

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Emily Decker,

Claimant,

v

No. 95-03556

Merrill Lynch, Pierce, Fenner & Smith, Inc.,  
Jeffrey C. Hopp, Sun Investment Services Company, and  
Robert V. Linkner,

Respondents.

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## **REPRESENTATION OF PARTIES**

Claimant Emily Decker ("Claimant") was represented by Joseph H. Spiegel, Esq. of Joseph H. Spiegel, P.C. located in Southfield, Michigan.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Jeffrey C. Hopp ("Hopp") were represented by Clarence L. Pozza, Jr., Esq. of Miller, Cantfield, Paddock and Stone located in Detroit, Michigan.

Respondent Sun Investment Services Company ("Sun Investment Services") was represented by Francis R. Ortiz, Esq. of Dickinson, Wright, Moon, Van Dusen & Freeman located in Detroit, Michigan.

Respondent Robert V. Linkner ("Linkner") was represented by Gregory I. Thomas, Esq. of Thomas, DeGrood, Witenoff & Hoffman, P.C. located in Southfield, Michigan.

## **CASE INFORMATION**

The Statement of Claim was filed on or about July 24, 1995.

The Amended Statement of Claim was filed on or about July 3, 1996.

Claimant's Submission Agreement was signed on July 14, 1995.

Respondent Merrill Lynch and Hopp's Statement of Answer was filed on or about September 28, 1995.

Respondent Merrill Lynch's Submission Agreement was signed on September 27, 1995 by Jonathan A. Schorr of Merrill Lynch.

Respondent Hopp's Submission Agreement was signed on October 11, 1995.

Respondent Sun Investment Services' Answer to the Amended Statement of Claim was filed on or about October 28, 1996.

Respondent Sun Investment Services' Submission Agreement was signed on September 9, 1996 by Laurie Lennox of Sun Investment Services.

Respondent Linkner's Answer to the Amended Statement of Claim was filed on or about October 28, 1996.

Respondent Linkner did not file a properly executed Submission Agreement with NASD Regulation, Inc. Office of Dispute Resolution.

### HEARING INFORMATION

A telephonic pre-hearing conference was held on: April 9, 1997 for one (1) session and May 13, 1997 for one (1) session.

The hearing was held on: May 20, 1997 for two (2) sessions; May 21, 1997 for two (2) sessions; June 30, 1997 for two (2) sessions; July 1, 1997 for two (2) sessions; July 2, 1997 for two (2) sessions; September 16, 1997 for two (2) sessions; September 17, 1997 for two (2) sessions; October 13, 1997 for two (2) sessions; October 14, 1997 for two (2) sessions; and November 12, 1997 for two (2) sessions.

The hearing was held in Southfield, Michigan.

### CASE SUMMARY

Claimant was a thirty-five year old mother of three young children at the time of the alleged wrongful conduct. Claimant contended she was in the process of going through a divorce in 1992, and throughout the time in question was a single parent. Claimant asserted that, in 1992, she inherited from her grandmother's estate over \$1,400,000, of which \$970,000 was Old Republic International Corporation ("Old Republic") stock with the balance consisting of a variety of blue chip securities. Claimant maintained that all of the stock had a very low basis.

Claimant alleged that, in late 1992, Respondent Linkner, a financial planner, and registered representative of Sun Investment Services, reviewed Claimant's holdings and met with her regarding future strategy for her investments. Claimant contended that Respondent Linkner introduced her to Respondent Hopp, a Merrill Lynch broker. Claimant asserted that she expressed that she did not want to have the day-to-day responsibility of running the account, as she was a busy working mother with no investment experience. Claimant maintained that she told Respondents Linkner and Hopp that she was very conservative, did not want to risk losing principal and wanted a steady monthly income.

Claimant alleged that, in January 1993, she deposited all of her securities, valued at over \$1,400,000 with Merrill Lynch. Claimant contended that, among the other account opening papers, she had signed Merrill Lynch documents/agreements giving Respondent Linkner discretion over the account. Claimant asserted that she later orally withdrew the authority, but gave it to Respondent Hopp instead. Claimant asserted that from the opening of the account until Claimant discovered the wrongdoing, Respondents Hopp and Merrill Lynch had discretion over Claimant's account. Claimant claims Respondents owed Claimant a high degree of fiduciary duty. Claimant maintained that she completely trusted Respondents Linkner and Hopp. Claimant alleged that Respondents Linkner, Merrill Lynch and Hopp, contrary to Claimant's best interest, recommended the sale of all the Old Republic which had a low basis that resulted in a tax in excess of \$280,000. Claimant contended that, in order to achieve a benefit from these series of transactions, Claimant would have had to earn substantial profits from the purchases of securities to make up for the taxes paid, probably in the amount of 50% or more.

Claimant alleged that, in early January 1995, she told Respondent Hopp not to sell any more Old Republic stock. Claimant claims that Respondent Hopp engaged in at least four unauthorized transactions after that time.

Claimant contended that, from the time the securities were received in January 1993 through, approximately January 1995, the account generated over \$67,000 in commissions, incurred nearly

\$18,000 in interest and incurred a net trading loss of about \$90,000. Claimant asserted that no written or oral investment plan was prepared for or presented to Claimant by any of the Respondents. Claimant maintained that the cost/equity ratio of the account was over 8.6%. Claimant maintained that Respondent Linkner failed to recommend and implement a Charitable Remainder Trust which resulted in \$2,700,000 in damages, attorneys fees and costs. Claimant alleged Respondents Merrill Lynch and Hopp caused over \$700,000 in damages, including commissions, trading losses, interest and unnecessary taxes, attorneys fees and costs.

