

NASD REGULATION, INC.  
AWARD

---

In the Matter of the Arbitration Between

Name of Claimant

Amy Shui

96-01019

Name of Respondents

Advest, Inc.  
Allan Fink  
Patrick Thorogood

---

**REPRESENTATION**

For Claimant Amy Shui ("Claimant") appeared Ruthann Niosi, Esq., a sole practitioner with law offices located in New York, New York.

For Respondents Advest, Inc. ("Advest"), Allan Fink ("Fink"), and Patrick Thorogood ("Thorogood"), collectively "Respondents", appeared Cynthia Feigin, Esq., of the law office of Davis, Scott, Weber & Edwards, P.C., located in New York, New York.

**CASE INFORMATION**

Claimant's Statement of Claim was filed on March 6, 1996.  
Claimant's Answer to the Counterclaim was filed on June 2, 1996.  
Claimant's Submission Agreement was signed on March 5, 1996.

Respondents' Joint Statement of Answer and Counterclaim was filed on May 6, 1996.  
Advest's Submission Agreement was signed on April 29, 1996.  
Fink's Submission Agreement was signed on April 29, 1996.  
Thorogood's Submission Agreement was signed on April 29, 1996.

**HEARING INFORMATION**

Pre-Hearing Conference:	December 1, 1997	One Session
Hearing Dates/Sessions:	February 26, 1998	One Session
	February 27, 1998	Two Sessions
	April 13, 1998	Two Sessions

April 20, 1998

Two Sessions

April 23, 1998

Two Sessions

The hearings were conducted at the offices of NASD Regulation, Inc. located in New York, New York.

### CASE SUMMARY

Claimant alleged that she was employed in retail sales as a registered representative at Advest. Claimant alleged that she placed short positions on November 2, 1994 in two securities in several clients' accounts with their full consent and/or authorization and in accordance with their investment objectives. Claimant asserted that these transactions were both authorized and journaled into margin accounts by her manager, Thorogood. Claimant further alleged that she relied upon Advest and Thorogood to ensure that all procedures relating to margin accounts were being complied with. Claimant alleged she advised Advest to make certain that margin accounts were either obtained or on file. Claimant asserted that she advised Thorogood of her concern regarding the short positions, but he assured her that the situation was under control. Claimant alleged Thorogood asked her to review all open positions and stated that he would handle her accounts while she was away on vacation. Claimant asserted that Thorogood proceeded to close out the short positions in two accounts without the clients' permission and despite one client's offer to deposit money into his account to cover the short. Claimant alleged Thorogood convinced another client not to close out all his short positions. Claimant alleged that she was informed that Thorogood received an order from Advest management to liquidate all short positions in her three ERISA accounts. Claimant maintained that she was assured that the losses incurred by calling in the positions would be covered by Errors and Omissions Insurance and that she would not be fired. Claimant alleged that Respondents advised her not to consult her attorney about the situation and insisted that she settle the accounts between her clients and Advest. Claimant alleged Thorogood continued to have her work on accounts that had not settled throughout this time period. Claimant further alleged that Thorogood's manager, Fink, stated that she was obligated to pay \$81,400.00 as the deductible for the insurance. Claimant alleged that she gave Fink a check for \$25,000.00 and instructed him to withhold her January and February paychecks to finance the remaining portion. Claimant alleged Respondents fraudulently misrepresented her obligation to pay the insurance. Claimant asserted that her employment was terminated by Thorogood on February 14, 1995 due to customer complaints. Claimant also asserted that Advest unfairly asked her to forfeit previously earned fees. Claimant alleged Respondents committed: fraud; breach of fiduciary duty; tortious interference; intentional infliction of emotional distress; and violations under New York's Labor Law.

Respondents maintained Claimant had a fiduciary duty to her customers by virtue of her discretionary authority to place trades in their accounts and a contractual obligation to ensure that all her trades in the Advest Management Portfolio Service ("AMPS") accounts were suitable given the customers' stated investment objectives and risk tolerance levels. Respondents further maintained that Claimant had an obligation to ensure that all recommended trades satisfied the suitability requirements of the NASD, as well as Advest's policies and procedures. Respondents contended that Claimant abused her discretion in placing short positions in AMPS accounts and trust and/or pension accounts, violated suitability requirements by placing short positions in

accounts with safety as the primary investment objective, failed to obtain the necessary margin agreements and violated Advest's policies and procedures by placing short positions without approval of the Stock Loan Department. Respondents contended that Claimant, in order to get Thorogood's approval and circumvent short sale procedures, entered the trades as long and then "cancelled and corrected" them to short positions without Thorogood's knowledge. Respondents further maintain Thorogood never informed Claimant that he would handle her accounts while she was on vacation. Respondents asserted that when they discovered the inappropriate short positions, Advest closed out the positions at a loss and reimbursed the customers for their losses. Respondents maintained that they never promised that Claimant would not be fired. Respondents asserted that Claimant was properly terminated for cause on February 15, 1996 after an investigation. Respondents maintained that they never told her not to consult her attorney. Respondents further asserted that it was reasonable for Claimant to pay the insurance deductible and her commission fees were retained to cover the balance still owing.

Respondents asserted in their First Counterclaim that Claimant signed a promissory note ("Note") with Advest in the amount of \$107,995.00 on August 16, 1995. Respondents further asserted that Claimant agreed to pay the unpaid principal plus accrued interest upon an event of default. Respondents maintained that the Note therefore became due when Claimant was discharged. Respondents asserted that they demanded payment, but no monies were received.

Respondents alleged in their Second Counterclaim that since Claimant's conduct created the losses, she is liable for the entire deductible.

