

## **NASD REGULATION, INC. AWARD**

### **Office of Dispute Resolution**

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**In the Matter of the Arbitration Between**

**Name of Claimants**

**John M. and Nelwyn Ross**

**96-04088**

**Name of Respondent**

**Josephthal, Lyon & Ross, Inc.**

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### **REPRESENTATION OF PARTIES**

**For Claimants: Christopher J. Christie, Esq. of the law firm of Dughi and Hewit, Marlton, New Jersey.**

**For Respondent Josephthal, Lyon & Ross, Inc. ("Josephthal"): John Bersin, Esq., Associate General Counsel with Josephthal, New York, New York.**

### **CASE INFORMATION**

**Statement of Claim was filed on September 11, 1996. Submission Agreement of Claimants John M. and Nelwyn Ross was signed on October 24, 1996.**

**Statement of Answer was filed by Respondent on March 6, 1997. Submission Agreement of Josephthal was signed on March 6, 1997 by Michael Loew.**

### **HEARING INFORMATION**

**A telephonic pre-hearing conference was held on March 3, 1997 before the full panel. The evidentiary hearing was held on September 15 and 16, 1997 in Fort Lauderdale, Florida for a total of three sessions.**

### **CASE SUMMARY**

Claimants alleged that Respondent, through its account executive Ralph Wood, made misrepresentations of and omitted to state material facts with respect to the inherent risks in the strategy recommended to Claimants of shorting PCI stocks, writing a put, and buying a call on the same stock, when there was a pending tender offer on the stock on a cash and securities basis. Claimants further alleged that Respondent failed to advise Claimants that a loss would be incurred when the positions were closed after the tender offer date had passed and misrepresented that a profit had been made when the positions were closed when, in fact, a loss had occurred.

Respondent denied the allegations of wrongdoing set forth in the Statement of Claim. Respondent asserted the affirmative defenses of failure to state a claim; lack of intent to defraud; authorization, knowledge and consent; damages claimed are not the result of any act or omission by the Respondent; actions or inactions of the Claimants caused the loss; ratification; waiver; estoppel; losses were caused by superseding or intervening causes; all duties were fully and faithfully performed; no fiduciary duty owed; no negligence; investments were suitable; supervisory procedures were adequate and were diligently performed; punitive damages are not recoverable as a matter of law; and attorney's fees are not recoverable as a matter of law.

### **RELIEF REQUESTED**

Claimants requested an award in the amount of \$82,515.02; costs and expenses including travel, expert witness and forum fees; and, legal fees.

Respondent requested dismissal and costs.

### **OTHER ISSUES CONSIDERED & DECIDED**

1. By the evidence presented during the hearing of this matter, argued during Claimants' closing argument, and acknowledged during Respondent's closing argument, the essential nature of the claim was effectively amended to one of misrepresentation and omission.

2. 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 arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is found liable and shall pay to Claimants the amount of \$62,515.02.
2. Respondent shall reimburse the Claimants \$500.00 for the hearing session deposit previously made by the Claimants.
3. Claimants' requests for costs, expenses, and legal fees are denied.
4. Respondent's request for costs is denied.

### **FORUM FEES**

Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure ("Code"), a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, the panel has assessed forum fees in the amount of \$2,000.00 (1 pre-hearing conference: \$500.00 plus 3 hearing sessions x \$500.00 per session).

1. Respondent is hereby assessed \$2,000.00, less the \$500.00 previously deposited by the Claimants in partial satisfaction thereof leaving a balance due in the sum of \$1,500.00.
2. NASD Regulation, Inc. shall retain the non-refundable filing fee of \$150.00 paid by the Claimants.

3. Pursuant to Rule 10333 of the Code, Respondent shall pay to NASD Regulation, Inc. the \$300.00 past due member surcharge, which was previously invoiced.

**Fees are payable to NASD Regulation, Inc.**

Concurring Arbitrators' Signatures

/s/  
Arthur R. Louv, Esq.  
Public Arbitrator, Presiding Chair

/s/  
Cheryl E. Winton  
Public Arbitrator

/s/  
Leon J. Steiner  
Industry Arbitrator

Date of Decision: 10-13-97

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