Agreement was signed on: May 14, 1996.

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Birkelbach's Statement of Claim was filed on: March 14, 1996.
Birkelbach's Submission Agreement was signed by Carl M. Birkelbach, President of Birkelbach Investment Securities, Inc.

Witt's Submission Agreement signed on: July 14, 1995.
The NASD Regulation, Inc. Office of Dispute Resolution has no record of a Statement of Answer or properly executed Submission Agreement from Respondent Dau.

HEARING INFORMATION

Pre-hearing conferences: None held.

The hearing was held on: June 4, 1997 for two (2) sessions;
 June 5, 1997 for two (2) sessions; and
 June 6, 1997 for three (3) sessions.

The hearing was held in: Chicago, Illinois.

CASE SUMMARY

Case Number 96-00708

Witt brought this action to recover losses allegedly the result of unauthorized transactions by Birkelbach and Miya, a registered representative of Birkelbach. According to Witt, she opened a joint account with Dau at Birkelbach on January 31, 1995 and an individual account, also at Birkelbach, on May 25, 1995. On May 31, 1995, without Witt's consent or knowledge, 10,000 shares of Cephalon, Inc. ("Cephalon") were sold short in her individual account. Witt further asserted that additional short sales in Cephalon occurred in her account on June 6 (5,000 shares) and June 8 (15,000 shares), also without her consent or knowledge. The 30,000 shares of Cephalon, which were sold for a total of \$302,014, at an average price of \$10.07 (including commissions), were covered on June 12 at \$12.21 per share for a total of \$637,293.50. Based upon these allegations, Witt made the following legal claims: (1) violation of § 10b of the Securities Exchange Act, 15 U.S.C. § 77j(b) and Rule 10b-5 thereunder; (2) violation of § 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a); (3) breach of fiduciary duty; (4) negligence; (5) respondeat superior; (6) violations of NASD Rules of Fair Practice, Art. III, §§ 1, 2, 18, and 27; (7) breach of contract; and (8) punitive damages.

Birkelbach and Miya denied the material allegations set forth in the Statement of Claim, alleging that while the Cephalon stock was sold short in Witt's account, the short sales occurred with her knowledge or consent. According to Respondents, Witt knew of the short sales of Cephalon stock, as reflected by the same transactions in Cephalon common stock in the Dau/Witt joint account and in Dau's individual account. Dau had a written trading authorization from Witt, upon which Birkelbach and Miya relied with respect to accepting the short sale orders placed by Dau. As an affirmative defense, Birkelbach and Miya stated that Witt's Statement of Claim fails to state a claim upon which relief can be granted because Witt provided a written trading authorization to Dau, upon which Dau placed orders in Witt's account.

Case Number 96-01186

Birkelbach brought this action to recover the debit balances Dau and Witt's joint account and in Witt's individual account. According to Birkelbach, on or about April 20, 1995 Dau began placing orders to sell short the Cephalon stock in his individual account and in his joint account with Witt. On or about May 20, 1995 Dau began to place short sale orders for Cephalon in Witt's individual account pursuant to his power of attorney. Due to the dramatic increase in price of Cephalon, the clearing firm notified Birkelbach to post more margin money immediately. In response, Birkelbach bought in all the Cephalon common stock in the market to cover the short positions, which resulted in a \$72,355.81 debit in Witt's individual account and a \$20,164.65 debit in the Witt and Dau joint account. Birkelbach alleged that it has made demand upon Witt for these debit balances, but payment was not made. Pursuant to the above allegations, Birkelbach made the following legal

claims: (1) breach of contract; (2) liability according to account stated; (3) violation of Illinois Securities Law of 1953, as amended; and (4) common law fraud.

RELIEF REQUESTED

Witt requested an award for an amount in excess of \$335,280 plus interest thereon; costs including filing fees; and punitive damages.

Birkelbach and Miya requested that the Statement of Claim asserted against them be denied and dismissed with prejudice and that they be awarded their costs and attorneys' fees. On its claim, Birkelbach requested an award for actual damages of \$92,520.46, plus interest thereon, its filing fee, and costs, including reasonable attorney's fees incurred in connection herewith, as provided in the Margin Agreement.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Dau did not file an executed submission agreement or a Statement of Answer to the claim brought by Birkelbach. However, Respondent Dau executed a Margin Agreement on or about February 1, 1995 which contained an enforceable arbitration agreement and Dau is required to arbitrate pursuant to Section 10301 of the Code of Arbitration Procedure.

At hearing, Birkelbach presented a Motion to Bar Witt and Dau from presenting any arguments or defenses to the Statement of Claim due to the failure to file an answer. After hearing argument from the parties, the panel determined that the Motion would be denied.

After the presentation of evidence, Birkelbach filed a Motion to Reopen the Hearing. After review of the Motion and response, the Panel determined on July 15, 1997 that the Motion was denied.

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 Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. Respondents Birkelbach Investment Securities, Inc. and Frank Miya are jointly and severally liable for and shall pay to Claimant Leilani J. Witt actual damages in the amount of \$290,000.00;
2. Claimant Birkelbach Investment Securities, Inc.'s Statement of Claim is dismissed with prejudice and denied in its entirety;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
4. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed: Seven (7) hearing sessions x \$750.00 per session = \$5,250.00.

Pursuant to § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Leilani J. Witt. Claimant Leilani J. Witt is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$1,875 (One-half the \$5,250 total forum fees - \$750 hearing session deposit).

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Leilani J. Witt.

Pursuant to § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$600.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Birkelbach Investment Securities, Inc. Birkelbach Investment Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$2,025 (One-half the \$5,250.00 total forum fees - the \$600.00 hearing session deposit).

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$600 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Birkelbach Investment Securities, Inc.

Pursuant to § 10333 of the Code, Birkelbach Investment Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the member surcharge in the amount of \$350.00.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

/s/ Lee H. Goodman
Lee H. Goodman
Chairperson
Public Arbitrator

July 23, 1997
Date

/s/ Robert T. Rock
Robert T. Rock
Public Arbitrator

July 24, 1997
Date

/s/ Frank F. Foys
Frank F. Foys
Industry Arbitrator

July 24, 1997
Date

For NASD use only:
Date Award was served on the parties: August 6, 1997