Claimant alleged that there never existed a valid contract between her and the Respondents, either under a promissory note or pursuant to settlements made by Respondents with her clients. Claimant further alleged that her conduct was not the cause of the losses.

### **RELIEF REQUESTED**

Claimant requested compensatory and punitive damages.

Respondents requested that the Statement of Claim be dismissed in its entirety. In their Counterclaim Respondents requested damages in the amount of \$187,484.47, plus interest, costs and attorneys' fees.

Claimant requested that the Counterclaim be dismissed in its entirety.

### **OTHER ISSUES CONSIDERED & 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 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:

1. The claims of Shui against Respondents are denied, except to the following extent:
  - (a) Advest will refund to Shui the sum of \$93,412.00 that it received from Shui, either by check, deductions from her gross pay or amounts due from Smith Barney and Prudential as set forth in Shui's Exhibit 24. This refund, however, will be netted against amounts owed by Shui to Advest as set forth below.
  - (b) Advest should correct the Form U-5, Uniform Termination Notice, that it filed with respect to Shui (Shui's Exhibit 15), to the following extent: The DRPs that were filed with respect to Andrew and Ann DeMarco, Han-I Lien, M. Horiki and Han-I Lien should be withdrawn on the ground that the evidence did not establish that those investors made complaints against Shui.
2. Counterclaim of Advest:
  - (a) Advest's claim that Shui should contribute \$5,000.00 for each investor with whom Advest settled, which sum represents a deductible per claim under the E&O insurance policy, is upheld but only to the extent that Shui will be responsible for the deductible for those six investors, listed on Respondents' Exhibit ZZ, as to whom there was no margin agreement in effect, for a total obligation of \$30,000.00.
  - (b) Advest's claim against Shui for \$107,995 under the promissory note, dated August 16, 1995, is upheld.
3. In Conclusion:
  - (a) No interest will be added to the foregoing amounts. Inasmuch as the amounts owed by Shui to Advest are to be netted out against the amounts owed by Advest to Shui, Shui owes Advest \$44,583.00.
  - (b) The costs and expenses of the proceeding will be shared equally between Shui and the Respondents.

### **FORUM FEES**

Pursuant to Rule 10205(c) of the NASD Regulation Code of Arbitration Procedure, the arbitrators have determined that the NASD will retain the \$500.00 non-refundable filing fee and \$600.00 postponement fee paid by Shui and the \$500.00 non-refundable filing fee and \$350.00 member surcharge paid by Advest. In addition, the arbitrators have assessed the following Forum Fees:

1 Pre-hearing conference (full panel) x \$750.00	=	\$ 750.00
9 Hearing sessions x \$750.00	=	<u>\$6,750.00</u>
Total Forum Fees	=	\$7,500.00

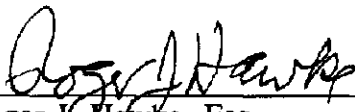
1. Claimant is liable for and shall pay the sum of \$3,750.00 representing one-half of the total forum fees assessed. Claimant previously deposited \$700.00 with NASD Regulation, Inc., and, therefore, shall remit the \$3,050.00 remaining balance.
2. Respondents are jointly and severally liable and shall pay the sum of \$3,750.00 representing one-half of the total forum fees assessed. Respondents previously deposited \$765.00 with NASD Regulation, Inc., and, therefore, shall remit the \$2,985.00 remaining balance.

Fees are payable to NASD Regulation, Inc.

**ARBITRATION PANEL**


Roger J. Hawke, Esq.	-	Public Chairperson
Anthony P. Connolly	-	Public Arbitrator
Thomas A. Turley	-	Industry Arbitrator

**CONCURRING ARBITRATOR'S SIGNATURE**

  
\_\_\_\_\_  
Roger J. Hawke, Esq.  
Chairperson - Public Arbitrator

Date of decision: June 2, 1998

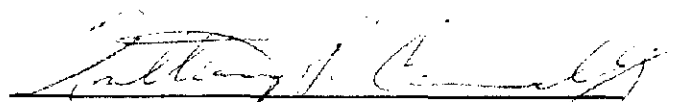
I, **Roger J. Hawke, Esq.**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Roger J. Hawke, Esq.

**ARBITRATION PANEL**


Roger J. Hawke, Esq.	-	Public Chairperson
Anthony P. Connolly	-	Public Arbitrator
Thomas A. Turley	-	Industry Arbitrator

**CONCURRING ARBITRATOR'S SIGNATURE**

  
\_\_\_\_\_  
Anthony P. Connolly  
Public Arbitrator

Date of decision: June 2, 1998

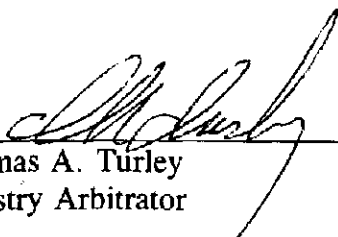
I, **Anthony P. Connolly**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Anthony P. Connolly

**ARBITRATION PANEL**

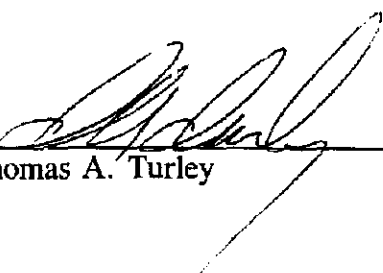
Roger J. Hawke, Esq.	-	Public Chairperson
Anthony P. Connolly	-	Public Arbitrator
Thomas A. Turley	-	Industry Arbitrator

**CONCURRING ARBITRATOR'S SIGNATURE**

  
\_\_\_\_\_  
Thomas A. Turley  
Industry Arbitrator

Date of decision: June 2, 1998

I, **Thomas A. Turley**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Thomas A. Turley