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NASD REGULATION, INC. AWARD

NASD REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Raymond M. Weinstein

96-05198

Name of Respondents

Josephthal Lyon & Ross, Inc.
Michael Magno
Dennis W. Burke

REPRESENTATION

For Claimant Raymond M. Weinstein ("Claimant"), Steven Kapustin, Esq. of counsel to the law firm of Bland & Arndt, L.L.P., located in Columbia, South Carolina

For Respondents Josephthal Lyon & Ross, Inc. ("Josephthal"), Michael Magno ("Magno"), and Dennis W. Burke ("Burke"), Robert E. Murphy, Deputy General Counsel of Josephthal Lyon & Ross, Inc., located in New York, New York.

CASE INFORMATION

Statement of Claim filed: November 20, 1996.

Amended Statement of Claim filed: December 20, 1996.

Claimant's Submission Agreement signed on: December 11, 1996.

Joint Statement of Answer filed by Respondents Josephthal, Magno, and Burke (collectively referred to as "Respondents") on: February 27, 1997.

Joint Amended Statement of Answer filed by Respondents on: August 22, 1997.

Josephthal's Submission Agreement executed by Michael Loew, Assistant Secretary of Josephthal Lyon & Ross, Incorporated on: February 10, 1997.

Magno's Submission Agreement signed on: March 13, 1997.

Burke's Submission Agreement signed on: executed but undated.

HEARING INFORMATION

Pre-Hearing Conference:

September 12, 1997 - one session

September 19, 1997 - one session

October 28, 1997 - one session

Hearing Dates/Sessions: November 3, 1997 - two sessions
November 4, 1997 - two sessions

Hearing Location: NASD Regulation, Inc. District 7 Office, Atlanta, GA

CASE SUMMARY

Claimant opened an account with Josephthal on or about September 16, 1993. At the time Claimant opened the account, he was a resident of Augusta, Georgia, but employed full time as a professor at the University of South Carolina at Aiken, South Carolina. Claimant maintained that Respondents were aware that Claimant worked in South Carolina on a daily basis. Claimant maintained that from late 1993 through mid-1996, that he made over 900 telephone calls from his business office in South Carolina to Josephthal's office in Boca Raton, Florida. Claimant maintained that numerous telephone calls were made from Josephthal's Boca Raton office to Claimant's Aiken, South Carolina office. Claimant's alleged, among other things, that Magno was not registered to sell securities in South Carolina. Claimant alleged that as a result of this failure to register and the violations of South Carolina occasioned thereby specifically Sections 35-1-410, 1490, 1500 and 180, Claimant sought to rescind certain of those transactions made from South Carolina where he suffered losses. Under the relevant statutes, Claimant alleged that he is entitled to recover damages, plus attorneys' fees and interest.

Claimant also alleged that misrepresentations had been made to him concerning the failure to register as an agent, and that Josephthal, through its supervisor at the Boca Raton office, Burke failed to adequately supervise Magno. Claimant alleged that the option investments in his account were unsuitable and that Claimant neither had the liquidity nor the capability to meet his obligations that were caused by these transactions. Claimant alleged that said conduct constituted a breach of fiduciary duty and that the securities laws had been violated. Claimant further alleged intentional infliction of emotional harm and invasion of privacy.

Claimant denied all allegation of wrongdoing asserted by Respondents in their counterclaim.

Respondents categorically denied all allegations of wrongdoing and specifically maintained that Magno was properly registered to do business with Claimant as Magno was registered in both Georgia and Florida. Respondents maintained that Claimant was, at all relevant times, a resident of Georgia. Respondents maintained that damages, if any were sustained by Claimant, were caused by Claimant's unsolicited and aggressive trading of options in his accounts. Respondents maintained that Magno made no material misrepresentation, material omissions or fraudulent statements to Claimant. Respondents maintained that Claimant, at all times, exercised control over his account and all transactions were in line with Claimant's investment objective. Respondents maintained that Magno properly handled Claimant's accounts and that Burke properly supervised Magno and Claimant's accounts.

Respondents asserted that Claimant had a margin call that needed to be satisfied. Respondents maintained that Claimant sent in a check to satisfy the margin maintenance requirement. Respondents maintained that Claimant stopped payment on this check thereby creating a debit balance in his account. Claimant was advised that he owed Josephthal for a debit balance and that if he failed to pay the debit balance, that it was Josephthal's policy to make Magno responsible for the debit resulting from the stop payment.

