

Award
NASD Dispute Resolution

COPY

In the Matter of the Arbitration Between:

Naomi Bosley, TTEE The Bosley Family Trust, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey N. Tadder, Respondents

Case Number: 02-04965

Hearing Site: San Diego, California

REPRESENTATION OF PARTIES

For Claimant:

L. Michael Wilson, Esq.
Law Office of Michael Wilson
San Diego, California

For Respondents:

Robert M. Traylor, Esq.
Seltzer Caplan McMahon Vitek
San Diego, California

CASE INFORMATION

Statement of Claim filed: August 20, 2002

Amended Statement of Claim filed: May 5, 2003

Claimant's Uniform Submission Agreement signed: Not dated

Joint Statement of Answer to Statement of Claim filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey N. Tadder: November 12, 2002

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Uniform Submission Agreement signed: November 4, 2002

Respondent Jeffrey N. Tadder's Uniform Submission Agreement signed: October 2, 2002

CASE SUMMARY

In the Original and Amended Statement of Claim, Claimant alleged violation of NYSE and NASD Rules, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, professional malpractice, negligence, violation of Sections 10(B) and 20 of the Securities Exchange Act of 1934 and Rule 10B-5 of the Securities Exchange Commission, fraud, deceit, omission, suitability, common law fraud, intentional misrepresentation, negligent misrepresentation, and "elder abuse". The dispute involved the purchase of a variable annuity for Claimant's Family Trust Account held with Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Original and Amended Statement of Claim and asserted affirmative defenses.

RELIEF REQUESTED

In the Original and Amended Statement of Claim, Claimant requested compensatory damages in the amount of \$25,000.00, unspecified punitive damages, interest, attorney's fees, and arbitration costs.

Respondents requested dismissal of the Claimant's Original and Amended Statement of Claim in their entirety and requested forum fees, arbitration costs, and expenses incurred in defending the Claim. Respondents further requested an order expunging all reference of these proceedings from Respondent Jeffrey N. Tadder's CRD records.

OTHER ISSUES CONSIDERED AND DECIDED

On May 5, 2003, Claimant filed an Amended Statement of Claim pursuant to a stipulation of the parties.

On December 19, 2002, Claimant and Claimant's counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On June 2, 2003, the Arbitrator, having reviewed the submitted documents relative to Dismissal of Claimant's Statement of Claim or to Dismiss/Strike Claimant's "Elder Abuse" Amendment in this case, and after listening to the orally presented arguments to the Arbitrator by all parties, ordered that Respondents' Motion to Dismiss Claimant's Statement of Claim or to Dismiss/Strike Claimant's "Elder Abuse" Amendment be denied en toto, subject to Respondents' reservation to raise said motion at the hearing on this matter. The Arbitrator granted Claimant's request to take up Rule 10304 issues after the presentation of evidence.

On June 30, 2003, the Arbitration Chair granted in part, modified in part, and stayed in pertinent part Claimant's Motion of June 24, 2003 to Further Compel Production of Documents and Motion for Sanctions, as follows:

- 1) As to sanctions to be assessed to Respondents from June 24, 2003, the Chair granted the instant motion but deferred assessment and determination of dollar amounts per day until the close of the hearing.
- 2) Respondents are to pay Claimant's attorney's fees and costs associated with bringing the instant motion in the amount of dollars to be determined and assessed by the Chair after the close of hearing.

On July 2, 2003, during the third session of hearing, Respondents made a Motion to Dismiss Claim. The Arbitrator took the motion under submission.

At the close of hearing, the parties requested permission to submit post-hearing briefs on the merits relative to the claim of elder abuse and also with regard to fees and costs. The Arbitrator took the motion under submission.

On July 11, 2003, Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey N. Tadder's Counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, testimony, and evidence presented at the hearing, the Arbitrator decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondents' Motion to Dismiss Claim made during the third session of hearing, July 2, 2003, is denied.

- 2) Claimant's initial prayers of August 20, 2002 for joint and several assessment of damages recovery, imputed interest on the claim, for decline in value of investments according to proof, for pre and post-award interest in an amount to be proven at hearing, and for exemplary damages and for further just and equitable relief is granted in part, denied in part, and modified in part as follows below:
 - A) Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable to and shall pay Claimant \$20,000.00 in compensatory damages representing the decline in value of Claimant's investments.
 - B) Claimant's prayer for imputed interest on the claim is denied.
 - C) Claimant's prayer for pre-award and post-award interest is denied.
 - D) Claimant's prayer for exemplary damages to make an example of, and punish, Respondents' conduct is denied.
 - E) Claimant's prayer for assessment of damages to Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey N. Tadder to be joint and several is denied.
- 3) Respondents' initial prayers for damages of November 12, 2002 to deny all relief to Claimant, that the Arbitrator award Respondents attorney's fees, forum fees, costs, and other expenses, and that the Arbitrator direct the expungement of any reference to this arbitration from Respondent Jeffrey N. Tadder's regulatory records is denied in full.
- 4) The Chair's decision, following all written and oral presentations through the close of the hearing concerning Claimant's Motion of June 24, 2003 to Further Compel Production of Documents and Motion for Sanctions, is that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable to and shall pay Claimant \$2,750.00 in attorney's fees.
- 5) The Chair's decision, following all written and oral presentations through the close of the hearing concerning Claimant's Motion of June 24, 2003 to Further Compel Production of Documents and Motion for Sanctions, is that there shall be no imposition of sanctions as to Respondents in any amount.
- 6) The parties' request to submit post-hearing submissions is denied.
- 7) Respondents' Motion to Strike/Dismiss Claimant's "Elder Abuse" Amendment is granted.
- 8) Except as noted above, the parties shall bear their respective costs, including attorney's fees.
- 9) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$ 125.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following fees are assessed:

Member Surcharge = \$ 425.00

Total Member Fees = \$ 425.00

Forum Fees and Assessments

The Arbitrator assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Arbitrator. The following fees are assessed:

3 Pre-hearing conference sessions with the Arbitrator @ \$450.00/session = \$ 1,350.00

Pre-hearing conferences: March 13, 2003 1 session
 June 2, 2003 1 session
 June 30, 2003 1 session

4 Hearing sessions @ \$450.00/session = \$ 1,800.00

Hearings: July 1, 2003 2 sessions
 July 2, 2003 2 sessions

Total Forum Fees = \$ 3,150.00

1. The Arbitrator assessed \$450.00 of the forum fees jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey N. Tadder.
2. The Arbitrator assessed \$2,700.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

Fee Summary

1. Claimant Naomi Bosley, TTEE The Bosley Family Trust is charged with the following fees and costs:

Initial Filing Fee	= \$ 125.00
Less payments	= \$(575.00)
Refund Due Claimant	= \$(450.00)

2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is charged with the following fees and costs:

Member Fees	= \$ 425.00
Forum Fees	= \$ 2,700.00
Total Fees	= \$ 3,125.00
Less payments	= \$(1,175.00)
Balance Due NASD Dispute Resolution	= \$ 1,950.00

3. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey N. Tadder are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 450.00
Balance Due NASD Dispute Resolution	= \$ 450.00

All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

NASD Dispute Resolution
Arbitration No. 02-04965
Award Page 7 of 7

ARBITRATOR

James J. Dobbin, Esq.

Public Arbitrator, Presiding Chair

Arbitrator's Signature

James J. Dobbin, Esq.
James J. Dobbin, Esq.
Public Arbitrator

July 16, 2003
Signature Date

7/16/03
Date of Service