

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Joyce Knutson and Neil Knutson, (Claimants) vs. Michael Levine, Michael Verbitsky, Bennett, Mullaney & Co., John Doe, and National Financial Services Corporation, (Respondents).

Case Number:  
99-04109

Hearing Site:  
Denver, Colorado

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**REPRESENTATION OF PARTIES**

Claimants, Joyce Knutson and Neil Knutson, hereinafter collectively referred to as "Claimants": Harvey W. Shaver, Esq., Shaver & Licht, Denver, Colorado.

Respondent, Michael Verbitsky ("Verbitsky") a/k/a Michael Levine ("Levine"): Robert L. Herskovits, Esq., Bachner & Gehn, New York, New York.

Respondent, Bennett, Mullaney & Co. ("Bennett"): David W. Kenna, Esq., Mound Cotton & Wollan, New York, New York.

Respondent, John Doe, the compliance principal of Bennett, Mullaney & Co. ("Doe"): David W. Kenna, Esq., Mound Cotton & Wollan, New York, New York.

Respondent, National Financial Services Corporation ("National"): Michael G. Shannon, Esq., Phillips, Lytle, Hitchcock, Blaine & Huber LLP New York, New York.

**CASE INFORMATION**

Statement of Claim filed on or about: September 2, 1999

-Claimants signed the Uniform Submission Agreement: September 8, 1999

Respondent, (Bennett), signed the Uniform Submission Agreement: January 28, 2000

Respondent, (National), signed the Uniform Submission Agreement: December 23, 1999

Statement of Answer filed by Respondent, (Verbitsky a/k/a Levine), on or about: January 11, 2000

Statement of Answer filed by Respondent, (Bennett), on or about: January 28, 2000

Statement of Answer filed by Respondent, (National), on or about: December 23, 1999

Respondent, (National), filed a Motion for Pre-hearing Dismissal, on or about: December 23, 1999

Respondent, (National), filed a Crossclaim, on or about: December 23, 1999  
Claimants filed a Response to Respondent's (National) Motion for Pre-hearing Dismissal, on or about: January 14, 2000

Claimants filed a Notice of Dismissal with Prejudice of Respondent, (National), on or about: September 11, 2000

### **CASE SUMMARY**

Claimant asserted the following causes of action:

1. Violation of 15 U.S.C. §§ 78j(b), 17 C.F.R. 240.10(b)-5, 15 U.S.C. 78o(c)(1), and 17 C.F.R. 240.15(c)1-2.
  - a. Beginning in April and May of 1999 and continuing through July of 1999, Respondents Verbitsky a/k/a Levine, Doe, and Bennett, acting singly and in concert, directly and indirectly, caused purchases in Claimants' accounts which were not suitable to Claimants' investment objectives.
  - b. Respondents caused speculative securities to be purchased for the Claimants' accounts in a short period of time in order to generate commissions and fees for Respondents.
  - c. Respondent Verbitsky a/k/a Levine, with full knowledge and approval of Respondents Bennett, Doe and National, converted Claimant Joyce Knutson's account to a margin account without Claimants' knowledge and began churning the account through the continued purchase and sale of unsuitable securities.
  - d. Trading was excessive in Claimants' accounts and the accounts were turned over an unbelievable amount of times on an annualized basis.
  - e. Respondent Verbitsky a/k/a Levine exercised control over the account and, with full knowledge and approval of Respondent Bennett and Respondent Doe, acted with intent to defraud and/or acted with willful and reckless disregard for Claimants' interests.
  - f. Claimants' accounts were used as a vehicle by Respondents to generate commissions and fees by virtue of manipulative, deceptive or other fraudulent devices or contrivances which acts, practices and course of conduct operated as a fraud and deceit upon Claimants.
2. Violation of § 20 of the Securities Exchange Act of 1934, Failure to Supervise.
  - a. Respondent Bennett was at all times pertinent to the claim a control person of Respondent Verbitsky a/k/a Levine within the definition of § 20 of the Securities Exchange Act of 1934.

