

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Leslie Ann Fletcher

96-04014

Name of Respondents

Fox & Company Investments  
Nicholas J. Klapp  
Jim Moldermaker

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**CASE SUMMARY**

In a case filed with the National Association of Securities Dealers Regulation, Inc. on September 9, 1996, claimant Leslie Ann Fletcher ("claimant"), who appeared Pro Se, alleged that respondents Fox & Company Investments ("Fox"), Nicholas Klapp ("Klapp") and Jim Moldermaker ("Moldermaker") failed to repay money loaned to Klapp as agreed to by a Promissory Note ("Note"). Claimant further alleged that she had a meeting with Klapp, who was acting as an employee and branch manager of Fox, when he asked to borrow \$5,000.00 in September 1994. Claimant asserted that Klapp was her investment adviser, who she trusted to make appropriate recommendations with the investment of her money. Claimant further asserted that Klapp made this appear to be an attractive investment opportunity providing a return on the investment of 18%. Claimant also asserted that she asked Klapp if he could pursue alternative means for acquiring the funds, but stated there were no other avenues and pressured her to lend him the money.

Claimant contended that on September 14, 1994, she reluctantly gave Klapp a check for \$5,000.00 and drew up and both signed a Promissory Note ("Note") stating the specific terms of the loan. Claimant further contended that the terms of the Note provided an 18% annual interest rate return, due in full by March 15, 1995. Claimant also contended that Klapp to this day has not repaid the Note. Claimant maintained that continuing to get no response from Klapp, she began to pursue the matter with Moldermaker, President and Compliance Officer at Fox. Claimant further maintained Moldermaker was aware of the situation and was unwilling to assist in the resolution. Claimant also maintained that Moldermaker failed to supervise Klapp, and was negligent for allowing this to happen to a client of Fox.

Respondent Fox and Moldermaker (collectively referred to as "respondents"), through their representative and President James W. Moldermaker, maintained that the two individuals involved with the loan were consenting single adults romantically involved. Respondents also maintained that the romantic nature of their relationship enhanced Klapp's position to commit this fraud. Respondents contended that it is true NASD Rules of Fair Practice prohibit registered representatives from borrowing money from their customers and on June 16, 1994 an annual compliance interview was conducted by Moldermaker with Klapp at his office. Respondents contended that at the interview Klapp answered that he was aware of the regulations that prohibits borrowing or lending customers money and stated that he had not engaged

such conduct anything like this. Respondents maintained that Moldermaker demonstrated reasonable diligence in the supervision of Klapp. Respondents further maintained that Klapp acted solely on his own behalf and is solely responsible.

Respondent Nicholas Klapp did not file an Answer to the Statement of Claim nor did he execute a Submission Agreement.

#### **RELIEF REQUESTED**

Claimant Leslie Fletcher requested: (1) \$5,000.00; (2) \$1,875.00 representing 18% annual interest through the date of this resolution; and (3) \$125.00 for the filing fee.

Respondents Moldermaker and Fox requested that the claims of claimant be dismissed in their entirety against them and that Klapp should be solely responsible for his actions.

Respondent Klapp did not file an Answer to the Statement of Claim.

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

The arbitrator determined that respondent Nicholas Klapp was never served in this matter, therefore, declined to make any award concerning respondent Nicholas Klapp. The arbitrator dismissed the claims asserted against Nicholas Klapp without prejudice.

#### **REPORT OF THE ARBITRATOR**

A. Respondents Fox & Company Investments and Jim Moldermaker as President of Fox & Company Investments are liable, jointly and severally, to Leslie Ann Fletcher for the sum of \$5,000.00 plus interest at ten percent per annum from September 14, 1994 until paid.

B. There is no evidence in the file provided the arbitrator that Nicholas J. Klapp was ever served in this matter. Accordingly, the arbitrator declines to make any award concerning Nicholas J. Klapp. At some time in the future, if it is necessary, and if Claimant wishes and if service on Nicholas J. Klapp can be accomplished, the matter may proceed against him. In this regard, the arbitrator notes that Fox & Company Investments stated that "Fox and Company could provide addresses for Mr. Klapp and his closest relatives and parents to help the claimant (to proceed in another action against Klapp)" but apparently did not provide the information for service in this matter to the NASD.

C. The liability set forth in A. above is based upon the following facts that appear to be uncontested:

1. Claimant was a customer of Fox & Company Investments and her registered representative was Nicholas J. Klapp. Claimant had been a customer of Fox & Company and Klapp for five years prior to September, 1994.
2. Klapp was a manager of the Fox & Company office in Tempe, Arizona.
3. Klapp was suspended by Fox & Company on August 29, 1994 and terminated thereafter, without being reinstated, on August 1, 1996.

4. After being suspended on August 29, 1994 there is no evidence that the fact of his suspension was communicated to his customers.
5. Although he had been suspended, Klapp was allowed to use the Tempe office of Fox & Company and met there with Claimant, a customer of Fox & Company, in early September 1994.
6. Apparently Fox & Company was aware that the relationship between Claimant and Klapp was more than that of registered representative and customer.
7. There is nothing in the record to show that at the time of making the loan to Klapp the Claimant was aware that he had been suspended. Substantially after the loan Claimant was told that Klapp was working out of his home.

The arbitrator finds that the liability set forth in A. above exists because of the failure of the Respondents Fox & Company and Moldermaker its President to communicate the fact of Klapp's suspension to his customers and to prevent Klapp from using the Fox & Company Tempe office. These failures clothed Klapp with an apparent authority that he in fact did not possess. The arbitrator finds that this apparent authority was an inducing factor in claimant's decision to make a loan to Klapp. Had she been advised that Klapp had been suspended and that Klapp did not have the authority to use the Tempe office at Fox & Company she would not have made the loan.

#### AWARD

Pursuant to Rule 10302 of the Code of Arbitration Procedure, a single Public Arbitrator, Frank Lewis, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by claimant Leslie Fletcher on September 7, 1996 and by respondents Fox & Company Investments on October 14, 1996 and by Jim Moldermaker on October 14, 1996 as required by Rules 10301 and 10302 of the Code of Arbitration Procedure.

And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondents Fox and Moldermaker be and hereby are jointly and severally liable and shall pay claimant the sum of \$5,000.00.
2. Respondents Fox and Moldermaker be and hereby are jointly and severally liable and shall pay claimant an interest rate of 10% per annum from September 14, 1994, until paid in full.
3. The \$125.00 filing fee previously deposited by claimant shall be retained by NASD Regulation, Inc. Respondents Moldermaker and Fox be and hereby are jointly and severally liable and shall pay claimant the sum of 125.00 as reimbursement of the filing fee.

**AFFIRMATION**

I, **Frank Lewis, Esq.**, do hereby affirm upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.



Frank Lewis, Esq.

Date of Decision: April 30, 1997