

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between**

**Name of Claimants**

**Hilton O. Karm; Karm Repair Company, Inc.**

**94-00905**

**Name of Respondents**

**Merrill Lynch, Pierce, Fenner & Smith, Inc.;  
Danford R. Meischen**

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**REPRESENTATION**

**For Claimants: Hilton O. Karm ("Karm") and Karm Repair Company, Inc. ("Karm Repair") were represented by Leonard J. Meyer, Esq. of Zimmerman, Flaum & Axelrad, P.C., located in Houston, Texas.**

**For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Danford R. Meischen ("Meischen") were represented by Grant J. Harvey, Esq. of Gibbs & Bruns, L.L.P., located in Houston, Texas.**

**CASE INFORMATION**

**Statement of Claim filed: March 9, 1994.**

**Claimant Karm's Submission Agreement signed on: February 16, 1994.**

**Claimant Karm Repair's Submission Agreement signed on: February 21, 1994 by Hilton O. Karm, President, Karm Repair Company, Inc.**

**Statement of Answer filed by Respondents on: May 2, 1994.**

**Respondent Merrill Lynch's Submission Agreement signed on: April 29, 1994 by John R. Cummings, First Vice President and Assistant General Counsel, Merrill Lynch, Pierce, Fenner & Smith, Inc.**

**Respondent Meischen's Submission Agreement signed on: May 4, 1994.**

### **HEARING INFORMATION**

**Pre-Hearing Conference:** None Held.  
**Hearing Dates/Sessions:** November 16, 1994 for Two (2) sessions;  
November 17, 1994 for Two (2) sessions.  
**Hearing Location:** Houston, Texas.

### **CASE SUMMARY**

Claimants alleged that Respondent Meischen, while employed by or acting as an agent for Respondent Merrill Lynch, breached the fiduciary duty owed to Claimants through negligence, misrepresentation and a failure to supervise. Claimants specifically alleged that:

1. On April 26, 1990, a bank recovered a judgment in state court against Karm and Karm Repair, based upon two unpaid promissory notes arising from the claimants' real estate activities;
2. Unable to collect the judgment, the bank began negotiating a settlement of the judgment, and eventually agreed to settle for \$250,000.00. The offer was taken under advisement by Karm;
3. On or about June 4, 1993, Karm and his CPA met with Meischen to discuss the possibility of depositing substantial sums of money with Merrill Lynch, in part to fund any settlement. Nearly all funds were held by Karm's daughter. Karm expressed his concern to Meischen about transferring assets into the account in his name with the outstanding judgment;
4. Meischen assured Karm that any assets transferred could not be reached by the bank, without the bank having a court order, and that if legal action occurred, Claimants would have time to withdraw funds. In addition, Meischen assured Karm that it was impossible for anyone to know that Karm deposited money with Merrill Lynch;
5. Karm caused his daughter to transfer approximately \$702,000.00 into his Merrill Lynch account. Without notice to Claimants, Merrill Lynch ran a credit report on Karm, which may have put the public on notice of the deposit, unless disclosure occurred in some other manner;
6. Almost immediately thereafter, the state court entered a post-judgment garnishment proceeding order against Karm's account, which was immediately served on Merrill Lynch and the account frozen;

7. Karm vigorously pursued settlement discussions with the bank, but to no avail. The full amount owed of \$564,976.60 was seized by the bank from Karm's Merrill Lynch account through a court judgment, as well as \$1,000.00 in costs to Merrill Lynch.

Based upon the above allegations, Claimants asserted that Respondents actions were in reckless disregard of the Claimants' best interests; their advise constituted negligence, gross negligence and misrepresentation; and, they failed to disclose facts necessary to make the representations truthful when taken as a whole. In addition, Respondents rendered incorrect legal advise and made recommendations contrary to Karm's express concerns.

Respondents denied the material allegations of the Statement of Claim, asserting that:

1. At no time was Karm given any comfort, assistance or assurance that Merrill Lynch would participate or aid in his scheme to avoid paying the lawful obligation;
2. At the time of opening his account, Karm applied for a credit card. The application for the card contained a statement that the application was subject to a routine credit check;
3. Respondents did not contact, speak to or divulge to any individual or institution Karm's existence or relationship except as described; and
4. On August 3, 1993, an application for Writ of Garnishment After Judgment was filed and served on Merrill Lynch on August 6, 1993, which froze Karm's account. On September 29, 1993, a Judgment in Garnishment was signed and served on the local Merrill Lynch office the next day.

In addition, Respondents asserted the following affirmative defenses:

1. The Statement of Claim failed to state a claim upon which relief can be granted;
2. Claimant is barred from any recovery because he directed, authorized, consented to, acquiesced in, and/or ratified all transactions in his account;
3. Karm made all the investment decisions and any losses in the account were caused by his decisions or by conditions outside the control of Respondents; and
4. Respondents acted properly and in good faith with regard to Claimants' account.

### **RELIEF REQUESTED**

Claimants requested entry of an award against Respondents in the sum of \$315,977.00 in actual damages, representing the amount being garnished minus the amount Karm could have settled the judgment; the return of all commissions and reimbursement of all other losses; interest from the date of loss; punitive damages as may be awarded by the Panel; and reasonable attorneys' fees and accountants' fees.

Respondents requested that the Claimants' claims for damages be denied in all respects, and that the costs of this action, including attorneys' fees, be assessed against Claimants.

### **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, and the post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Statement of Claim is hereby dismissed with prejudice and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically granted is hereby denied.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Four (4) hearing sessions x \$750.00 per session = \$3,000.00.

The National Association of Securities dealers, Inc. shall retain the \$200.00 claim filing fee and the \$750.00 hearing session deposit previously deposited by the Claimants. In addition, the NASD shall retain the additional \$300.00 previously filed by Claimants. Claimants Hilton O. Karm and Karm Repair Company, Inc. are liable for and shall pay to the NASD the sum of

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\$1,950.00 as forum fees.

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

**Concurring Arbitrators' Signatures**

**Name**

**Date**

/s/ Cynthia J. Thomson, Esq.  
Cynthia J. Thomson, Esq.  
Public Arbitrator  
Chairperson

February 25, 1995

/s/ Brantly Harris, Esq.  
Brantly Harris, Esq.  
Public Arbitrator

February 22, 1994

/s/ John M. Greer  
John M. Greer  
Industry Arbitrator

February 22, 1995

**For NASD Use Only**  
**Date of Service of Award: March 6, 1995.**