

## **AWARD**

### **NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.**

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In the Matter of the Arbitration Between

#### Names of Claimants

John H. and Judith Ann Bruckner

96-02230

#### Names of Respondents

Josephthal Lyon & Ross Inc.  
Sheldon Berman  
Donald A. Peterson

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### **REPRESENTATION**

For Claimants John H. and Judith Ann Bruckner ("the Bruckners"): Eugene Michael Kennedy, Esq. of Fort Lauderdale, Florida.

For Respondents Josephthal Lyon & Ross, Inc. ("Josephthal") and Sheldon Berman ("Berman"): Brian J. Neville, Esq. of Josephthal Lyon & Ross, Inc., New York, New York (see "Other Issues").

The Respondent Donald A. Peterson ("Peterson") appeared pro se (initially Peterson was represented by Josephthal's attorney, Brian J. Neville, Esq. but later appeared pro se).

### **CASE INFORMATION**

Statement of Claim filed: May 23, 1996.

Claimants' Submission Agreement signed on: April 1, 1996.

Joint Statement of Answer filed by Respondents Josephthal, Berman and Peterson on: September 4, 1996.

Respondent Josephthal's Submission Agreement/Corporate Acknowledgment signed on: September 4, 1996 by Charles Roden on behalf of Josephthal.

Submission Agreement signed by Respondent Berman on: August 30, 1996.

Submission Agreement signed by Respondent Peterson on: August 30, 1996.

### **HEARING INFORMATION**

Hearings lasting three sessions were held on January 6, 1997 and February 6, 1997 in Fort Lauderdale, Florida.

### CASE SUMMARY

Claimants alleged that they opened an investment account with Respondents in April, 1991 with the net proceeds of a personal injury settlement; that they instructed Peterson, who represented himself to Claimants as a registered associated person of Respondent Josephthal, that the account comprised all of the Claimants' retirement funds; that both Claimants were and continue to be in ill health; that that fact was well known to Peterson; that Claimants instructed Peterson that they could bear no risk to their principal; that they would only hold securities backed by the United States government and only agreed to the initial purchase allocation of their funds; that Peterson never again sought Claimants' consent or authorization for any other transaction in the account; and, that Peterson churned their account without their consent or authority with trades totaling more than \$9,000,000.00. Claimants next alleged that since their stated objective was protection of their principal and they wished to invest solely in U.S. backed securities, that Respondents deceived them by using U.S. backed securities to churn, short-sell, margin and day-trade their account without consent, authority or apparent concern to Claimants' well being. Claimants further stated that upon receipt of statements and confirmations reflecting the activity described above that they sought explanations from Peterson who double-talked them and told them not to worry; that they were paid "earnings" by the Respondents from Claimants' own funds, and that when that was insufficient, from Peterson's funds; and, that Peterson consistently and regularly assured the Claimants that their funds were secure and that margin calls should be ignored by the Claimants since they were in good hands. Claimants also stated in their pleadings that Respondents Josephthal and Berman, failed to supervise Peterson in his handling of Claimants' account.

In the Joint Statement of Answer Respondents denied all allegations of wrongdoing contained in the Statement of Claim and maintained that Claimants always appeared to be in good health; that Mr. Bruckner was the only Claimant with substantive contact with any of the Respondents regarding Claimants' account and that he was adamant and clear with his investment objective of aggressively improving his income while at all times completely understanding that this would put his principal at risk; that Respondent Peterson did not hold himself out as a registered representative of Josephthal at that time; that Claimant (Mr. Bruckner) would never let Peterson forget his perceived need for more and more income potential without regard to the level of risk; that Claimants made an informed decision to change their investment strategy from holding U.S. Treasuries for income to trading in securities using margin to increase income potential. Respondents further denied that Claimants' account was churned and that the use of margin in Claimants' account was unauthorized and stated that Claimants were fully informed of all trades which were part of a planned, organized investment strategy; and, that there was not an unauthorized use of short positions.

