

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant

Case Number: 02-05886

Pamela A. Miles Revocable Living Trust
Pamela A. Miles, Trustee

Name of the Respondents

Hearing Site: St. Louis, Missouri

Merrill Lynch Pierce Fenner & Smith, Inc.
and Guy B. Knapp

NATURE OF DISPUTE

Customer vs. Member Firm and Associated Person

REPRESENTATION OF PARTIES

Stuart R. Berkowitz, Esq. of the law firm Platke and Berkowitz, LLP, located in St. Louis, Missouri represented the Claimant, Pamela A. Miles, Trustee of the Pamela A. Miles Revocable Living Trust, hereinafter referred to as "Claimant."

Jeffrey H. Kass, Esq. of the law firm Armstrong Teasdale, LLP, located in St. Louis, Missouri represented Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") and Guy N. Knapp ("Knapp"), hereinafter collectively referred to as "Respondents."

CASE INFORMATION

Statement of Claim filed on October 2, 2002.

Claimant, Pamela A. Miles, Trustee of the Pamela A. Miles Revocable Living Trust, signed the Uniform Submission Agreement on October 2, 2002.

Statement of Answer filed by Respondents, Merrill Lynch Pierce Fenner & Smith and Guy B. Knapp on December 19, 2002.

Respondent, Merrill Lynch, signed the Uniform Submission Agreement on November 2, 2002.

Respondent, Guy B. Knapp, signed the Uniform Submission Agreement on March 13, 2003.

At the close of hearing in this matter, parties were given leave to file post-hearing submissions. On October 20, 2003, Claimant filed a Motion to Amend Statement of Claim to increase compensatory damages. Claimant filed her post-hearing submission on November 4, 2003 to address the amendment to the Statement of Claim arguing that Rule 10314(a) contains no specific pleading requirements for a Statement of Claim, and made specific allegations of unsuitable investments and violations of Missouri's Blue Sky Law. Claimant further argued that a finding of unsuitable recommendations would normally require an award of appropriate damages; Missouri's Blue Sky Law affords additional relief by way of rescission, interest and

attorney's fees.

On November 6, 2003, Respondents filed their post-hearing submission requesting that before closing arguments on November 13, 2003, the Panel hear arguments on newly discovered evidence that Claimant made investment changes to her account after parties completed presenting their case to the Panel. Respondents also filed a Motion to admit into evidence an Affidavit of Respondent, Guy Knapp, regarding Claimant's change of investments.

CASE SUMMARY

Claimant asserted the following causes of action: suitability and failure to supervise. The causes of action relate to the order execution of variable annuities, namely, Gulf, Polaris and Engemann funds. Claimant asserted that these annuities were unsuitable and were over-concentrated, and did not meet Claimant's needs and investment objectives.

Unless specifically admitted in its Answer, Respondents, Merrill Lynch and Knapp, denied the allegations made in the Statement of Claim and asserted the following defenses:

1. No unsuitable trading. Claimant seeks recovery solely under Missouri's Blue Sky Law, which requires Claimant to prove that Knapp made an untrue statement of material fact in connection with the sale of securities. Claimant has not alleged any misrepresentations or omissions and, Knapp did not make any. Had Claimant sought recovery under other theories, this is still not a case of unsuitable trading. Both transactions were discussed and authorized by Claimant.
2. Waiver, Estoppel and Ratification. Claimant's claims are barred by the doctrines of waiver, estoppel and ratification. Claimant received confirmations of both transaction and monthly statements detailing all of the account's activity. Claimant never once complained about, and specifically authorized, the activity in the account. Accordingly, she ratified the transactions at issue and is now estopped from contesting them.
3. "Bespeaks Caution" Doctrine. Claimant's claims, to a large degree, are also barred because Claimant had access to prospectuses describing in detail the risks of investments and she did not complain. Claimant's then husband, Richard Miles, testified under oath in his arbitration against Merrill Lynch that he made decisions regarding his and Claimant's accounts prior to their divorce. He also engaged in substantial on-line research both at the Merrill Lynch website and elsewhere. When an investor has access to and an opportunity to review a prospectus, which "bespeaks caution," the law is clear that he cannot be heard to claim that he ignored it. Any reliance on an alleged oral statement to the contrary is unreasonable as a matter of law. To the extent Claimant seeks damages arising out of investments for which she received prospectuses, those claims are barred by the "bespeaks caution" doctrine and must be dismissed.
4. Statute of Limitations and Laches. Claimant's claims are barred, in part, by the statute of limitations and the doctrine of laches. Under federal law, Plaintiff is required to bring securities claims within one year of "discovery" of the alleged wrongdoing. In this instance, where Plaintiff claims that Respondents recommended

unsuitable investments, discovery would have been well over a year ago when her account had declined significantly. Thus, claims relating to the two trades at issue are barred and must be dismissed.

