

PUBLIC

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Mary Elmasry  
Elmasry Investment Club

92-00399

Name of Respondent(s)

Advest, Inc.  
Gruntal & Co., Inc.  
William Kravitz

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REPRESENTATION

For Claimants: The Claimants appeared pro se.

For Respondents Gruntal & Co., Inc. ("Gruntal") and William Kravitz ("Kravitz") in connection with any allegations concerning his activities while employed at Gruntal - Emilia DeMeo, Esq., in-house counsel.

For Respondents Advest, Inc. ("Advest") and William Kravitz in connection with any allegations concerning his activities while employed at Advest, Inc. - Cynthia A. Feigin, Esq., of the law firm of Davis, Scott, Weber & Edwards, P.C., New York, NY.

CASE INFORMATION

Statement of Claim filed: February 3, 1992.

First Amended Statement of Claim filed on January 25, 1993.

Memorandum of Claimant in Opposition to Motion to Dismiss dated April 26, 1993.

Claimants' Submission Agreement signed on: January 13, 1992.

Statement of Answer filed by Respondents Gruntal and Kravitz on: May 28, 1992.

First Amended Statement of Answer by Respondents Gruntal and Kravitz dated April 2, 1993.

Respondents Gruntal and Kravitz Motion to Preclude Introduction of Certain Evidence by Claimants dated September 30, 1993.

Respondents Gruntal and Kravitz Motion to Dismiss Certain Claims dated September 30, 1993.

Statement of Answer of Advest and Kravitz to the First Amended Statement of Claim dated April 5, 1993.

Respondent Advest's Motion to Dismiss Claims under Rule 10B-5 and RICO as time barred dated April 5, 1993.

### **HEARING INFORMATION**

May 5, 1994	2 sessions
May 6, 1994	2 sessions
June 23, 1994	2 sessions
June 24, 1994	2 sessions
July 18, 1994	2 sessions
July 20, 1994	2 sessions

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

### **CASE SUMMARY**

Claimants alleged that they suffered damages as a result of the unsuitability of the Respondents' recommendations concerning securities purchased for Claimants' accounts carried out and through Respondents and by reason of unauthorized trading effected in such accounts by Claimants' broker, Respondent Kravitz. Claimants further alleged Respondents Advest and Gruntal failed to supervise Kravitz in a manner sufficient to have prevented his wrongful acts and Advest and Gruntal are liable for the acts and omissions of their employee under the doctrine of respondeat superior. Claimants further alleged in connection with the purchase and sale of securities through Respondents, they used a scheme and artifice to defraud, made untrue statements of fact, omitted to state material facts and Claimants relied, to their detriment, on the representations and Claimants are entitled to margin interest, punitive damages and the conduct and activities on the part of Respondents constitute a pattern of racketeering activity entitling Claimants to treble damages.

Respondents Advest and Kravitz maintained during the entire time the accounts were at Advest, Inc., Claimants never once complained about the handling of their accounts and on the whole, Claimants' accounts were profitable while they were at Advest, Inc. and Claimants' claim for unrealized losses while at Advest is not accurate. Respondents Advest and Kravitz further maintain that Claimant, Mary Elmasry, is an experienced businesswoman and contend that all transactions were specifically discussed with her before they were effected and Claimant understood the risks of investing in the stock market and given the Claimant's

overall financial condition and her prior investment experience, all recommendations made were suitable.

Respondents Gruntal and Kravitz maintained the Claimant Mary Elmasry is a knowledgeable and sophisticated investor who authorized each and every transaction in her Gruntal accounts and all of the transactions in Claimants' accounts were suitable for Claimants' stated investment objectives of growth and income and no misrepresentations were made by Respondents and appropriate supervisory procedures were followed with respect to the accounts. Respondents Gruntal and Kravitz further maintained that the Claimant Mary Elmasry retained complete control over her accounts and she has calculated her damages by selectively focusing on transactions that resulted in losses, and ignoring both profitable transactions and the substantial amounts of income that her investments generated and she failed to acknowledge that she acted against the specific advice of Mr. Kravitz when she chose to liquidate a number of her investments at Gruntal at a loss and Claimants are barred under New York law from recovering punitive damages.

Respondents Gruntal & Co., Inc. and Kravitz asserted a motion to dismiss all claims under the National Association of Securities Dealers, Inc. Rules of Fair Practice, all claims arising under the Racketeer Influenced and Corrupt Organization Act ("RICO"), and all claims for punitive damages as a matter of law alleging there is no private right of action under securities industry organization regulations; Claimants have failed to state a claim under RICO and it is well settled under New York law that "an arbitrator has no power to award punitive damages."