In a letter to NASD Regulation, Inc. dated February 3, 1997, Respondent Peterson denied all allegations of wrongdoing contained in the Statement of Claim and maintained that the alleged losses in Claimants' account were caused by market fluctuations in the prices of U.S. Treasury Bonds and not by any actions or inactions of Respondents.

**RELIEF REQUESTED**

Claimants requested damages totaling \$238,436.23 plus attorneys' fees and punitive damages. Respondents requested dismissal of the claim.

**OTHER ISSUES CONSIDERED & DECIDED**

1. Initially, all Respondents including Peterson were represented by Brian J. Neville, Esq. Mr. Neville later withdrew from the representation of Peterson. Peterson thereafter appeared pro se.
2. On January 3, 1997 NASD Regulation, Inc. received from the Claimants, via facsimile, a "Notice of Dropping Parties" with respect to Respondents Josephthal and Berman. Thereafter, this arbitration continued with the Claimants and Respondent Peterson only.
3. Respondent Peterson did not attend the hearings on January 6, 1997 and February 6, 1997. NASD Regulation, Inc. made contact with Peterson via telephone prior to the hearing on January 3, 1997; January 31, 1997; and, on February 4, 1997. On each of those occasions the staff advised Mr. Peterson of the Hearing date scheduled in this matter. On February 4, 1997 NASD Regulation, Inc. received a letter from Mr. Peterson dated February 3, 1997 advising that he would not be attending the hearing on February 6, 1997 and detailing the reasons for his absence. Accordingly, pursuant to Sections 10310, 10315 and 10318 of the Code of Arbitration Procedure, the arbitration panel found that NASD Regulation, Inc. provided Respondent Peterson with "due notice" of the hearing conducted in this matter by regular and certified mail and by the telephonic communications described above. The arbitration panel, therefore, determined to proceed with the hearing without Respondent Peterson. Additionally, pursuant to Section 10101 of the Code ("Code"), the arbitration panel found subject matter jurisdiction over this entire controversy.
4. On February 13, 1997 the arbitration panel was provided with a copy of the Settlement Stipulation dated December 24, 1996 outlining the terms of the settlement reached between Claimants and Respondents Josephthal and Berman. The foregoing was requested by the panel following the hearing on February 6, 1997.
5. The parties at the hearing 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.

**AWARD**

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

1. The arbitration panel has determined that the monies received by Claimants pursuant to the settlement stipulation dated December 24, 1996, adequately compensate Claimants for their damages. Therefore, the arbitration panel finds Respondent Peterson liable, jointly and severally, with the settling Respondents, for 20% of that amount.
2. Claimants' requests for punitive damages and attorneys' fees are hereby denied.

### **FORUM FEES**

Pursuant to Section 10332 of the Code of Arbitration Procedure, the arbitration panel has assessed Forum Fees in the amount \$2,250.00 (three (3) hearing sessions X \$750.00).

1. Respondent Peterson shall pay Forum Fees in the amount of \$1,500.00 payable to NASD Regulation, Inc.
2. Claimants are hereby assessed Forum Fees in the amount of \$750.00 for which NASD Regulation Inc. shall retain the \$750.00 previously deposited by Claimants in full satisfaction thereof.
3. NASD Regulation, Inc. shall retain the non-refundable filing fee of \$200.00 paid by the Claimants.
4. Respondent Josephthal shall pay to NASD Regulation, Inc. the non-refundable member surcharge of \$500.00 pursuant to Section 10333 of the Code of Arbitration Procedure.

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

### **ARBITRATION PANEL**

#### **Concurring Arbitrators' Signatures**

/s/

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Seymour Vidur, Esq.

Public/Chairperson

/s/

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John J. Hearn, Esq.

Public/Panelist

/s/

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Robert H. Rushowy

Industry/Panelist

Date of Decision: March 14, 1997