

**NASD AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Catherine Brown,

Claimant,

vs.

No. 95-00578

Bank of America Investment Services,  
Inc., and Robert Scott Thoms,  
Respondents.

and

**Consolidated**

Angeline S. Pappas,

Claimant,

vs.

No. 95-00596

Bank of America Investment Services,  
Inc., and Robert Scott Thoms,  
Respondents.

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**REPRESENTATION OF PARTIES**

Catherine Brown ("Brown") and Angeline Pappas ("Pappas") (or referred to jointly as "**Claimants**") appeared on their own behalf.

Bank of America Investment Services, Inc. ("BAIS"), and Robert Scott Thoms ("Thoms") (or referred to jointly as "**Respondents**") were represented by Joel P. Hoxie, Esq. and Brian J. Campbell, Esq., of Snell & Wilmer, Phoenix, Arizona.

**CASE INFORMATION**

Pappas' Statement of Claim was filed on or about February 3, 1995. Pappas' Submission Agreement was signed on February 1, 1995.

Respondents' Statement of Answer to Pappas' Statement of Claim was filed on or about April 28, 1995. Respondents' Submission Agreements were signed on April 25, 1995, and April 18, 1995, respectively.

Brown's Statement of Claim was filed on or about February 3, 1995. Brown's Submission Agreement was signed on February 1, 1995.

Respondents' Statement of Answer to Brown's Statement of Claim was filed on or about April 28, 1995. Respondents' Submission Agreements were signed on April 25, 1995, and April 18, 1995, respectively.

### **HEARING INFORMATION**

The hearing was held on November 2, 1995 for three (3) sessions, in Scottsdale, Arizona.

### **CASE SUMMARY**

Brown alleged that at the time she had opened a Bank of America savings account, and upon the Bank of America's recommendation, she was referred to Thoms, a representative for BAIS, who recommended and sold her \$150,000.00 of the Voyager Arizona Insured Tax Free Fund ("Voyager"). Brown alleged that: Thoms never made it clear to her that the investment in Voyager would fluctuate drastically; Thoms had told her that the investment was safe; had wanted to place the money in a safe investment; and had never established whether Brown needed income from the investment or whether she was in the 15% income tax bracket in determining the suitability of the investment sold to her. Brown also alleged that at the time of the sale, Thoms had never given her a prospectus folder. Brown further alleged that she had meetings with Thoms and his supervisor about the rapid decrease in value of the investment, and that Respondents did nothing to correct the situation. Lastly, Claimant stated that in November of 1994, she sold the Voyager and realized a loss of \$26,726.35.

Pappas alleged that upon the Bank of America's recommendation, she was referred to Thoms, a representative for BAIS, who recommended and sold her \$8,000.00 of Voyager. Pappas further alleged that: Thoms never made it clear to her that the investment in Voyager would fluctuate drastically; Thoms had told her that the investment was safe; had wanted to place the money in a safe investment; Thoms had told her that the reinvestment earnings would increase the value of her investment; at the time of the sale, Thoms had never given her a copy of the prospectus; and had never established whether Brown needed income from the investment or whether she was in the 15% income tax bracket in determining the suitability of the investment sold to her. Pappas also alleged that she had meetings with Thoms and his supervisor about the rapid decrease in value of the investment, and that Respondents did nothing to correct the situation. Lastly, Claimant stated that in November of 1994, she sold the Voyager and realized a loss of \$1,491.74.

Respondents, unless otherwise admitted in their Answers, denied all allegations of wrongdoing, including, without limitation, allegations that: Any material misrepresentations or omissions were made to Claimants; that an unsuitable investment was recommended or sold to Claimants; that Respondents breached any duty owing to Claimant; that Respondents were negligent in any manner; that Respondents engaged in any dishonest or unethical conduct; or that Respondents did or failed

to do anything that would entitle Claimants to any award in their favor . In addition, Respondents also asserted the following affirmative defenses: Claimants' claims are barred by the doctrines of ratification, waiver or estoppel; and that Claimants' investment losses were not proximately caused by any alleged wrongdoing on their part.

### **RELIEF REQUESTED**

Brown requested an award against the Respondents in the amount of \$26,726.35.

Pappas requested an award against the Respondents in the amount of \$1,491.74.

Respondents requested that the claims asserted against it be denied in its entirety and that it be awarded its' costs and reasonable attorneys' fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

At the beginning of the hearing, arbitrator Sarah Whitmore disclosed that she had been hired in 1979, and had given a deposition against one of Respondents' potential witnesses, Paul Butt. After disclosure, the parties confirmed that they were willing to proceed with two (2) arbitrators, or would allow arbitrator Whitmore to remain on the panel until Respondents chose, if ever, to call Mr. Butt as a witness.

At the close of Claimants' case, Respondents made an oral Motion to Dismiss. After hearing argument from the parties, and deliberation, the panel denied the motion. Respondents then raised an objection to the continued participation of Ms. Whitmore as a panelist due to the fact that they intended to call Mr. Butt as their expert witness. After consideration of the objection arbitrator Whitmore decided to recuse herself from the panel. The arbitration proceeded with the remaining arbitrators pursuant to the parties' affirmation made at the beginning of the hearing.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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:

Respondents BAIS and Thoms are jointly and severally liable for, and shall pay to Angeline S. Pappas the sum of \$976.00 as satisfaction of her claim.

Respondents BAIS and Thoms are jointly and severally liable for, and shall pay to Catherine S. Brown the sum of \$14,000.00 as satisfaction of her claim.

All other claims/requests for damages not specifically set forth herein are, and each of them, denied and dismissed with prejudice.

Each party shall bear its own costs and expenses associated with this arbitration.

### **FORUM FEES**

Forum fees are calculated at the rate of \$400.00 per hearing session and \$300.00 for each prehearing conference, if any. There were three (3) regular sessions x \$400.00 = \$1,200.00 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$100.00 and shall **refund** the hearing session deposit in the amount of \$400.00 previously deposited with the NASD by Catherine S. Brown.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$25.00 and shall **refund** the hearing session deposit in the amount of \$25.00 previously deposited with the NASD by Angeline S. Pappas.

Pursuant to §45 of the Code, the Respondent BAIS shall pay to the NASD the sum of \$200.00 for the member surcharge assessed in case number 95-00578, and shall pay to the NASD the sum of \$100.00 for the member surcharge assessed in case number 95-00596.

Additional forum fees in the amount of \$1,200.00 are assessed jointly and severally against Respondents BAIS and Thoms. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

Lester Friedman  
Lester Friedman  
Public Arbitrator, Presiding Chair

s/s

November 2, 1995

Philip B. Whitaker  
Philip B. Whitaker  
Public Arbitrator

s/s

November 2, 1995