- b. Respondent Doe was at all times pertinent to this claim a control person of Respondent Verbitsky a/k/a Levine within the definition of § of the Securities Exchange Act of 1934.
  - c. Respondents Doe and Bennett are liable to Claimants for failing to adequately supervise Respondent Verbitsky a/k/a Levine and are jointly and severally liable for all damages to Claimants caused by Respondent Verbitsky's a/k/a Levine's wrongful conduct.
- 3. Violation of 15 U.S.C. § 78j(b), Aiding and Abetting.
  - a. With full knowledge that Claimant Joyce Knutson had not authorized a margin account, Respondent National aided and abetted the other Respondents' wrongful conversion of Claimant's account from a cash account to a margin account.
  - b. Claimant Joyce Knutson refused to sign any margin agreement and yet, despite the policy of Respondent National being on actual notice that there was no margin agreement, Respondent National allowed the other Respondents to leverage Claimant Joyce Knutson's account against her wishes and to execute excessive trades that otherwise would not have been possible.
  - c. Respondent National enjoyed its share of economic rewards by virtue of receiving increased "ticket charges" from the excessive trading.
  - d. Respondent National sent the Claimants statements setting forth that their account was with the New York office of Respondent Bennett and that their account executive was Respondent Verbitsky a/k/a Levine. Further, the Claimants were led to believe that their account executive was a "Michael Levine" in the New Jersey office of Respondent Bennett. The Claimants' monthly statements do not reflect accurately all of the confirmations which the Claimants received.
  - e. Respondent National was on actual notice of Respondent Verbitsky's a/k/a Levine's churning of Claimants' accounts and made such churning possible by allowing purchases in a margin type account without the Claimants' approval and against the Claimants' expressed wishes.
  - f. Respondent National's actions constituted an irresponsible and reckless disregard for its duties and aided and abetted the other Respondents in pillaging Claimants' accounts.
- 4. Breach of fiduciary duty.
  - a. Respondent National breached its fiduciary duty to Claimants by knowingly allowing the broker for which it was clearing to treat a cash account as a margin account for Claimant.
  - b. Respondent National, as a clearing corporation, had a contractual and fiduciary duty to Claimants to safeguard cash and securities in the type of account that Claimants maintained with Respondents. It was a breach of that fiduciary duty to Claimants to permit the Respondent

brokers to unilaterally treat Claimants' cash account as a margin account for trading purposes without Claimants' authorization.

- c. Respondents Verbitsky a/k/a Levine, Doe, and Bennett breached their fiduciary duty to Claimants by not acting in Claimants' best interest, causing excessive trading in Claimants' account, causing unsuitable securities to be purchased for Claimants' accounts, and purchasing securities on margin despite Claimants' desire for a cash account.
- d. All of the Respondents acted in a manner and utilized a course of conduct to enrich themselves at the expense of the Claimants, all in a breach of their fiduciary duty to the Claimants.
- e. All Respondents are jointly and severally liable to Claimants for their losses.

5. Negligence.

- a. Respondent National negligently permitted the broker dealer for which it cleared to operate Claimants' account as a margin account when it in fact was a cash account.
- b. As a direct and proximate cause and result of Respondent National's negligence, excessive trading and churning occurred in Claimants' account and Claimants' losses were directly and proximately caused by this negligence.

6. Common law fraud and fraud in the inducement.

- a. Respondent Verbitsky a/k/a Levine, with full knowledge and approval of Respondents Doe and Bennett, fraudulently induced Claimants to open accounts at Bennett by virtue of deceptive sales practices.
- b. Respondents purposely and fraudulently purchased securities for the accounts of Claimants which were not suitable to their investment goals and churned and excessively traded the accounts to enrich themselves at Claimants' expense.
- c. Claimants justifiably relied upon the representations of Respondents Verbitsky a/k/a Levine and Bennett in opening accounts through Respondent Bennett, all of which was to their ultimate and severe detriment.

