

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

PUBLIC

In the Matter of Arbitration Between

Name of Claimant

Elaine Zekind

vs.

Case # 91-01778

Name of Respondents

Robert A. Semon
Phillips, Appel and Walden, Inc.
Gruntal & Co., Inc.
Merrill Lynch, Pierce, Fenner & Smith, Inc.

REPRESENTATION

For Claimant Elaine Zekind: Donald V. Pohlmeier, Esq.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"): Todd Zuckerbrod, Esq.

For Respondent Gruntal & Co., Inc. ("Gruntal"): David S. Gorobetz, Esq.

For Respondent Robert A. Semon ("Semon"): Laurie McPherson Esq. of the law firm of Phillips Nizer Benjamin Krim & Ballon

The Respondent Phillips, Appel and Walden, Inc. did not attend the hearing.

CASE INFORMATION

Statement of Claim filed: June 7, 1991.

Claimant's Submission Agreement was signed on: July 25, 1991.

The Respondent Phillips, Appel and Walden, Inc. did not execute a Submission Agreement or file a Statement of Answer as required pursuant to Section 25 of the Code of Arbitration Procedure.

Statement of Answer filed by Respondent, Robert Semon, on September 30, 1991.
Respondent Robert Semon's Submission Agreement signed on: September 26, 1991.

Statement of Answer filed by Respondent, Gruntal & Co., Inc., on September 16, 1991.
Respondent Gruntal & Co., Inc.'s Submission Agreement signed on : September 13, 1991.

Statement of Answer of Respondent Merrill Lynch, Pierce, Fenner & Smith filed on: September 26, 1991.
Respondent Merrill Lynch, Pierce, Fenner & Smith Inc.'s Submission Agreement signed on: September 26, 1991.

HEARING INFORMATION

Hearing Dates/Sessions:	March 23, 1992	-	one session
	June 25, 1992	-	one session
	December 7, 1992	-	one session

Hearing Location: NASD offices located in New York City, New York.

CASE SUMMARY

Claimant alleged Respondent Gruntal purchased the business and operations of the Fort Lee, New Jersey office of Respondent Phillips, Appel and Walden, Inc. and Claimant utilized the services of Phillips, Appel and Walden, Inc. and Semon for providing investment advice and helping her to invest and by its agency agreement with Phillips, Appel and Walden, Inc., Respondent Merrill Lynch set Phillips, Appel and Walden, Inc. up and authorized it to act as Merrill Lynch's agent for purposes of developing Merrill Lynch's transfer business. Claimant further alleged Respondents caused Claimant's funds to be invested in highly speculative and improper investments, entirely unsuitable for an investor of Claimant's age, financial condition and experience and churned Claimant's account and concentrated her assets in one investment; Respondents mishandled Claimant's accounts and failed to follow her instructions and Respondents Phillips, Appel and Walden, Inc. and Merrill Lynch failed to adequately supervise Respondent Semon. Claimant further alleged Respondents falsely and fraudulently forged or caused to be forged Claimant's name to an Option Agreement and a margin trading agreement with Respondent Merrill Lynch. Claimant further alleged Respondents engaged in a practice of manipulating the prices of securities in which they made a market, in order to defraud Claimant into believing that her investments were being properly and profitably managed.

Respondent Robert Semon denied any wrongdoing whatsoever and maintained that Claimant was kept fully informed of the status of her account throughout the relevant time period with detailed computer analyses, which clearly showed Claimant's cost basis and margin debit; all transactions engaged in by Respondent Robert Semon on Claimant's behalf were made with the prior authorization of Claimant; Claimant received written confirmations of each transaction in her account and monthly statements setting forth fully and accurately the transactions in and status of her account and Claimant never objected to any statement of transaction but understood and ratified each and every transaction in the account. Respondent Robert Semon further maintained he did not churn Claimant's account as evidenced by a review of his commissions which were not excessive or disproportionate to the size of the account, the nature of the transaction, the Claimant's stated investment objectives, the sophistication of the Claimant, the degree of control of the account by the Claimant and the frequency of the transactions. Respondent Robert Semon further maintained Claimant participated in all of the investment decisions with regard to her accounts, and any losses which may have been suffered by Claimant were caused by the investment decisions she made and were due to market conditions outside the control of Respondent Robert Semon. Respondent Robert Semon further maintained he is not liable to Claimant in any regard because at all relevant times he acted properly, in good faith, and in a commercially reasonable manner; he is not liable on any suitability claim as all the transactions were in accordance with the Claimant's investment objectives and Claimant has failed to plead sufficiently a RICO claim under N.J.S.A. 5:12-125, et seq.

Respondent Gruntal & Co., Inc. maintained that in Claimant's desperation for a deep pocket, she named Gruntal & Co as a Respondent, an entity that, by her own admission, had no contact with her and had nothing to do with the actions of Respondent Robert Semon and Phillips, Appel and Walden, Inc. with reference to the alleged wrongdoing in her account. Respondent Gruntal & Co., Inc. further maintained on or about April 18, 1988, Gruntal agreed to purchase certain assets from Phillips, Appel and Walden, Inc. and this agreement was delineated in a document entitled Asset Purchase Agreement which was duly executed by Phillips, Appel and Walden, Inc. and Gruntal and Respondent Semon, who had been employed by Phillips, Appel and Walden, Inc. at their Fort Lee office, apparently decided, with Gruntal's permission, to become employed at Gruntal and there is nothing more to it, and to state otherwise is to distort the facts and/or ignore the law.

