

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

**NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.**

**In the Matter of the Arbitration Between**

**Name of Claimant**

Helen W. Burbank

Case No. 95-00880

**Names of Respondents**

Merrill Lynch Pierce Fenner & Smith, Inc.  
Scott M. Griswold

**REPRESENTATION**

For Claimant Helen W. Burbank ("Burbank"): Randall W. Henley, Esq. and Joseph D. Farrish, Esq. of West Palm Beach, Florida.

For Respondent Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"): David P. Ackerman, Esq. and Tracy L. Gerber, Esq. of Ackerman, Link & Sartory, P.A., West Palm Beach, Florida.

Respondent Scott M. Griswold ("Griswold") did not appear (see "Other Issues").

**CASE INFORMATION**

Statement of Claim and Amendment to Statement of Claim filed: February 17, 1995.

Claimant's Submission Agreement signed: February 16, 1995.

Second Amended Statement of Claim filed: December 24, 1996.

Statement of Answer filed by Respondent Merrill Lynch: May 5, 1995.

Respondent Merrill Lynch's Submission Agreement/Corporate Acknowledgment signed: April 18, 1995 by Dennis M. Pape on behalf of the firm.

Respondent Merrill Lynch's Answer and Defenses to Claimant's Second Amended Statement of Claim filed: February 12, 1997.

Respondent Griswold did not file a Statement of Answer or an executed Submission Agreement.

**HEARING INFORMATION**

On January 9, 1998 the arbitration panel conducted a telephonic pre-hearing conference lasting one (1) session.

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On February 2, 3, 4 and 5, 1998 hearings lasting seven (7) sessions were conducted in Fort Lauderdale, Florida.

### CASE SUMMARY

Claimant alleged that Respondent Griswold defrauded her by recommending and selling away from Respondent Merrill Lynch, worthless securities representing them to be approved by Merrill Lynch. Claimant further alleged that Merrill Lynch was liable for the sales to Claimant while Respondent Griswold was employed by Merrill Lynch pursuant to the theory of Respondeat superior and the apparent agency law. Claimant also alleged that Merrill Lynch was responsible for the sale that occurred after Griswold was terminated by Merrill Lynch due to Merrill Lynch's failure to warn the Claimant.

Respondent Merrill Lynch denied all allegations of wrongdoing contained in Claimant's claims and asserted that (1) Merrill Lynch had no knowledge or notice of any of the investments at issue and did not lead Claimant to believe it did; (2) Merrill Lynch had no duty to supervise the transactions complained of under the applicable rule of the NASD's Rules of Fair Practice; and (3) Merrill Lynch was not paid for the investments and, thus, Claimant was not a customer of Merrill Lynch for those investments. Merrill Lynch also asserted that the evidence showed clearly that the investments at issue were not sponsored in any way by Merrill Lynch.

### RELIEF REQUESTED

Claimant requested compensatory damages in a minimum amount of \$150,000.00; punitive damages in the panel's discretion; treble damages pursuant to Chapter 772, Florida Statutes (1987); reasonable attorneys' fees, pursuant to Chapter 517, Florida Statute (1987); prejudgment interest on the compensatory damages; costs of this action including expert witness fees; and, any other relief as the arbitrators deem appropriate.

Respondent Merrill Lynch requested that the Statement of Claim be dismissed with prejudice in its entirety and further pointed out that the panel was without the power to award attorneys' fees in this case.

### OTHER ISSUES CONSIDERED & DECIDED

1. Pursuant to Rule 10101 of the Code of Arbitration Procedure ("Code") the arbitration panel found subject matter jurisdiction over this entire controversy.
2. Respondent Griswold did not attend the hearing nor did he file a Statement of Answer and properly executed Submission Agreement pursuant to Rule 10314(b) of the Code.
3. The arbitration panel determined that there was not sufficient proof of service with respect to Respondent Griswold in the case file, as required under Rule 10314(a) of the Code, and that the parties did not provide proof of personal service upon Griswold at the hearing. Therefore, the arbitration panel is dismissing, without prejudice, the claims against Respondent Griswold.

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4. 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 NASD Regulation, Inc.

#### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Merrill Lynch is found liable and shall pay to the Claimant the sum of \$130,000.00 inclusive of pre-judgment interest.
2. All claims against Respondent Griswold are hereby dismissed without prejudice.
3. Claimant's requests for punitive damages, treble damages, costs and expert witness fees are hereby denied.
4. A court of competent jurisdiction shall determine the issue of entitlement to and amount, if any of attorneys' fees to be awarded.
5. Respondent Merrill Lynch shall pay to the Claimant the sum of \$750.00 representing reimbursement of the hearing session deposit previously paid to NASD Regulation, Inc. by the Claimant.

#### **FORUM FEES**

Pursuant to Rule 10332(c) of the Code the arbitration panel has assessed forum fees in the amount of \$6,000.00 (one (1) pre-hearing conference (panel) x \$750.00 + seven (7) hearing sessions x \$750.00).

1. Respondent Merrill is hereby assessed forum fees in the amount of \$6,000.00 for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited by the Claimant in partial satisfaction thereof leaving a balance due to NASD Regulation, Inc. by Respondent Merrill Lynch of \$5,250.00.
2. NASD Regulation, Inc. shall retain the claim filing fee of \$200.00 paid by the Claimant.
3. NASD Regulation, Inc. shall retain the member surcharge of \$350.00 paid by Respondent Merrill Lynch pursuant to Rule 10333 of the Code.

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

ARBITRATION PANEL

Concurring Arbitrators' Signatures

/s/  
John B. Kelley, Esq.

Public/Chairperson

/s/  
Edward S. Burstein

Industry/Panelist

/s/  
Frank Nussbaum, Esq.

Public/Panelist

Date of Decision: March 2, 1998