7. Punitive Damages.

- a. The negligence of Respondent National was willful and reckless and with complete disregard of Claimants' interests.
- b. That the conduct of Respondents Verbitsky a/k/a Levine, Doe, and Bennett was willful, reckless and so egregious as to shock the conscience.
- c. That because of the willful and reckless nature of the Respondents' conduct, punitive damages are appropriate under the circumstances and Respondents should be liable to Claimants for punitive damages in an amount not less than twice their loss. Such punitive damages and appropriate under Colorado law.

Unless specifically admitted in its Answer, Respondent Verbitsky a/k/a Levine denied the allegations made in the Statement of Claim and asserted the following defenses:

1. The Statement of Claim fails to state a cause of action upon which relief may be granted.
2. Claimants had full control over their investment decisions in all accounts; any losses incurred were the result of market price fluctuations.
3. Claimants continued dealings with Respondents amounts to a ratification and waiver of any alleged acts claimed to have been committed by Respondent Verbitsky a/k/a Levine.
4. Claimants failed to mitigate any purported damages.
5. Claimants claims are barred by the doctrine of laches.
6. Claimants were estopped from bringing this claim.
7. Claimants are investors who knowingly, willingly, and voluntarily assumed the risk of their investments.
8. Claimants made their own investment decisions voluntarily and cannot shift to Respondents the burden of any investment losses.
9. Claimants losses, if any, were caused by their own conduct.
10. At all times, Respondent Verbitsky a/k/a Levine conducted his business in a professional manner and acted in good faith, without the knowledge of or participation in any improper activity.
11. Claimants did not rely to their detriment on any action or inaction of Respondent Verbitsky a/k/a Levine.
12. Claimants are not entitled to attorneys' fees in securities arbitration.

Unless specifically admitted in its Answer, Respondent Bennett denied the allegations made in the Statement of Claim and asserted the following defenses:

1. The Statement of Claim fails to state a claim upon which relief can be granted.
2. Claimants were fully aware from the onset, of the risks of profits and losses associated with their investments and voluntarily assumed the risk.
3. Claimants were barred from recovery under the doctrines of ratification, estoppel, waiver, laches, and consent.
4. Claimants failed to notify Respondent Bennett of failure of their investments to perform as Claimants desired.
5. Any losses sustained by the Claimants were proximately caused by their own conduct and negligence in relation to the transactions of which they complained.
6. Any damages allegedly suffered by Claimants were not caused by Respondent Bennett.
7. Claimants failed to act with due diligence to mitigate their damages after they knew, or should have known, of the alleged acts or omissions of which they now complain.

Unless specifically admitted in its Answer, Respondent National denied the allegations made in the Statement of Claim and asserted the following defenses:

1. The Claim fails to set forth a basis for recovery from Respondent National.
2. Claimants' claim as against Respondent National was barred because, as the clearing broker for Respondent Bennett, Respondent Bennett owed no fiduciary duties to Claimants.
3. All of the Claimants' alleged losses arise solely from the wrongful activity of others as to which Respondent National had no involvement or responsibility.
4. Claimants were barred by the principles of ratification, estoppel, and waiver from asserting such claims against Respondent National.
5. Claimants failed to mitigate their damages.
6. Claimants' alleged losses were proximately caused by their own conduct and/or negligence in relation to their accounts and not by any act of Respondent National.
7. Claimants have not alleged any basis for punitive damages against Respondent National.
8. Claimants have not alleged any basis for entitlement to attorneys' fees as a matter of law.

Respondent National asserted the following Crossclaim against Respondent Bennett and Respondent Verbitsky a/k/a Levine:

1. Indemnification against Respondent Bennett under the clearing agreement.
2. Indemnification against Respondent Bennett and/or Respondent Verbitsky a/k/a Levine under the common law.

