

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Floydella S. Rogers

and

Case Number: 03-06582
Hearing Site: Houston, Texas

Names of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc. and
Ellias D. Stabinsky

NATURE OF DISPUTE

Customer v. Member Firm and Associated Person

REPRESENTATION OF PARTIES

Floydella S. Rogers ("**Claimant**") was represented by John Courtade, Esq., Law Offices of John Courtade, Austin, Texas.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Merrill Lynch**") was represented by Ann Robertson, Esq., The Ballard Law Firm, Houston, Texas.

Ellias D. Stabinsky ("**Stabinsky**") of Houston, Texas, represented himself.

CASE INFORMATION

The Statement of Claim was filed on or about September 10, 2003. The Submission Agreement of Claimant, Floydella S. Rogers, was signed on or about September 5, 2003.

The Statement of Answer was filed by Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., on or about February 12, 2004. The Submission Agreement of Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., was signed on or about February 13, 2004.

The Statement of Answer was filed by Respondent, Ellias D. Stabinsky, on or about February 18, 2004. The Submission Agreement of Respondent, Ellias D. Stabinsky, was signed on or about February 12, 2004.

Claimant filed a Motion to Compel and for Sanctions on or about July 26, 2004.

Respondent, Merrill Lynch, filed a Response on or about July 29, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: breach of contract, breach of fiduciary duty, negligence, and failure to supervise. The causes of action related to the recommendation and purchase of four (4) growth funds: Alliance Premier Growth Fund B, Dreyfus Premier Worldwide Growth Fund B, Fidelity Advisor Dividend Growth Fund B, and Eaton Vance Tax Managed Growth Fund B. Claimant alleged that the four growth funds were grossly inconsistent with Merrill Lynch's own guidelines for asset allocation and the guidelines for any reputable broker in the country for an investor of Claimant's age and financial situation. Claimant alleged that Stabinsky's motivation for investing all Claimant's money into B type mutual funds was strongly influenced by the prospect of large commissions. Also, Claimant alleged that Merrill Lynch failed to supervise their control person.

Unless specifically admitted in its Answer, Respondent, Merrill Lynch, denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: Claimant failed to state a claim upon which relief can be granted; Claimant is estopped by her conduct from complaining about the transactions in her accounts at Merrill Lynch; Claimant knew the risks associated with the investments in her accounts and willingly assumed those risks at the time each and every transaction took place; Claimant ratified, approved, and confirmed in all respects the acts complained of in the Statement of Claim; Claimant is barred by the doctrine of laches and the applicable statute of limitations; and Respondent is not the producing or proximate cause of any damages to Claimant under the Texas Deceptive Trade Practices Act.

Respondent, Stabinsky, adopted the Answer of Respondent, Merrill Lynch.

RELIEF REQUESTED

Claimant requested an award in the amount of:

Actual/Compensatory	\$500,000
Punitive/Exemplary	Unspecified
Interest	Unspecified
Attorney's Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

Respondent, Merrill Lynch, requested that the claims asserted against it be denied in their entirety and it they be awarded its costs and attorneys' fees.

Respondent, Stabinsky, adopted the relief requests of Respondent, Merrill Lynch.

OTHER ISSUES CONSIDERED & DECIDED

The Panel deferred ruling on the issue of sanctions until the final hearing.

At the final hearing, Claimant made a Motion to Strike Exhibit 41 submitted by Respondent, Merrill Lynch. After consideration of the Motion along with further testimony, the Panel admitted Exhibit 41.

After presentation of the evidence at hearing, the Panel specifically finds that Respondents were grossly negligent in the failure to supervise the Merrill Lynch Office, and that the recommendations for this investor were unsuitable.

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(s) remain on file with NASD Dispute Resolution ("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.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, the sum of \$24,169.56 in compensatory damages;
- 2.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, interest on compensatory damages (\$24,169.56) at the rate of 10% per annum from and including 10/18/2001 through and including 8/31/2003;
- 3.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, interest on compensatory damages (\$24,169.56) at the rate of 5% per annum from and including 9/1/2003 through and including 9/6/2004;

