

AWARD
NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

John Franklin and Shirley Franklin

Claimants,

and

No. 96-03673

**Financial Investment Network
Corporation and Jeannie Janota**

Respondents.

REPRESENTATION OF PARTIES

Claimants, John Franklin and Shirley Franklin, were represented by Glenn H. Devlin, Esquire of Devlin & Phillips, located in Houston, Texas.

Respondents, Financial Investment Network Corporation and Jeannie Kay Janota, were represented by Thomas A Wiltrakis, Esquire of Financial Investment Network Corporation located in Torrance, California.

CASE INFORMATION

Claimants, John Franklin and Shirley Franklin's Statement of Claim was filed on or about September 20, 1996.

Claimants, John Franklin's and Shirley Franklin's Submission Agreement was signed August 20, 1996.

Respondents, Financial Investment Network Corporation and Jeannie Kay Janota's Statement of Answer was filed on or about October 17, 1996.

Respondent, Jeannie Kay Janota's Submission Agreement was signed on October 23, 1996.

HEARING INFORMATION

The hearing was held on August 13, 1997 in Houston, Texas for two (2) sessions.

CASE SUMMARY

In the Statement of Claim, John Franklin and Shirley Franklin ("Claimants") alleged that pursuant to advice given by Respondent, Jeannie Janota ("Janota"), they opened an account at Respondent, Financial Network Investment Corporation ("FNIC"), on February 28, 1996 by investing their retirement funds of \$50,00 in the Aim High Value Fund and \$10,000 in the Aim Communication Value Fund. According to Claimants, during John Franklin's employment at Excel Communication, Inc., he was told there would be an initial public offering of Excel Communication Inc. ("ECI") common stock on May 10, 1996, and was given the name of a broker handling the stock purchases. Claimants stated that they left a message on May 6, 1996 on Janota's answering machine explaining they wished to sell \$20,000 of the AIM High Yield Fund, in order to purchase ECI common stock. After questioning the Claimants' about their plan during a telephone conversation on May 8, 1996, Claimants asserted that Janota said she would handle the purchase for the Claimants. Claimants allegedly left many messages on Janota's answering machine, in order to ensure that she did indeed purchase the stock at the \$27 per share quote which Claimants believed all Excel employees were to acquire the stock. After the market closed on that day, the Claimants alleged that Janota left word that she was out of town and the market was erratic, so she had not purchased the stock.

Claimants asserted that on May 14, 1997, Janota called the Claimants asking them if they wanted her to purchase 677 shares of ECI at $28\frac{3}{4}$ to which they answered in the affirmative but they later discovered that Janota had already purchased these shares on May 13, 1997. According to Claimants, when John Franklin spoke with Janota on May 21, 1997, she informed him that he owed \$19,000 for the purchase of the 677 shares, and that ECI was trading at $44\frac{3}{4}$. At this point, Claimants alleged they decided to sell the stock yet when John Franklin asked Janota whether she still wanted him to send her the check, she replied that the sale of the stock would cover the purchase price and she would put the profit into his account, thereby allowing him to "free-ride" the profits of the sale. Claimants stated that due to the SEC rules against free-riding, FNIC cancelled their ECI trade. Claimants asserted that they should have received the difference between the \$27 per share quote which other ECI employees received since Janota failed to purchase the stock on May 10, 1996 and the $44\frac{3}{4}$ quote which Claimants would have received had Janota made them aware of the SEC rules against free-riding.

In the Statement of Answer, Financial Network Investment Corporation and Jeannie Kay Janota ("Respondents") denied the allegations set forth in the Statement of Claim as they related to any wrongdoing on their part. Respondents alleged that Claimants did not give Janota "time and price" discretion to process the transaction, so the terms of the purchase were not made clear by Claimants.

Respondents further alleged that when Janota did not purchase the ECI shares on May 10, 1997, Claimants telephoned her and left a message telling her to "forget the whole thing," which she did not receive, thereby prompting her to purchase the stock on May 13, 1997. When she later called Claimants to report the trade, Respondents alleged that John Franklin told her he would get back to her which he did not. Respondents stated that on May 21, 1997 when she called to get the \$19,000 check from Claimants, she followed Claimants' instructions to sell the stock at 44 $\frac{3}{4}$.

Respondents asserted that the \$27 per share quote that the Claimants alleged as the base for its claim for damages was speculative and not the price at which they would necessarily have received had Janota purchased ECI for them because 27 was the low (opening price) on May 10, 1996, with the high being 33 $\frac{1}{8}$ and the close at 29 $\frac{3}{8}$. Furthermore, the Respondents asserted that they could not follow Claimants' instructions to sell the ECI stock since the transaction would violate the Statute of Frauds as well as the SEC Rules including Regulation T against free-riding. Respondents alleged that Respondents could not change the terms and conditions contained on the confirmation statements which provided that Claimants had to pay for a purchase before it could be sold, and that FNIC could cancel a transaction for which a customer had not paid at its discretion.

RELIEF REQUESTED

Claimants, John and Shirley Franklin, requested an award for \$12,833.80 in compensatory damages plus reasonable attorney's fees, costs and interest.

Respondents, Financial Network Investment Corporation and Jeannie Kay Janota, requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent, Financial Network Investment Corporation, did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration, but is required to submit to arbitration pursuant to § 10301 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 original(s) 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 arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Financial Investment Network Corporation and Jeannie Kay Janota are, jointly and severally, liable for and shall pay to John Franklin and Shirley Franklin the sum of \$10,119.47 in compensatory damages plus simple interest at a rate of 6% from May 21, 1996 until the award is paid;.
2. Financial Investment Network Corporation and Jeannie Kay Janota are, jointly and severally, liable for and shall pay to John Franklin and Shirley Franklin the sum of \$5,059.74 in attorney's fees. In deciding to award attorney's fees, the arbitrator considered the pleadings, the evidence and the testimony of the parties including the provisions contained on the confirmation statements between Financial Network Investment Corporation and the Claimants.

3. Other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$300 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were two (2) hearing sessions x \$300 = \$600.00 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (the "Code") a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee of \$100.00 and shall retain as forum fees the hearing session deposit of \$300.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants, John and Shirley Franklin.

Pursuant to § 10332(c) of the Code, Financial Network Investment Corporation and Jeannie Kay Janota are, jointly and severally, liable for and shall pay to John Franklin and Shirley Franklin the sum of \$400 as reimbursement for the claim filing fee and hearing session deposit. Financial Network Investment Corporation and Jeannie Kay Janota are, jointly and severally, liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$300 in forum fees.

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Pursuant to § 10333 of the Code, the NASD Regulation, Inc., Respondents Financial Network Investment Corporation is liable for and shall pay the member surcharge sum of \$200 to the NASD Regulation, Inc. Office of Dispute Resolution.

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

Concurring Arbitrator Signature

Martha Failing, Esquire
Martha Failing, Esquire
Chairperson
Public Arbitrator

September 4, 1997
Dated:

For NASD use only:

Date Award was served on the parties: September 5, 1997