**RELIEF REQUESTED**

Claimants requested:

|  |                |
|--|----------------|
| Compensatory Damages                       | \$173,650      |
| Punitive Damages                           | \$300,000      |
| Interest                                   | Unspecified    |
| Attorneys' Fees                            | Unspecified    |
| Other Costs                                | Unspecified    |
| Other Monetary/Non-Monetary Relief if any: | None Requested |

Respondent Verbitsky a/k/a Levine requested:

|  |                           |
|--|---------------------------|
| Compensatory Damages                       | \$0                       |
| Punitive Damages                           | \$0                       |
| Interest                                   | \$0                       |
| Attorneys' Fees                            | Unspecified               |
| Other Costs                                | Unspecified               |
| Other Monetary/Non-Monetary Relief if any: | Order that all references |

be expunged from the  
Central Registration  
Depository with respect to  
Michael Verbitsky a/k/a  
Michael Levine.

**Respondent Bennett requested:**

|  |                |
|--|----------------|
| Compensatory Damages                       | \$0            |
| Punitive Damages                           | \$0            |
| Interest                                   | \$0            |
| Attorneys' Fees                            | Unspecified    |
| Other Costs                                | Unspecified    |
| Other Monetary/Non-Monetary Relief if any: | None Requested |

**Respondent National requested**

|  |   |
|--|---|
| Compensatory Damages                       | \$0   |
| Punitive Damages                           | \$0   |
| Interest                                   | \$0   |
| Attorneys' Fees                            | Unspecified   |
| Other Costs                                | Unspecified   |
| Other Monetary/Non-Monetary Relief if any: | Respondent National<br>requested to be dismissed<br>with prejudice in advance<br>of the hearing. Further,<br>Respondent National<br>requested indemnification<br>and/or contribution as to<br>any award in favor of<br>Claimants. |

**OTHER ISSUES CONSIDERED AND DECIDED**

Claimants dismissed Respondent National Financial Services Corporation with  
prejudice from the arbitration proceeding on September 11, 2000. Therefore, the  
panel made no further rulings as to this Respondent.

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.

**AWARD**

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

That based upon Counts I and VI of the Statement of Claim, Claimants

are awarded against Respondent Verbitsky a/k/a Levine \$120,411 in compensatory damages as to the joint account of the Claimants. Further the Claimants are awarded interest at the statutory rate of 8%, beginning on July 1, 1999. This award is reduced by the \$6,000 recovered as settlement from Respondent Bennett.

That Claimant Joyce Knutson is awarded against Respondent Verbitsky a/k/a Levine \$22,695.02 in compensatory damages as to the account of Claimant Joyce Knutson. Further, Claimant is awarded interest at the statutory rate of 8%, beginning July 1, 1999.

Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

|                                      |         |
|--------------------------------------|---------|
| Initial claim filing fee (Claimants) | = \$300 |
| Crossclaim (National)                | = \$500 |

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm(s) are Respondent Bennett and Respondent National.

|                                   |           |
|-----------------------------------|-----------|
| Member surcharge (Bennett)        | = \$1,500 |
| Pre-hearing process fee (Bennett) | = \$ 600  |
| Hearing process fee (Bennett)     | = \$2,500 |

|                                    |           |
|------------------------------------|-----------|
| Member surcharge (National)        | = \$1,500 |
| Pre-hearing process fee (National) | = \$ 600  |
| Hearing process fee (National)     | = \$2,500 |

#### **Administrative Costs**

|                                 |         |
|---------------------------------|---------|
| Administrative Costs (National) | = \$ 15 |
|---------------------------------|---------|

#### **Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s).



including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) Pre-hearing sessions with Panel x \$1,125 = \$3,375

Pre-hearing conference(s): March 20, 2000 1 session

April 6, 2000 1 session

September 1, 2000 1 session

One (1) Hearing sessions x \$1,125 with Panel x \$1,125 = \$1,125

Hearing Date(s):

September 20, 2000 1 session

Total Forum Fees = \$4,500

- The Arbitration Panel has assessed \$4,500 of the forum fees to Respondent Verbitsky a/k/a Levine.

