

**Award**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimants

Zane Gubman and Karen Gubman, as Co-Trustees of the Gubman Revocable Trust, and as Co-Trustees of the Sidney Cohn Life Insurance Trust

Case Number: 10-02738

vs.

Respondent

The GMS Group, LLC

Hearing Site: Boca Raton, Florida

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Nature of the Dispute: Customers vs. Member

**REPRESENTATION OF PARTIES**

Zane Gubman and Karen Gubman, as Co-Trustees of the Gubman Revocable Trust ("Gubman Revocable Trust"), and as Co-Trustees of the Sidney Cohn Life Insurance Trust ("Sidney Cohn Life Insurance Trust"), hereinafter collectively referred to as "Claimants": Stefan M. Apotheker, Esq. and Jeffrey Erez, Esq., Sonn & Erez, PLC, Fort Lauderdale, FL.

The GMS Group, LLC, hereinafter referred to as "Respondent": John E. Jenkins, Esq., Lubiner & Schmidt, Cranford, NJ.

**CASE INFORMATION**

Statement of Claim filed on or about: June 10, 2010.

Zane Gubman signed the Submission Agreement: June 23, 2010.

Karen Gubman signed the Submission Agreement: June 23, 2010.

Statement of Answer filed by Respondent on or about: September 8, 2010.

The GMS Group, LLC signed the Submission Agreement: October 11, 2010.

**CASE SUMMARY**

Claimants asserted the following causes of action: 1) breach of fiduciary duty; 2) negligence; 3) negligent supervision; 4) fraud; and, 5) breach of contract. The causes of action relate to Claimants' investments in Main Street Natural Gas, Inc. Gas Project Revenue Bonds, Series 2008A ("Main Street Bonds") and Washington Mutual 4% Notes ("Washington Mutual Bonds").

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimants requested: 1) compensatory damages for losses in the range of \$50,000.00 - \$100,000.00; 2) interest; 3) costs; 4) punitive damages; and, 5) further relief as the Arbitrator deemed just and proper.

Respondent requested dismissal of the Statement of Claim in its entirety and for such other and further relief as the Arbitrator deemed just and proper.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrator acknowledges that she has read the pleadings and other materials filed by the parties.

At the evidentiary hearing, the parties jointly requested that the Arbitrator provide an explained decision. Thereafter, the parties jointly reiterated their request for an explained decision in writing. The Arbitrator determined to waive the requirement under Rule 12904(g) of the Code of Arbitration Procedure ("Code") that the parties' written request was to be provided no later than the time for pre-hearing exchange of documents. As such, the Arbitrator has included an explained decision herein.

### **AWARD**

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

The total award amount payable to Claimants is \$69,865.93. The Arbitrator determined this amount as follows:

Respondent is liable for breach of fiduciary duty, negligence, and breach of contract as to the sale of Main Street Bonds and shall pay to Claimant Gubman Revocable Trust \$40,980.97 (\$32,519.82 compensatory plus \$8,461.15 prejudgment interest).

Respondent is liable for breach of fiduciary duty, negligence, and breach of contract as to the sale of Main Street Bonds and shall pay to Claimant Sidney Cohn Life Insurance Trust \$28,884.96 (\$22,712.00 compensatory plus \$6,172.96 prejudgment interest).

All claims for relief as to the sale/purchase of the Washington Mutual Bonds are denied.

Respondent's Rules, FINRA Rules and MSRB Rules all apply to the practices of Respondent and the associated person ("AP") serving as a broker for Respondent. These rules require the company and the AP to deal fairly with the customer in making sales of bonds and fair dealing requires, amongst other things, that Respondent do reasonably thorough research into the terms and creditworthiness of the products it offers, that the company convey that information to its brokers and that the brokers, in turn, make sure that the customer is given all pertinent information. In this case,

because Claimants made it clear that they were relying solely upon the expertise of the AP/Respondent and not interested in doing research on their own, Respondent and the AP could not assume that Claimants brought any particular knowledge to the transaction over and above that which was provided to them by their broker.

In order to adequately familiarize their customer with the Main Street Bonds and Washington Mutual Bonds at issue, Respondent and the AP, needed to know at a minimum 1) the opinions of the three major rating agencies as to the credit risks associated with the bonds, 2) the factual details and terms of the bonds they were proposing for sale, 3) general market conditions, and, 4) the entities whose risk their customer would be exposed to in the event of a default by a participating party.

The evidence shows that as to both the Main Street Bonds and the Washington Mutual Bonds, this information was in the possession of or ascertainable by both Respondent's management and analysts and the AP prior to the sale of the bonds to Claimants.

The underlying principle of law involved in this matter is that material misrepresentations regarding the product being sold and purchased cannot be made by the broker to the client. Material misrepresentations include omissions as well as false affirmative statements. If the AP knew that a risk of default was on someone other than the "named" issuing entity or knew that a particular market condition might adversely affect the value of bonds being offered, he was obligated to convey this information to Claimants so that the latter could make an informed decision. While Claimants routinely made quick decisions about bonds suggested by the AP and always, apparently, bought the suggested bonds, the evidence showed that they never cut the AP off when information was being offered and would more likely than not have listened if the AP had attempted to go into greater detail in connection with a particular offering. Despite the fact that Claimants always bought the bonds suggested by the AP, the evidence shows that in the case of the Main Street Bonds, Claimants may well have declined to purchase them had they been told everything that Respondent and the AP knew or should have known. The evidence showed that Claimants exercised their own judgment when necessary and when fully informed, even if it conflicted with the AP's recommendations. Specifically, Claimants decided to sell the bonds at issue despite the AP's suggestion that they not. Claimants reasonably considered their need for liquidity, the non-payment of interest and concerns that the bonds might lose further value in light of market trends. Claimants then followed their independent judgment to determine when to sell.