- 4.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, the sum of \$5,000.00 in punitive damages;
- 5.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, the sum of \$28,717.50 in attorney's fees pursuant to the contract;
- 6.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, the sum of \$4000.00 in costs;
- 7.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, the sum of \$3,835.00 for the expert fees of David Blockus;
- 8.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, the sum of \$1,000.00 in sanctions for discovery abuse by not providing the supervisory name to Claimant without Claimant filing a motion to compel;
- 9.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for and shall pay to Claimant, Floydella S. Rogers, interest at the rate of 5% per annum, on each and all of the items noted in paragraphs 1-8 above, from and including 9/7/2004 through and including the date this award is paid in full; and
- 10.) Any relief not specifically enumerated is hereby denied with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$300.00
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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. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00

Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing 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 a single arbitrator x \$450.00	= \$ 450.00
Pre-hearing conference: July 30, 2004	1 session
One (1) Pre-hearing session with Panel x \$1,125.00	= \$1,125.00
Pre-hearing conference: March 9, 2004	1 session
Seven (7) Hearing sessions x \$1,125.00	= \$7,875.00
Hearing Dates: September 1, 2004	2 sessions
September 2, 2004	2 sessions
September 3, 2004	3 sessions
Total Forum Fees	= \$9,450.00

The Arbitration Panel has assessed \$9,450.00 of the forum fees jointly and severally to Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky.

FEE SUMMARY

Claimant, Floydella S. Rogers, is liable for:

Initial Filing Fee	= \$ 300.00
Total Fees	= \$ 300.00
Less payments	= \$ 1,425.00
Refund Due from NASD Dispute Resolution	= \$ 1,125.00

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

Member Fees	= \$ 5,200.00
Total Fees	= \$ 5,200.00

<u>Less payments</u>	= \$ 5,200.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Elias D. Stabinsky, are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 9,450.00
<u>Total Fees</u>	= \$ 9,450.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 9,450.00

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

ARBITRATION PANEL

Jeff Kilgore, Esq. - Public Arbitrator, Presiding Chair
Pamela B. Houck - Public Arbitrator
Theodore E. Davis - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Jeff Kilgore, Esq.
Jeff Kilgore, Esq.
Public Arbitrator, Presiding Chair

September 10, 2004
Signature Date

/s/ Pamela B. Houck
Pamela B. Houck
Public Arbitrator

September 10, 2004
Signature Date

/s/ Theodore E. Davis
Theodore E. Davis
Non-Public Arbitrator

September 9, 2004
Signature Date

September 10, 2004
Date of Service (For NASD office use only)

Less payments	= \$ 5200.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents, Merrill Lynch Pierce Fenner & Smith and Elias D. Stabinsky, are jointly and severally liable for:

Forum Fees	= \$9450.00
Total Fees	= \$9450.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 9450.00

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ARBITRATION PANEL

Jeff Kilgore, Esq. - Public Arbitrator, Presiding Chair
Pamela B. Houck - Public Arbitrator
Theodore E. Davis - Non-Public Arbitrator

Concurring Arbitrators:

Jeff K. Gore
Jeff K. Gore, Esq.
Public Arbitrator, Presiding Chair

September 12, 2004
Signature Date

Pamela B. Houck
Public Arbitrator

Signature Date

Theodore E. Davis
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)

<u>Less payments</u>	= \$ 5200.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents, Merrill Lynch Pierce Fenner & Smith and Elias D. Stabinsky, are jointly and severally liable for:

<u>Forum Fees</u>	= \$9450.00
<u>Total Fees</u>	= \$9450.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 9450.00

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Pamela B. Houck - Public Arbitrator
Theodore E. Davis - Non-Public Arbitrator

Concurring Arbitrators:

Jeff Kilgore, Esq.
Public Arbitrator, Presiding Chair

Pamela B. Houck
Pamela B. Houck
Public Arbitrator

Signature Date

September 10, 2004
Signature Date

Theodore E. Davis
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)

Less payments		0.00
Balance Due NASD Dispute Resolution		= \$ 0.00

Respondents, Merrill Lynch Pierce Fenner & Smith and Elias D. Stabinsky, are jointly and severally liable for:

Forum Fees		= \$9450.00
Total Fees		= \$9450.00
Less payments		= \$ 0.00
Balance Due NASD Dispute Resolution		= \$ 9450.00

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Pamela B. Houck - Public Arbitrator
Theodore E. Davis - Non-Public Arbitrator

Concurring Arbitrators:

Jeff Kilgore, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Pamela B. Houck
Public Arbitrator

Signature Date

Theodore E. Davis
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)