### Fee Summary

- Claimants, (Joyce Knutson and Neil Knutson), be and hereby are jointly and severally liable for:

Initial Filing Fee = \$ 300

Forum Fees = \$ 0

Total Fees = \$ 300

Less payments = \$1,425

Refund Due from NASD Dispute Resolution, Inc. = \$1,125

- Respondent, (Verbitsky a/k/a Levine), be and hereby is solely liable for:

Forum Fees = \$4,500

Total Fees = \$4,500

Less payments = \$ 0

Balance Due NASD Dispute Resolution, Inc. = \$4,500

- Respondent, (Bennett), be and hereby is solely liable for:

Member Fees = \$4,600

Total Fees = \$4,600

Less Payments = \$2,100

Balance Due NASD Dispute Resolution, Inc. = \$2,500

- Respondent, (National), be and hereby is solely liable for:

Crossclaim filing fee = \$ 500

Administrative Costs = \$ 15

Member Fees = \$4,600

Total Fees = \$5,115

Less Payments = \$6,115

Refund Due from NASD Dispute Resolution, Inc. = \$1,000

NASD Dispute Resolution, Inc.

Arbitration No. 99-04109

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All balances are due to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**

/s/ Charles G. Michaels

November 3, 2000

\_\_\_\_\_  
Charles G. Michaels, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

/s/James R. Augustine

November 3, 2000

\_\_\_\_\_  
James R. Augustine  
Public Arbitrator

\_\_\_\_\_  
Signature Date

/s/ Rhonda Rhodes

November 7, 2000

\_\_\_\_\_  
Rhonda L. Rhodes, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution, Inc. office use only)

NASD Dispute Resolution, Inc.  
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|   |           |
|---|-----------|
| <u>Member Fees</u>                            | = \$4,600 |
| <u>Total Fees</u>                             | = \$5,115 |
| <u>Less Payments</u>                          | = \$6,115 |
| Refund Due from NASD Dispute Resolution, Inc. | = \$1,000 |

All balances are due to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**



Charles G. Michaels, Esq.  
Public Arbitrator, Presiding Chair

11/3/2000  
Signature Date

\_\_\_\_\_  
James R. Augustine  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Rhonda L. Rhodes, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

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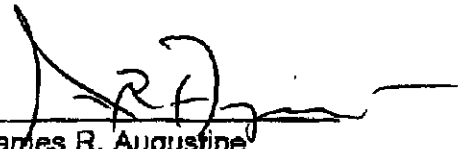
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|--|-----------|
| <u>Member Fees</u>                                   | = \$4,600 |
| <u>Total Fees</u>                                    | = \$5,115 |
| <u>Less Payments</u>                                 | = \$6,115 |
| <u>Refund Due from NASD Dispute Resolution, Inc.</u> | = \$1,000 |

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Charles G. Michaels, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
James R. Augustine  
Public Arbitrator

11/3/00  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Rhonda L. Rhodes, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution, Inc. office use only)

NASD Dispute Resolution, Inc.

Arbitration No. 99-04109

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|   |           |
|---|-----------|
| <u>Member Fees</u>                            | = \$4,600 |
| <u>Total Fees</u>                             | = \$5,115 |
| <u>Less Payments</u>                          | = \$6,115 |
| Refund Due from NASD Dispute Resolution, Inc. | = \$1,000 |

All balances are due to NASD Dispute Resolution, Inc.

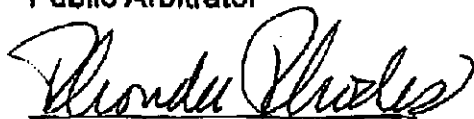
Concurring Arbitrators' Signatures

\_\_\_\_\_  
Charles G. Michaels, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
James R. Augustine  
Public Arbitrator

\_\_\_\_\_  
Signature Date



Rhonda L. Rhodes, Esq.  
Public Arbitrator

11/7/00  
\_\_\_\_\_  
Signature Date

Date of Service (For NASD Dispute Resolution, Inc. office use only)