Respondent Merrill Lynch maintained it is not a proper party to the arbitration and Merrill Lynch was the clearing agent for Phillips, Appel and Walden, Inc. and the controlling agreement specified that it should not hold Merrill Lynch liable for any losses the Claimant sustained and as a matter of law, a clearing broker such as Merrill Lynch is not and cannot be held liable for the acts of an introducing firm or its employees and that by signing the customer agreement the Claimant has agreed that Merrill Lynch shall not be responsible or liable for any acts or omissions of Phillips, Appel and Walden, Inc. or its employee Robert Semon. Respondent Merrill Lynch further maintained Claimant's Statement of Claim fails to state an independent or primary cause of action against Merrill Lynch.

RELIEF REQUESTED

Claimant requested damages of \$75,000.00; treble damages plus attorneys fees and costs of suit; punitive damages and such other relief as is just under the circumstances.

Respondent Robert Semon requested that the instant claim be dismissed in all respects and that he be awarded attorneys fees, costs and expenses incurred in the defense of the instant claims and that he be awarded such other and further relief as is deemed just and proper.

Respondent Gruntal & Co., Inc. requested that Claimant's claims be dismissed in their entirety and that Gruntal be awarded costs of the arbitration.

Respondent Merrill Lynch requested that it be dismissed as a party from the arbitration and that the costs of the action be assessed against the Claimant.

OTHER ISSUES CONSIDERED & DECIDED

The arbitration panel made the following rulings with regard to the Respondent:

In accordance with Section 1 of the Code, the panel ruled that it had jurisdiction over the Respondent, Phillips, Appel and Walden, Inc.

In accordance with Section 25 of the Code, the Respondent Phillips, Appel and Walden, Inc. was served with the Statement of Claim and given an opportunity to respond which it failed to do;

In accordance with Section 21 and Section 26 of the Code, the Respondent Phillips, Appel and Walden, Inc. was given due notice of the hearing procedure by regular and certified mail and failed to appear at the hearing;

In accordance with Section 29 of the Code, the panel ruled that the Respondent Phillips, Appel and Walden, Inc. had adequate notice of this hearing and determined to proceed with the Respondent Phillips, Appel and Walden, Inc. as a party in its absence.

AWARD

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

1. The arbitration panel was informed by the Claimant that the Claimant had entered into a settlement agreement with Respondent Robert Semon and had dismissed with prejudice all claims against Respondents Merrill Lynch and Gruntal & Co., Inc.
2. The Respondent Phillips, Appel and Walden, Inc. be and hereby is liable and shall pay to the Claimant the sum of \$33,704.44.
3. The adjournment fee for the hearings scheduled for July 30 and July 31 has been waived.
4. Each party shall bear their respective costs including attorneys fees.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

3 sessions x \$750.00 = \$2,250.00 less Claimant's hearing session deposit (\$750.00) =
\$1,500.00 net due.

The Claimant be and hereby is liable and shall pay to the NASD the sum of \$1,500.00 representing forum fees.

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

ARBITRATION PANEL

Name

Public/Industry

David I. Gilchrist, Esq.

Public

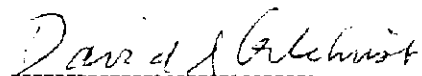
Charles C. Marotta

Public

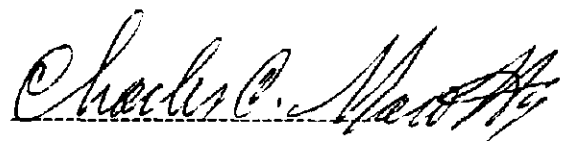
Donald J. Rasweiler

Industry

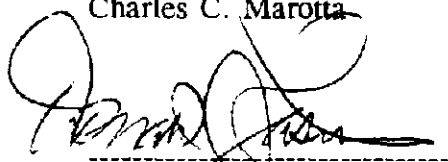
CONCURRING ARBITRATORS' SIGNATURE



David I. Gilchrist, Esq.



Charles C. Marotta



Donald J. Rasweiler

Date of Decision: January 18, 1994

Award #91-01778

STATE OF:

SS:

COUNTY OF:

On this 6th day of January, 1994, before me personally appeared **David I. Gilchrist, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

Harold A. McCully

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STATE OF: NY

SS:

COUNTY OF: Nassau

On this 12th day of January, 1994, before me personally appeared **Charles C. Marotta** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

Charles C. Marotta

Paula J. Wickman
Notary Public
PAULA J. WICKMAN
Notary Public, State of New York
No. 452163
Commission Expires May 22, 1995

STATE OF:

SS:

COUNTY OF:

On this 7th day of Jan., 1994, before me personally appeared **Donald J. Raweiler** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

Joan Schneider

JOAN SCHNEIDER
Notary Public, State of New York
No. 01504858528
Qualified in Kings County
Term Expires May 5, 1994