Respondent Advest moved to dismiss all claims premised upon Section 10(b) of the Exchange Act and Rule 10b-5 alleging those claims are barred by the statute of limitations set forth in Lampf, Pleva, Lipkind, Prupis and Petigrow v. Gilbertson, 501 U.S. 111(1991) and moved to dismiss all claims premised upon RICO on the ground that those claims are barred by the four-year statute of limitations set forth in Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143(1987).

In response, the Claimants maintained that their RICO claims are not time barred because the limitations period for RICO claims runs from discovery of the RICO violation, which in this case took place in or about July, 1990, rather than from the time of the violation, and because even time-barred securities violations can sustain a RICO claim. Claimants further maintained with respect to Claimants' securities claims, Respondents' reliance upon Lampf, is unavailing because the limitation set forth therein has been repeatedly construed to be a statute of repose and, hence, a matter of substantive law and as such, the Arbitration Panel is not bound by the Lampf limitation period, need not apply this limitation, and may instead do substantial justice as appears appropriate in the circumstances.

Claimants further maintained that in addition, counsel for Advest, who also represents Respondent Kravitz for the period during which Kravitz purchased and sold securities for Claimants' accounts at Advest, has made this motion only on behalf of Advest, implicitly recognizing that Kravitz's continuous course of dealing with Claimants as their broker and fiduciary renders Claimants immune from a statute of limitations attack as against Kravitz. Claimants further maintained under principles of secondary liability, Advest will remain fully liable for Kravitz's conduct while he was employed by Advest even if Advest had a sustainable limitations argument which it does not.

### **RELIEF REQUESTED**

Claimants requested: Compensatory damages in excess of \$119,729.00, punitive damages, treble damages plus costs of suit.

Respondents Gruntal and Kravitz requested that Claimants' claims be dismissed in their entirety and requested that they be awarded their attorneys' fees and costs in defense of the action.

Respondents Advest and Kravitz requested that Claimants' claims be dismissed and that they be awarded their attorneys' fees and costs.

### **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 Claimants' claims against all Respondents be and hereby are dismissed in all respects.
2. The Claimants' requests for punitive damages and treble damages are denied in all respects.
3. Each party shall bear their respective costs including attorneys' fees.

### **FORUM FEES**

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

12 sessions X \$750 = \$9,000 less Claimants' hearing session deposit (\$1,050) = net \$7,950 due.

The Claimants be and hereby are liable jointly and severally and shall pay to the NASD the sum of \$3,450 representing forum fees.

The Respondents Gruntal and Kravitz be and hereby are liable jointly and


severally and shall pay to the NASD the sum of \$2,250 representing forum fees.

The Respondents Advest and Kravitz be and hereby are liable jointly and severally and shall pay to the NASD the sum of \$2,250 representing forum fees.

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

Concurring Arbitrators' Signatures  
Name

Public/Industry

  
\_\_\_\_\_  
William Friedman, Esq.

Public

  
\_\_\_\_\_  
Eugene J. McCabe, Esq.

Public

  
\_\_\_\_\_  
John W. Engelskirger

Industry

Date of Decision: August 30, 1994

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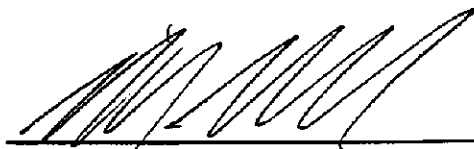
Award #92-00399

STATE OF: *New York*

SS:

COUNTY OF: *New York*

On this *15th* day of *August*, 1994, before me personally appeared **William Friedman, 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.



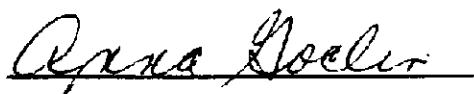
DAVID W. BARNHARD  
Notary Public, State of New York  
No. 4808370  
Qualified in Bronx County  
Commission Expires 7-31-96

STATE OF: *New Jersey*

SS:

COUNTY OF: *Monmouth*

On this *19th* day of *August*, 1994, before me personally appeared **Eugene J. McCabe, 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.



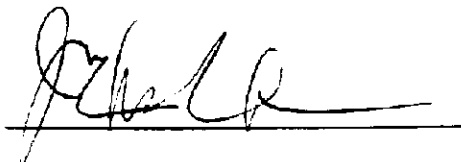
ANNA GOCLIN  
Notary Public of New Jersey  
My Commission Expires July 19, 1999

STATE OF: *CONNECTICUT*

SS:

COUNTY OF: *FAIRFIELD*

On this *22nd* day of *August*, 1994, before me personally appeared **John W. Engelskirger** 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.



CAROL A. MARINO  
Notary Public, State of New York  
No. 41-4844102  
Qualified in Queens County  
Commission Expires October 31, *1995*

