

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Miriam Edelstein

94-01952

Name of Respondents

Advantage Capitol Corporation  
Nancy S. Bell

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**REPRESENTATION**

For Claimant: Miriam Edelstein, Nanuet, New York.

For Respondent: J. Christopher Jackson, Esq., Van Kampen American Capital Inc., Oakbrook Terrace, Illinois.

**CASE INFORMATION**

Statement of Claim filed: May 23, 1994.

Claimant's Submission Agreement signed on: August 5, 1994.

Statement of Answer filed by Respondent, Nancy Sue Bell on: December 23, 1994.

Respondent, Nancy Sue Bell's Submission Agreement signed on: October 25 1994.

Statement of Answer filed by Respondent, Advantage Capital Corporation on: September 29, 1994.

Respondent's Advantage Capital Corporation's Submission Agreement signed on: September 26, 1994.

### **HEARING INFORMATION**

Hearing Date / Sessions: February 17, 1995 / Two Sessions  
Hearing Location: National Association of Securities Dealers Offices located at 33 Whitehall Street, New York, New York.

### **CASE SUMMARY**

Claimant alleged that in early December 1991 her mother, Esther Wachtel, unconditionally gifted to Claimant a number of individual stocks, Claimant alleged that on December 23, 1991 she met with Respondent Nancy Bell ("Bell"), a registered representative of Respondent Advantage Capital Corp. ("Advantage") and Robert Fertel, a Division Manager with Respondent Advantage. Claimant further alleged that Bell recommended that Claimant sell most of the gifted securities and consolidate the proceeds into a tax-free vehicle. Claimant further alleged that she immediately questioned the tax consequences of the alleged recommended course of action and that Bell assured her that there would be no tax consequences as claimant's cost basis and selling price were the same. Claimant alleged that Bells's assurance as to the tax question was given with such confidence there was no need to question the advice further, and Bell at no time recommended consultation with an accountant or tax professional to verify the advice. Claimant alleged that on February 6, 1992, she purchased 10,483 shares of Trans-American Special High Yield Tax Free Fund with the proceeds of the sales of the securities at issue. Claimant alleged satisfaction with the purchase, but extreme dissatisfaction with the ultimate tax liability incurred due to the incorrect advice of Bell. Claimant alleged that during preparation of her 1992 income taxes, she was informed by her accountant that the cost basis for the subject securities was the cost at which her mother, Esther Wachtel acquired them, resulting in a federal tax of \$12745.00 and a New York State tax of \$3940.00. In addition, claimant alleged a federal penalty of \$450.71 and a state penalty of \$114.69 for not having filed estimated taxes on the purported capital gains during the taxable year. Claimant alleged total out-of-pocket costs due to Bell's false advice in the amount of \$17,250.40.

Respondent Bell maintained that she was contacted by claimant in mid-December 1991 for the purpose of discussing what kind of investment to make with the proceeds of the sale of the securities gifted to claimant by Wachtel. Respondent Bell maintained that an appointment was set up for December 23, 1991. In addition, Respondent Bell maintained that she contacted her Division Manager Fertel to advise him of the proposed transaction, since the sale of the securities would be done in his name and registered representative number. Respondent Bell maintained that Fertel requested to be present at the meeting scheduled for December 23, 1991. Respondent Bell next maintained that she and Fertel met with claimant as planned. Respondent Bell maintained that at no time during this meeting did the subject of taxes come up. Respondent Bell also maintained that claimant said that she was filing a gift tax return, but other than that, claimant did not ask for, or receive any tax advice.

Respondent Advantage Capital maintained that Bell was formerly a registered representative of Advantage Capital, whose license was limited to mutual funds and variable insurance products.

Respondent Advantage Capital maintained that Fertel was another registered representative of Advantage Capital and was Bell's manager. Respondent Advantage Capital further maintained that Fertel's involvement with claimant resulted from Bell's not being licensed to buy or sell general securities. Respondent Advantage Capital next maintained that claimant did not solicit tax advice from Fertel. Moreover, respondent Advantage Capital asserted that Fertel never heard a tax discussion between Bell and claimant. In addition, respondent Advantage Capital alleged that Bell was not a tax advisor and did not hold herself out as such. Respondent Advantage Capital maintained, as an available defense, the lack of causation in that Bell had no expertise in the area of taxation, and did not hold herself out to have such expertise. In addition, respondent Advantage Capital maintained that claimant had an accountant and did not discuss potential tax liability with him. Respondent Advantage Capital further maintained that claimant was required to pay taxes on the sale of her securities due to her decision to not seek tax advice, and that if she accepted tax advice from someone not qualified to give it, she did so at her own risk and peril. Respondent Advantage Capital also maintained that claimant had ample opportunity to consult with her tax advisor in that the meeting with Bell and Fertel was in December 1991 and the securities were not sold until mid-January 1992. Respondent Advantage Capital further maintained, as available defenses, that claimant assumed the risk of tax liability by failing to contact her accountant for the advice she needed and that.

#### **RELIEF REQUESTED**

Claimant requested:

1. An award in the amount of \$18,000.00 in actual damages.

Respondents requested:

1. That Claimant's Statement of Claim be dismissed and that Claimant receive no award in this matter.

#### **AWARD**

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

1. Claimant's Statement of Claim is dismissed in its entirety.

#### **FORUM FEES**

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

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2 Sessions x \$300.00 = \$600.00 less \$300.00 Hearing Session Deposit paid by Claimant =  
\$300.00 Net Due.

Forum Fees are assessed against:

1. Respondent is assessed the sum of \$300 which represents the balance of the forum fees due. Respondent be and hereby is liable and shall pay to the NASD the sum of \$300.00.

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

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Arbitrator's Signature

Name

Public Chairman

Melvin Lyon  
Melvin Lyon

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Date of Decision: April 7, 1995

STATE OF: New Jersey

SS:

COUNTY OF: Hudson

On this 6<sup>th</sup> day of April, 1995, before me personally appeared **Melvin Lyon** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Melvin Lyon

**HEIDA MAGAN**  
**NOTARY PUBLIC OF NEW JERSEY**  
My Commission Expires August 30, 1996