5. The Statement of Claim fails to state a claim upon which relief can be granted under R.S.Mo. 409.411(a)(2) as it does not allege any specific misrepresentation or omissions to state a material fact, nor did Respondents ever do so because this is the only statute or other theory under which Claimant has sued, the Statement of Claim should be dismissed.
6. Claimant failed to mitigate her damages by her continued dealings with Respondents and otherwise.
7. Upon proper disclosure, Claimant knowingly, willingly and voluntarily assumed the risks of her investments. Claimant made her own decisions voluntarily, and cannot now shift the burden of any investment losses to Respondents. Therefore, Claimant's losses, if any, were caused by her own conduct.
8. Claimant, by her acts and conduct, is not timely objecting to the transactions she made in the account and otherwise, has ratified the transactions and is estopped from asserting damages as a result of them.
9. At all relevant times, Respondents conducted their business in a professional manner and acted in good faith without knowledge of or participation in any alleged improper activity.
10. There is no basis in law for an award of interest, attorney's fee, rescission costs, and other costs, and therefore, Respondents move to strike all such claims.

RELIEF REQUESTED

Claimant requested:

Compensatory Damages	\$1,445,374.40
Interest	8% from date of purchase
Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief if any:	unspecified

Respondents, Merrill Lynch Pierce and Knapp, requested that all claims be dismissed in their entirety with prejudice, all of its costs of arbitration and expenses, attorney's fees, consulting fees, witness fees and other costs be awarded. Respondents further requested that Knapp's Form U-5 be expunged of any reference to this Statement of Claim, and to grant such other and further relief as this Panel deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel allowed Claimant's Amended Statement of Claim to increase compensatory damages from \$100,000.00 to \$1,445,374.40. At closing arguments on November 13, 2002, the Panel also allowed arguments on new evidence discovered regarding Claimant's investment changes.

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, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Guy B. Knapp, are jointly and severally liable for and shall pay Claimant, Pamela A. Miles, Trustee of the Pamela A. Miles Revocable Living Trust, the sum of \$223,000.00 as compensatory damages, plus interest at the rate of 8% per annum accruing twenty (20) days from the date of service of award until award is paid in full.
2. Parties shall bear their own costs, including any attorneys' fees, except as specified herein.
3. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 500.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch Pierce Fenner & Smith, Inc. is a party and is assessed the following fees:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00
Total fees	= \$ 8,550.00

Forum Fees and Assessments

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

One (1) Pre-hearing session with Panel @ \$1,200.00	= \$ 1,200.00
Pre-hearing conference: May 12, 2003 1 session	

Eight (8) Hearing sessions @ \$1,200.00 = \$ 9,600.00

Hearing Date(s): October 14, 2003 2 sessions
 October 15, 2003 2 sessions
 October 16, 2003 2 sessions
 November 13, 2003 2 sessions

Total Forum Fees = \$10,800.00

The Panel has assessed 100% of the total forum fees in the amount of \$10,800.00 jointly and severally to Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Guy B. Knapp.

Fee Summary

1. Claimant, Pamela A. Miles, Trustee of the Pamela Revocable Living Trust, is solely liable for:

Initial Filing Fee	= \$ 500.00
Less payments	= \$ 1,575.00
Refund Due NASD Dispute Resolution	= \$ 1,075.00

2. Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$ 8,550.00
Less payments	= \$ 7,000.00
Balance Due NASD Dispute Resolution	= \$ 1,550.00

3. Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Guy B. Knapp, are jointly and severally liable for:

Forum fees	= \$10,800.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$10,800.00

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

ARBITRATION PANEL

Albert J. Haller, Esq.	-	Public Arbitrator, Presiding Chairperson
Raymond R. Hirsch, Esq.	-	Public Arbitrator
Richard L. Johannesman	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Albert J. Haller, Esq.
Public Arbitrator, Presiding Chairperson

12/22/03
Signature Date

Raymond R. Hirsch, Esq.
Public Arbitrator

1/7/04
Signature Date

Richard L. Johannesman
Non-Public Arbitrator

12/23/03
Signature Date


12/23/03
Date of Service (For NASD Dispute Resolution office use only)

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ARBITRATION PANEL

Albert J. Haller, Esq.	-	Public Arbitrator, Presiding Chairperson
Raymond R. Hirsch, Esq.	-	Public Arbitrator
Richard L. Johannesman	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Albert J. Haller, Esq.
Public Arbitrator, Presiding Chairperson

Dec. 22, 2003
Signature Date

Raymond R. Hirsch, Esq.
Public Arbitrator

Signature Date

Richard L. Johannesman
Non-Public Arbitrator

Signature Date

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ARBITRATION PANEL

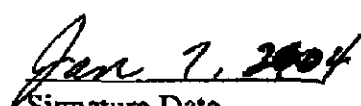
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Public Arbitrator, Presiding Chairperson

Signature Date


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Public Arbitrator


Signature Date

Richard L. Johannesman
Non-Public Arbitrator

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Richard L. Johannesman	-	Non-Public Arbitrator

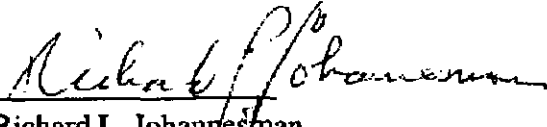
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Public Arbitrator

Signature Date



Richard L. Johannesman
Non-Public Arbitrator



Signature Date

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