

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of Arbitration Between

Fae Greenburg Living Trust, Bradley J. Fink, Denise Price,  
Michele Kichura, and Doris Fisher,

Claimants,

and

No. 95-04795

Advest, Inc. and Charles Wayne O'Neal,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimants, Fae Greenburg Living Trust, Bradley J. Fink, Denise Price, Michele Kichura, and Doris Fisher, were represented by Mayer S. Klein, Esquire of Newman, Goldfarb, Freyman, Stevens & Klein, P.C., located in St. Louis, Missouri.

Respondents, Advest, Incorporated and Charles Wayne O'Neal, were represented by Barry J. Kronemer, Esquire of Advest, Incorporated, located in Hartford, Connecticut.

### **CASE INFORMATION**

Fae Greenburg Living Trust, Bradley J. Fink, Denise Price, Michele Kichura, and Doris Fisher's Statement of Claim was filed on or about October 10, 1995.

Fae Greenburg Living Trust, Bradley J. Fink, Denise Price, Michele Kichura, and Doris Fisher's First Amended Statement of Claim was filed on or about August 12, 1996.

Fae Greenburg Living Trust, Bradley J. Fink, Denise Price, Michele Kichura, and Doris Fisher's Second Amended Statement of Claim was filed on or about March 7, 1997.

Fae Greenburg Living Trust's Submission Agreement was signed on or about October 25, 1995 by Fae Greenburg, Trustee of the Fae Greenburg Living Trust.

Bradley J. Fink's Submission Agreement was signed on or about September 27, 1995.

Denise Price's submission Agreement was signed on or about September 26, 1995.

Michele Kichura's submission Agreement was signed on or about September 27, 1995.

Doris Fisher's Submission Agreement was signed on September 26, 1995.

Advest, Incorporated and Charles Wayne O'Neal's Statement of Answer was filed on or about January 3, 1996.

Advest, Incorporated and Charles Wayne O'Neal's Amended Statement of Answer was filed on or about August 21, 1996.

Advest, Incorporated and Charles Wayne O'Neal's Amended Statement of Answer to the Second Amended Statement of Claim was filed on or about March 21, 1997.

Advest, Incorporated's Submission Agreement was signed on January 3, 1996 by Lee G. Kuckro, General Counsel of Advest, Incorporated

Charles Wayne O'Neal's Submission Agreement was signed on January 3, 1996.

### **HEARING INFORMATION**

Pre-hearing conferences were held on: June 20, 1996 for one (1) session; August 22, 1996 for one (1) session; and November 6, 1996 for one (1) session.

The hearing was held on: July 22, 1997 for two (2) sessions, and on July 23, 1997 for three (3) sessions.

The hearing was held in St. Louis, Missouri.

### **CASE SUMMARY**

Claimants, Fae Greenburg Living Trust, Bradley J. Fink, Denise Price, Michele Kichura, and Doris Fisher (hereinafter collectively referred to as "Claimants"), brought this action to recover losses sustained in their accounts allegedly through unsuitable investments and misrepresentations of investments recommended by Charles Wayne O'Neal ("O'Neal") while a registered representative of Advest, Incorporated ("Advest").

According to Claimants, on or about April 13, 1993, Fae Greenburg entered certain "Advest Account Agreements" with Advest and O'Neal (hereinafter collectively referred to as "Respondents"), some of which were held in joint tenancy with the other claimants. Claimants stated that all of Fae Greenburg's funds were invested in American Strategic Income Portfolio, Incorporated III, TCW

DW Term Trust 2003-SBI Alliance World Dollar Government Fund II, and Heritage U. S. Government Income Fund - SBI Funds (the "Funds"). Claimants alleged that Respondents did not advise Fae Greenburg of the risk involved in investment in the Funds and that the value of the Funds would decrease should interest rates rise. Claimants further averred that Fae Greenburg would not have agreed to authorize the investment in the Funds had she been aware of the facts that Respondents omitted to relate to her. These investments, Claimants further alleged, were unsuitable for Fae Greenburg as Respondents were well aware that she was an unsophisticated investor and that her investment objective was to maintain safe income-producing investments without any risk of loss of the principal. Claimants asserted that Fae Greenburg invested a principal amount of \$145,000, which was depleted to \$105,000 as a direct and proximate result of Respondents acts.

Respondent denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on their part. Respondents stated that Claimants came to Advest looking for higher return, and were free to buy certificates of deposit and treasury bonds, but rejected them because of low return. According to Respondents, not all of Claimants were unsophisticated investors. Respondents asserted the following affirmative defenses: (1) Claimants failed to state a cause of action; and (2) Claimants' claims are barred by the doctrine of ratification.

#### **RELIEF REQUESTED**

Claimants, Fae Greenburg Living Trust, Bradley J. Fink, Denise Rce, Michele Kichura, and Doris Fisher, requested an award for: compensatory damages of at least \$40,000, plus lost profits, interest, commissions, concessions, expert witness fees, attorneys' fees, and costs; and punitive damages.

Respondents, Advest, Incorporated and Charles Wayne O'Neal, requested that the claims asserted against them be dismissed in their entirety with prejudice.

#### **OTHER ISSUES CONSIDERED AND 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 original(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

#### **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. Respondents Advest, Inc. and Charles Wayne O'Neal are jointly and severally liable for, and shall pay to Fae Greenburg the sum of \$20,000, plus interest at the rate of 10% per annum from the date of the award, as satisfaction of their claims for

compensatory damages and interest; and

2. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each pre-hearing conference, if any. There were three (3) pre-hearing conferences x \$300 and there were five (5) hearing sessions x \$400 = \$2,900 in forum fees. Pursuant to § 10332(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 § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$120 and shall retain as forum fees the hearing session deposit in the amount of \$400 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Fae Greenburg Living Trust, Bradley J. Fink, Denise Price, Michele Kichura, and Doris Fisher.

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$200 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Advest, Incorporated.

Additional forum fees in the amount of \$2,500 (\$2,900 - \$400 hearing session deposit) are assessed jointly and severally against Advest, Inc. and Charles Wayne O'Neal.

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

#### Concurring Arbitrators' Signatures

Thomas J Ray  
Thomas J. Ray, Esquire  
Chairperson  
Public Arbitrator

/s/

July 30, 1997  
Dated:

Bryan Goetz  
Bryan Goetz  
Panelist  
Public Arbitrator

/s/

July 30, 1997  
Dated:

Richard L. Johannesman  
Richard L. Johannesman  
Panelist  
Industry Arbitrator

/s/

August 22, 1997  
Dated: