

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Joseph J. Whittman

92-03840

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith Inc.  
Brian C. Buetel

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**REPRESENTATION**

Claimant Joseph J. Whittman, III ("Claimant"): Herbert M. Linsenberg, Attorney at Law and Anthony Boris, Attorney at Law.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill") and Brian C. Buetel ("Buetel"): V. James Mann, Vice President and Senior Counsel at Merrill.

**CASE INFORMATION**

Statement of Claim filed on: November 12, 1992.

Claimant's Submission Agreement signed on: November 7, 1992.

Joint Statement of Answer filed by Respondents Merrill & Buetel (collectively referred to as "Respondents") on: January 15, 1993.

Respondent Merrill's Submission Agreement signed on: January 12, 1993.

Respondent Buetel's Submission Agreement signed on: January 11, 1993.

**HEARING INFORMATION**

Hearing Date/Sessions: December 2, 1993, 3 sessions

Hearing Location: Holiday Inn, Philadelphia, PA.

### CASE SUMMARY

Claimant alleged that between January 1, 1991 and May 31, 1992, Respondents churned his account, made material misrepresentations and engaged in other practices which were inconsistent with Claimant's stated investment objectives. Claimant alleged that Buetel induced him (Claimant) to sell some of his bonds and that Buetel began to buy and sell securities in rapid succession. Claimant alleged that Respondents induced him to purchase new issues and to engage in a number of short sales. Claimant alleged that Respondents encouraged him to trade on margin. Claimant alleged that the investment strategy that Respondents encouraged was for their benefit at the expense of Claimant. Claimant alleged, that while his account sustained losses, Respondents generated large commissions and interest charges. Claimant alleged that the investments were unsuitable. Claimant further alleged that had his portfolio would have increased. Claimant alleged that Merrill failed to properly supervise Buetel's activities. Claimant alleged that the confirmation slips wrongfully indicated that the trades were unsolicited whereas they were solicited by Buetel.

Respondents denied each and every allegation of wrongdoing asserted by Claimant. Respondents maintained that Claimant, a wealthy individual, wanted to invest in speculative securities and sought out opportunities for large returns. Respondents maintained that Claimant was aware of the margin feature in his account and took advantage of that feature. Respondents maintained that Claimant would at times disregard the advise of Buetel to invest more conservatively. Respondents maintained that Claimant decided to trade aggressively and to purchase initial public offerings. Respondents maintained that although Buetel had originally recommended Waste Management Co. to Claimant it was Claimant's decision to trade in Waste Management. Respondents maintained that the losses Claimant incurred in Waste Management were due to Claimant's investment strategy. Respondents maintained that both Buetel and Claimant's CPA advised Claimant to re-evaluate his aggressive trading. Respondent maintained that Claimant's own check writing had a significant impact on Claimant's margin interest charges. Respondents maintained that Claimant's losses were caused by his own negligent conduct. Respondents maintained that Claimant failed to mitigate his damages. Merrill maintained it properly supervised its employees, that it acted in good faith and did not induce any acts constituting a cause of action. Respondents maintained all transactions were either ordered or approved by Claimant; that all risks were fully disclosed; and, that Claimant failed to use due diligence in monitoring, trading, managing and handling his account.

**RELIEF REQUESTED**

Claimant requested in his pleadings compensatory damages, including loss of profits, an amount totaling \$278,927 plus punitive damages in the amount of \$220,000.

Respondents requested that the Claimant's claim be dismissed, with costs assessed against Claimant.

**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 originals remain on file with the NASD.

**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. Respondent Merrill shall pay to Claimant the sum of Twelve Thousand Four Hundred and Eighty Two Dollars and Eighty Eight Cents (\$12,482.88).
2. Respondent Buetel shall pay to Claimant the sum of Three Thousand Six Hundred Seven Dollars and Thirty Seven Cents (\$3,607.37).
3. No pre-award interest is assessed.
4. The arbitrators note that they have rejected the claims of churning and unsuitability. The arbitrators find that as of January, 1992, Merrill failed to take steps to adequately supervise the broker's activities with regard to Claimant's account, and that as of that date, the broker failed to take steps to adequately know his customer.

**FORUM FEES**

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

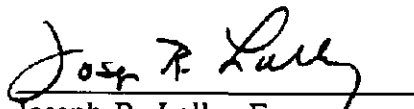
3 hearing sessions x \$750 = \$2,250

Respondent Merrill shall bear all Forum Fees so that Merrill is directed to refund directly to the Claimant his hearing session deposit of \$750 and to pay Forum Fees to the NASD in the amount of \$1,500.

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

Concurring Arbitrator's Signature  
Name

Public/Industry

  
Joseph R. Lally, Esq.

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Public Arbitrator

NASD Date of Decision: February 7, 1994

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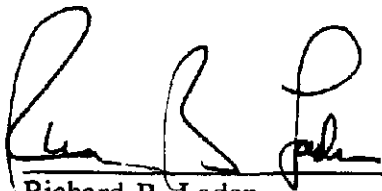
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Concurring Arbitrator's Signature  
Name

Public/Industry

  
Richard B. Laden

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Public Arbitrator

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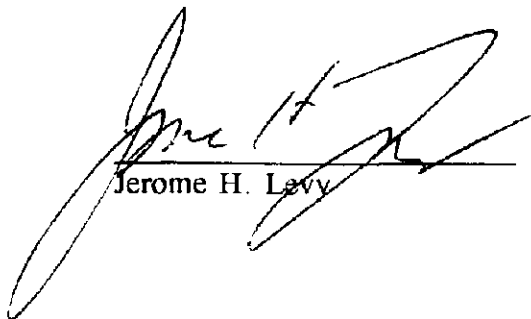
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Concurring Arbitrator's Signature  
Name

Public/Industry



Jerome H. Levy

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Industry Arbitrator

NASD Date of Decision: February 7, 1994