Respondents Merrill Lynch and Hopp denied all allegations of wrongdoing, breach of duty, liability and damages. Respondents Merrill Lynch and Hopp asserted that the transactions opened at Merrill Lynch were profitable. Respondents Merrill Lynch and Hopp alleged that any alleged losses were caused by the decline in market value of positions transferred into the account by Claimant, and by securities sales required to fund Claimant's withdrawals of over one million dollars from the account.

Respondent Merrill Lynch and Hopp contended that all transactions were undertaken with Claimant's authorization, knowledge and consent and were not excessive. Respondents Merrill Lynch and Hopp alleged that all transactions were suitable for Claimant given the objectives and risk tolerance and were the result of numerous discussions and meetings. Respondents Merrill Lynch and Hopp contended that Respondents advised Claimant of the risks inherent in the investments and Claimant knowingly chose to assume the risks. Respondents Merrill Lynch and Hopp asserted that transactions were undertaken after discussion and authorization to diversify Claimant's account in an orderly, gradual and reasonable fashion. Respondents Merrill Lynch and Hopp maintained that, at all times, there was proper supervision of the account. Respondents Merrill Lynch and Hopp asserted affirmative defenses including: authorization and ratification; estoppel; statutes of limitation; failure to mitigate; market conditions; and a constitutional bar to punitive damages.

Respondent Sun Investment Services denied that it committed any of the wrongdoing alleged in the Statement of Claim or that it otherwise breached any obligation or violated any duty to Claimant. Respondent Sun Investment Services contended that its only involvement with Claimant's finances or investments occurred during the period from October 1992 through approximately October 1993, when its registered representative, Respondent Linkner, sold Claimant (a) two tax credit limited partnership interests for a total investment of \$50,000 and (b) several mutual funds for a total investment of \$83,000. Respondent Sun Investment Services asserted that the Claimant still owns the limited partnership interests, has already taken certain tax credits, and has additional tax credits available in the future. Respondent Sun Investment Services maintained that the mutual funds have all performed well, but the Claimant sold many of them through another broker. Respondent Sun Investment Services alleged that all of these investments were entirely suitable for the Claimant in order to, among other things, diversify her \$1.3 million dollar portfolio that was heavily concentrated in Old Republic stock.

Respondent Linkner alleged that the financial plan he recommended for Claimant was both reasonable and appropriate under the circumstances. Respondent Linkner contended that he recommended that Claimant purchase \$1,000,000 of life insurance, something that no witness testified would be inappropriate for a young woman with three small children and an estate of \$1,400,000. Respondent Linkner asserted that he recommended that Claimant sell down her over-concentration in Old Republic over a period of five years, something that no witness testified was inappropriate. Respondent Linkner maintained that he suggested that Claimant purchase \$83,000 in mutual funds, which was entirely consistent with her desire to divest some of the Old Republic stock while at the same time not being required to be involved in the day-to-day management of her portfolio. Respondent Linkner alleged that he suggested that Claimant purchase \$50,000 of the Boston Capital Low Income Housing Tax Credit Program, which not only complied with Claimant's desire to do something socially responsible, but also provided her with tax credits to offset the capital gain taxes that would be incurred as a result of the Old Republic stock diversification.

#### **RELIEF REQUESTED**

Claimant requested an award for over \$700,000 in damages, attorneys fees and costs, plus punitive damages totaling over \$10,000,000.

Respondents Merrill Lynch and Hopp requested that all claims be denied in their entirety with costs and attorney fees assessed to Claimant.

Respondent Sun Investment Services requested that the Statement of Claim be dismissed in its entirety and an award of \$30,000 in attorney fees and litigation costs.

Respondent Linkner requested that the Statement of Claim be dismissed in its entirety with prejudice, plus an award of sanctions in the amount of \$2,500 per day of arbitration be assessed, for a total of \$25,000.

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

Respondent Linkner did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

The "Case Summary" and "Relief Requested" sections of the award were based on summaries prepared and submitted by the parties.

### 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) That Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey C. Hopp are jointly and severally liable for and shall pay to Claimant Emily Decker damages in the amount of Forty Thousand Dollars and No Cents (\$40,000.00);
- (2) That all claims against Respondents Sun Investment Services Company and Robert V. Linkner are hereby dismissed in their entirety with prejudice;
- (3) That other than forum fees which are specified below, the parties shall each bear their own costs, expenses, and attorneys' fees incurred in this matter; and
- (4) That any relief not specifically enumerated is hereby denied with prejudice.

### FORUM FEES

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each pre-hearing conference, if any. There were two (2) pre-hearing sessions x \$300 = \$600, and there were twenty (20) hearing sessions x \$1,500 = \$30,000 in forum fees. Total forum fees = \$30,600. Pursuant to §10332(b) of 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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$300 and shall **refund** the hearing session

deposit in the amount of \$1,500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to §10332(c) of the Code, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay all forum fees in the amount of \$30,600.

Pursuant to §10333 of the Code, Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Sun Investment Services Company are each separately liable for and shall pay the member surcharge fee in the amount of \$500.

**Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Concurring Arbitrators' Signatures

/s/ Stephen K. Woods, Esq.  
Stephen K. Woods, Esq.  
Chairperson  
Public Arbitrator

December 1, 1997  
Dated:

/s/ Michael J. Meeusen, Esq.  
Michael J. Meeusen, Esq.  
Panelist  
Public Arbitrator

December 4, 1997  
Dated:

/s/ Peter S. Viviano  
Peter S. Viviano  
Panelist  
Industry Arbitrator

December 9, 1997  
Dated:

For NASD use only:  
Date award served on the parties: December 9, 1997