Respondents Josephthal and Magno counterclaimed for damages resulting from Claimant's breach of contract. Respondents Magno and Josephthal also counterclaimed for litigation expenses/attorneys' fees as well as punitive damages.

RELIEF REQUESTED

Claimant requested damages in the amount of \$1,000,000.00 plus attorneys' fees and interest. Claimant also requested the return of the amount that he invested with Josephthal in the amount of \$150,000.00.

Respondents requested that Claimant's allegations be dismissed and that on their counterclaim that Respondent Josephthal and Magno be awarded \$10,399.00 for breach of contract, Respondents Josephthal and Magno requested an award of \$5,000.00 in litigation expenses and punitive damages in the amount of \$20,000. In addition, Respondents in their November 14, 1997 post hearing submission requested on behalf of Respondent Burke that the panel issue an order of expungement of any and all references to this case from his U-4 including any and all amendments, together with any and all reporting forms for any self-regulatory organization and/or exchanges. Respondents requested on behalf of Respondent Magno similar treatment as that mentioned to Respondent Burke's U-4.

OTHER ISSUES CONSIDERED & DECIDED

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 remains on file with NASD Regulation, Inc. ("NASD Regulation").

Count 2 (Material misstatements) of Claimant's amended statement of claim was withdrawn at the hearing. Respondent Magno's counterclaim against Claimant for the margin call was also withdrawn.

AWARD

After considering the pleadings, the testimony, 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. As to the following claims, the panel finds that Claimant failed to carry his burden of proof and persuasion:

Count 1 (South Carolina securities laws)
Count 3 (Unsuitability/negligence)
Count 4 (Breach of fiduciary duty)
Count 5 (Failure to supervise)
Count 6 (Intentional infliction of emotional distress)

These above listed claims are hereby dismissed with prejudice.

2. The panel finds in favor of Claimant and against Respondent Magno as to Count 7 (Invasion of privacy), and awards damages in the amount of \$1,000.00. Respondent Magno is liable to Claimant and shall pay to Claimant the sum of \$1,000.00; this amount is exclusive of prejudgment interest.
3. The panel finds in favor of Respondent Josephthal and against Claimant as to Respondent's claims for a margin debt balance, and expenses of litigation under O.C.G.A. Section 13-6-11, and awards \$16,399.00. Claimant is liable to Respondent Josephthal and shall pay to Respondent Josephthal the sum of \$16,399.00.
4. The panel orders that NASD's Central Registration Depository expunge any and all references to this case on Respondents Burke and Magno's Form U-4. As to Respondent Magno, the panel further finds that the nominal award of \$1,000 for Invasion of Privacy is not an investment-related, consumer-initiated complaint or proceeding that alleged compensatory damages of \$10,000 or more, or found fraud, or wrongful taking of property.
5. The panel finds that Respondents' request for punitive damages is denied in its entirety.
6. Any and all other claims for relief not specifically addressed herein are denied in their entirety.

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the following Forum Fees are assessed:

$(3 \text{ pre hearing} \times \$300) + (4 \text{ sessions} \times \$1,000) = \$4,900$ minus hearing session deposit of \$1,000 =
net \$3,900 due.

Respondent Josephthal's member surcharge of \$500 remains outstanding.

Forum Fees Assessed Against: Claimant. Claimant is assessed forum fees in the amount of \$3,900 and shall pay this amount to NASD Regulation.

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Date Award Signed

Concurring Arbitrators' Signatures

Sidney R. Barrett, Esq., Chairman
Public Arbitrator

Harriet H. Harris, Esq., Panelist
Public Arbitrator

11-23-97



Michael J. Stern, Esq., Panelist
Industry Arbitrator

Date Award Served by NASD Regulation: November 26, 1997

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Date Award Signed

11-24-97

Concurring Arbitrators' Signatures



Sidney R. Barrett, Esq., Chairman
Public Arbitrator

Harriet H. Harris, Esq., Panelist
Public Arbitrator



Michael J. Stern, Esq., Panelist
Industry Arbitrator

Date Award Served by NASD Regulation:

November 26, 1997

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Date Award Signed

Concurring Arbitrators' Signatures

Sidney R. Barrett, Esq., Chairman
Public Arbitrator

Nov. 24, 1997

Harriet H. Harris
Harriet H. Harris, Esq., Panelist
Public Arbitrator

Michael J. Stern, Esq., Panelist
Industry Arbitrator

Date Award Served by NASD Regulation: November 26, 1997