Further, Respondent and the AP could not rely upon the belated production of a prospectus to inform Claimants of risks of default. An initial omission of facts could not be cured in this manner.

## MAIN STREET BONDS

As to the Main Street Bonds, which were a new issue, the evidence shows that Claimants were clearly exposed to the risk of any default by Lehman Brothers (parent company and subsidiaries) as participants in the offering and as guarantor(s). Although the bonds were rated as investment grade by the three (3) major rating agencies, additional information was available in April 2008 and August 2008 when they were

offered for sale to Claimants. Specifically, there had been recent downgrades of Lehman Brothers' credit worthiness. The Main Street Bonds were particularly complex in nature with the purchaser's money going through Main Street to Lehman Commodities which then was obligated to purchase gas to be delivered to Main Street which would then distribute the gas for thirty (30) years into the future to municipalities and others. The revenue generated by the sale of the gas was to be used to pay the bond holders, however, Lehman Brothers, the parent company of Lehman Commodities, guaranteed the payment of principle and interest on the bonds. This meant that if there was a default anywhere along the line, including by Lehman Commodities, the bond holder was exposed to the risk of default of both Lehman Commodities and Lehman Brothers.

The evidence shows and the AP testified that at the time of the sale of the Main Street Bonds, he was aware that there were increased concerns in the general market about Lehman's ratings. He testified that, as a general practice, he advised customers about increased concerns and downgrades but that he doesn't recall if he told Claimants about recent downgrades of Lehman. Claimants testified that they were never given this information. Claimants further testified that they relied upon the fact that the offering was guaranteed by what Claimants perceived to be a prestigious firm (Lehman Brothers).

Given the availability of relevant information over and above the basics of rate, term, issuer, industry/business of the issuer, guarantor and maturity date which the AP did provide to Claimants, it is the conclusion of the Arbitrator that Respondent and the AP failed to fully inform Claimants of all relevant information which they should have had to make a decision as to whether or not to invest in these bonds. It is specifically concluded that this was not done with the intent to defraud but was rather a negligent omission.

## WASHINGTON MUTUAL BONDS

The requirement of full disclosure, as discussed above, also applies to the sale of the Washington Mutual Bonds as a secondary issue. In this case, however, it is the conclusion of the Arbitrator that full disclosure of all relevant facts was made.

In addition to the basic information always conveyed to prospective buyers, the AP provided more information to Claimants which they were free to consider prior to the purchase of the bonds. He faxed a numbers/news sheet to Claimants for their consideration. The evidence shows that Claimants read the document prior to purchasing the bonds, called the AP back to discuss it and then proceeded with the purchase. The document sent to Claimants had information underlined which indicated that Washington Mutual had sufficient liquidity to pay bond holders at least through the next few years and, because the bonds were to mature within several months of the purchase, Claimants concluded that they were safe to buy. There was sufficient additional information in the document which, although not underlined by the AP to draw attention to it, was available for Claimants to consider so that they could make an informed decision. Whether or not they read the material or disregarded it and only paid attention to the part emphasized by the AP is not relevant. Respondent and the AP provided the information and Claimants could easily have read this brief document to

better determine the suitability of this bond issue to their needs. Again, it is specifically concluded that there was no intent to defraud in the sale of this bond issue.

As such, Respondent is directed to pay a total of \$69,865.93 as specified above.

The Arbitrator's explanation of her decision in the Award is for the information of the parties only and is not precedential in nature.

Any and all claims for relief not specifically addressed herein, including Claimants' request for punitive damages, are denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution assessed a filing fee\* for each claim:

Initial claim filing fee = \$ 975.00

*\*The filing fee is made up of a non-refundable and a refundable portion.*

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a member firm and a party, Respondent is assessed the following:

Member surcharge = \$1,100.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$1,700.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

September 20-23, 2011, adjournment by parties = \$ 450.00

The Arbitrator has assessed \$225.00 of the adjournment fee jointly and severally to Claimants.

The Arbitrator has assessed \$225.00 of the adjournment fee to Respondent.

#### **Hearing Session Fees and Assessments**

The Arbitrator has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s) that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00/session = \$ 900.00

Pre-hearing conferences: October 28, 2010 1 session

November 1, 2011 1 session

Eight (8) Hearing sessions @ \$450.00/session	= \$3,600.00
Hearing Dates: December 5, 2011 2 sessions	
December 6, 2011 2 sessions	
December 7, 2011 2 sessions	
December 8, 2011 2 sessions	
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Total Hearing Session Fees	= \$4,500.00

The Arbitrator has assessed \$2,250.00 of the hearing session fees jointly and severally to Claimants.

The Arbitrator has assessed \$2,250.00 of the hearing session fees to Respondent.

**Explained Decision Fees**

Fees apply if the Chairperson drafts an explained decision based on the parties' timely received joint request for an explained decision.

The Arbitrator has assessed \$200.00 of the explained decision fee jointly and severally to Claimants.

The Arbitrator has assessed \$200.00 of the explained decision fee to Respondent.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATOR**

Alyson R. Dachelet

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Arbitrator's Signature**

/s/

\_\_\_\_\_  
Alyson R. Dachelet  
Sole Public Arbitrator

01/09/2012

\_\_\_\_\_  
Signature Date

January 9, 2012

Date of Service (For FINRA Dispute Resolution office use only)

**ARBITRATOR**

Alyson R. Dachelet

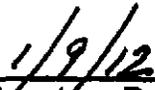
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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Arbitrator's Signature**

  
\_\_\_\_\_  
Alyson R. Dachelet  
Sole Public Arbitrator

  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For FINRA Dispute Resolution office use only)