

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Gregory James Hirte

88-02519

391

Name of Respondent(s)

Merrill Lynch, Pierce, Fenner & Smith  
Bruce Grace  
Jane Doe Grace

CHICAGO

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on August 9, 1988 and clarified and supplemented March 18, 1990. Claimant Gregory James Hirte alleged that Bruce Grace, a registered representative of Merrill Lynch Pierce, Fenner & Smith (Merrill Lynch and Bruce Grace are collectively referred to herein as Respondents) made several misrepresentations regarding the establishment of a margin account for Claimant and the 25,000 shares of "144" unregistered stock of American Credit Card Telephone Company deposited by Claimant with Respondents as security for the margin account. Claimant specifically alleged as follows:

1. In May of 1987, Respondent Grace told Claimant that an opinion letter of counsel was required to make the shares freely transferable/saleable and would have to be in the possession of Merrill Lynch before the margin account would be opened;
2. Claimant was instructed that he not obtain the letter and that the Merrill Lynch legal department would secure the letter and approve the set-up of the account;
3. In August of 1987, Respondent Grace informed Claimant that the opinion letter had been received and the account was opened with the stock trading at approximately seven dollars and a loan amount of \$55,000.00;

4. Respondent Grace told Claimant several times that the stock was now freely transferable/saleable and could be sold at anytime at Claimant's direction to pay the margin account loan and that the stock would not be allowed to drop below 4 1/2 per share without a margin call being made for more funds or the shares being sold;
5. On October 7, 1987, with the stock selling at 5 1/4 per share, Claimant called Respondent Grace and requested that all the stock be sold, the loan repaid, the account closed, and the balance being returned to Claimant. On October 9, 1987, Respondent Grace communicated to Claimant that the sale could not be executed because the opinion letter of counsel had not been obtained;
6. The first request for an opinion letter was made by Merrill Lynch in late October of 1987;
7. Merrill Lynch did not sell the stock and it continued to decline in value;
8. Without Claimant's authorization or notification, the 25,000 shares of stock were sold for approximately \$1.00 per share by Merrill Lynch to cover the account after the "144" holding requirement had expired resulting in a debit balance in the account.

Based on the above, Claimant alleged that Respondents had violated Federal and State securities statutes, the Arizona Consumer Fraud Act, the Arizona RICO act, and the NASD Rules of Fair Practice and NYSE Rules as they create a standard of care. In addition, Claimant alleged that Respondents were liable for negligence, gross negligence, constructive fraud and negligent misrepresentation.

In a Statement of Answer filed with the NASD on May 5, 1989, Respondent Bruce Grace denied all allegations and inferences of wrongdoing of any sort, alleging that: (1) Claimant did not place a sell order in October of 1987 and requested after that the shares not be sold pursuant to a maintenance call; (2) he did not represent to Claimant that Merrill Lynch would obtain the opinion letter; and (3) Claimant was informed that he was responsible for providing the opinion letter. Respondent Grace incorporated in his Statement of Answer the remaining portions of Merrill Lynch's response.

Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. filed a Statement of Answer and Counterclaim on October 13, 1988, denying all allegations or inferences of wrongdoing of any sort. Merrill Lynch affirmatively alleged as follows:

1. Bruce Grace never told Claimant that Merrill Lynch would or had obtained an opinion letter or that the stock was "freely transferable";
2. Bruce Grace never told Claimant that the stock would not be allowed to fall below a price of \$4.50 per share;
3. Counsel for American Credit Card Telephone Company did not notify Merrill Lynch of the opinion letter requirement in conversations during July of 1987;
4. An opinion letter would have been filed on October 27, 1987 if Claimant had paid the attorneys' fees required to prepare the letter and Claimant never did produce a letter;
5. Claimant requested as late as January of 1988 that Merrill Lynch not sell the shares in a margin maintenance call based on his belief that the price would increase;
6. Merrill Lynch secured its own opinion letter in May of 1988, but was unable to sell the shares because the issuer had failed to file the required SEC reporting materials; and,
7. The stock was sold two days after the "144" holding period expired.

In the Counterclaim filed by Merrill Lynch, Respondent alleged that Claimant Gregory James Hirte owed for the amount of the debit balance incurred pursuant to the margin account agreement and the margin maintenance sale.

In a Reply to the Counterclaim of Merrill Lynch filed with the NASD on November 14, 1988, Claimant Gregory James Hirte denied the Respondents allegations, stating that; (1) the documents attesting to the debit balance were induced by the false representations of Merrill Lynch; (2) Merrill Lynch should not profit by their deceptions; (3) it was Merrill Lynch's responsibility to have the opinion letter on October 7, 1987 when Claimant desired to sell the shares; and, (4) it was Merrill Lynch's wrongful acts which were responsible for the debit balance being created. As affirmative defenses, Claimant alleged accord and satisfaction, duress, estoppel, failure of consideration, contract of adhesion, unconscionability, fraud in the inducement, fraud, illegality, laches, payments, release, waiver, mistake, offset and/or set-off.

### RELIEF REQUESTED

Claimant Gregory James Hirte requested the entry of an award against Respondents Merrill Lynch, Pierce, Fenner and Smith, Inc. and Bruce Grace for \$76,250.00 in actual damages, treble damages pursuant to the Federal Securities Acts and other statutory provisions, 18 per cent interest on his account balance, attorneys' fees and costs.

Respondents Merrill Lynch, Pierce, Fenner and Smith, Inc. and Bruce Grace requested that the Arbitrators deny the relief requested in the Statement of Claim. Respondent Merrill Lynch requested entry of an award against Claimant Gregory James Hirte in the principal sum of \$33,608.31, interest at the Merrill Lynch margin rate of interest, reasonable costs and attorneys' fees.

### AWARD

On September 27 and 28, October 3 and 4, and November 27 and 28, 1990 in Phoenix, Arizona during a hearing lasting fourteen sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant Gregory James Hirte on August 23, 1988, signed by Daniel J. O'Connor on behalf of Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. on October 12, 1988, and signed by Respondent Bruce Grace on May 4, 1989.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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.

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. The Statement of Claim filed by Claimant Gregory James Hirte is hereby dismissed and denied its entirety;
2. Claimant Gregory James Hirte is liable for and shall pay to Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. the sum of \$33,608.31 as damages on Respondent's Counterclaim;
3. Each party shall bear their own costs, including attorneys' fees, except for those specifically enumerated herein.

### FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed. Claimant Gregory James Hirte is liable for and shall pay forum fees in the sum of \$5,250.00. Respondents Merrill Lynch, Pierce, Fenner and Smith and Bruce Grace are jointly and severally liable for and shall pay forum fees in the sum of \$5,250.00.

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

Arbitrators Signature

Stephen Michael Venezia, Esq.

Date of Decision:

2/1/91

Matthew J. Zale, Esq.

**Date of Decision:**

Bruce A. Lindvig  
Industry Arbitrator

Date of Decision:

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Date of Decision: \_\_\_\_\_

  
Matthew J. Zale, Esq.

Date of Decision: 2/6/91

Bruce A. Lindvig  
Industry Arbitrator

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Stephen Michael Venezia, Esq.

Date of Decision: \_\_\_\_\_

Matthew J. Zale, Esq.

Date of Decision: \_\_\_\_\_

  
Bruce A. Lindvig  
Industry Arbitrator

Date of Decision: 2/4/91