

NASD DISPUTE RESOLUTION AWARD
NASD DISPUTE RESOLUTION

CASE: 04-00889

Claire Barrett Young, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc. Respondent

ATTORNEYS:

For Claimant, Claire Barret Young, ("Claimant") appeared Jeffrey B. Kaplan, Esq., of the firm Dimond, Kaplan & Rothstein, P.A., Miami, FL.

For Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Respondent") appeared Bradley B. Rounsaville, Esq., of the firm Maynard, Cooper & Gale, P.C., Birmingham, AL.

NATURE OF DISPUTE: Customer vs. Member.

DATE FILED: February 6, 2004.

CASE SUMMARY: Claimant alleged that she suffered financial damages as a result of Respondent's misrepresentations associated with the recommendation and sale of its proprietary mutual fund, the Merrill Lynch Focus Twenty Fund. Claimant further alleged breach of fiduciary duty, common law fraud, fraudulent misrepresentation, fraudulent inducement, negligence, negligent misrepresentation, and gross negligence.

ARBITRATOR'S REPORT: See attached Exhibit A.

Claim Data	Award Data
Claim: \$14,293.68	Award: \$16,263.98
Pre-judgment Interest: Unspecified	Pre-judgment Interest: \$.00
Post-judgment Interest: \$.00	Post-judgment Interest: @ the legal rate of Florida if award is not paid within 30 days of date of award
Filing Fees: Unspecified	Filing Fees: \$425.00
Other: Unspecified	Other: \$.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) Respondent is liable and shall pay to the Claimant \$16,263.98. 2) Respondent is liable and shall pay Claimant post-judgment interest at the legal rate of Florida if the award is not paid within thirty (30) days of the date of the award. 3) All requests for pre-judgment interest are denied. 4) All other relief requests are denied. 5) NASD Dispute Resolution shall retain the \$425.00 filing fee that the Claimant deposited previously. 6) Respondent is liable and shall pay Claimant \$425.00 as reimbursement of the filing fee.

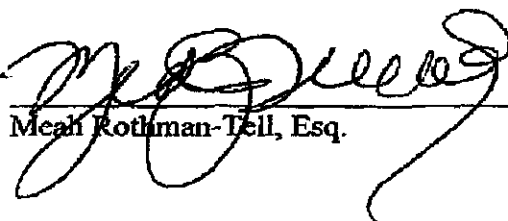
OTHER FEES: Pursuant to Rule 10333 of the Code, respondent has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

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Meah Rothman-Tell, Esq. - Sole Public Arbitrator

AFFIRMATION

I, Meah Rothman-Tell, 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.



Meah Rothman-Tell, Esq.

October 19, 2004
Signature Date

October 25, 2004
Date of Service (For NASD-DR office use only)

NASD DISPUTE RESOLUTION

In the Matter of the Arbitration Between

Claire Barrett Young,

Case No. 04-00889

Claimant

And

Merrill Lynch Pierce Fenner & Smith,

Respondent

AWARD OF THE ARBITRATOR

MEAH ROTHMAN TELL, Arbitrator, having considered the Claim, Respondent's Answer, Claimant's Reply and Respondent's Final Submission, the Arbitrator makes the following findings of fact and renders the following Award:

FACTS

The Claimant and the Respondent agree that the Claimant and the broker discussed the Merrill Lynch Focus Twenty Fund (the "Fund") in which the Claimant invested \$16,263.98 in March 10, 2000 (five days prior to Merrill Lynch commencing the public sale of shares of the Fund, on or about March 15, 2000). The contents of the discussion are disputed. There is no dispute that the December 1999 prospectus of the Fund stated that the Fund "may not:

- 1. Invest more than 25% of its total assets, taken at market value at the time of each investment, in the securities of issuers in any particular industry (excluding the U.S. Government and its agencies and instrumentalities."**

The term "any particular industry" does not appear to be defined in the prospectus.

The Respondent argues that the term "industry" refers to a more specific, narrow division of the broader technology "sector" The May 31, 2000 Semi-Annual Report sets forth the following "industries" under the schedule of investments: Communication Equipment, Broadcasting/Media, Communications Equipment, Computer Services, Diversified Companies, Electronic Components, Healthcare/Biotechnology, Internetworking, Semiconductors, Telecommunications & Equipment and Wireless Communications—Domestic Paging & Cellular.

The Morningstar Take article dated June 26, 2000 refers to the Fund as "packed to the hilt with technology and telecommunication shares, because companies from those industries have fantastic earnings momentum. Indeed, less than 10% of the portfolio falls outside those two sectors." The author appears to use the terms "industry" and "sector" synonymously.

The term "industry" is defined in Black's Law Dictionary as "Any department or branch of art, occupation, or business conducted as a means of livelihood or for profit; especially, one which employs much labor and capital and is a distinct branch of trade."

It appears that if the word "industry" is synonymous with "sector" then the Fund was invested more than 25% in the technology sector at or about the time Claimant made her investment in the Fund. There is no evidence that this was disclosed to Claimant until the May 31, 2000 Semi-Annual Report. The Respondent argues that the Claimant had a duty to mitigate her losses. There is no evidence that the Claimant did mitigate her losses. It was not until January 3, 2003 that Claimant transferred her Focus 20 Fund holdings out

of her Merrill Lynch account, resulting is a loss of \$14,293.68 or 87.89 % of her investment.

The Claimant alleges that the entire investment should be returned on the basis of rescission since the broker fraudulently misrepresented that the Fund was an appropriate investment for the Claimant. Respondent alleges that there was no intent to defraud, no reliance, and that the broker did not cause the Claimant's losses.

Respondent states that by May 31, 2000, the Fund had declined by 31% in value, by November 30, 2000, it had declined approximately 38% in value.

CONCLUSION

While the broker did not have a duty to manage the Fund or make investments for the Fund, the broker did have an affirmative obligation to accurately represent to the Claimant the nature of the investment that she was making, and the fact that more than 25% of the Fund was invested in the technology sector. While the broker may have discussed the risks of investing in the Fund with the Claimant he also had the obligation to discuss with the Claimant the fact that the Fund was heavily invested in technology stocks, which made the Fund less diversified. The broker had the duty to make sure that there was a reasonable basis for advising the Claimant that purchase of shares in the Fund was appropriate for her retirement funds. The prospectus which described the limitations on the Fund's investments was at best confusing, and had the Claimant known that the term "industry" was not intended to mean "sector" and that the portfolio was over 90% invested in telecommunications and technology stocks, she might not have purchased shares in the Fund. There is no representation that the broker ever told her how the Fund

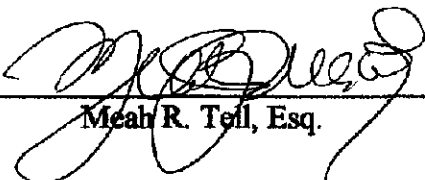
was invested at or about the time she purchased shares in the Fund.

It is reasonable to conclude that the Claimant was misled as to the nature of her investment. The critical issue is whether the Claimant's damages should be limited to the decline in her portfolio as of the time she reasonably should have known of the over concentration of the portfolio, or that whether the transaction should be rescinded. There is no evidence of why the Claimant continued to hold her shares in the Fund, however, it is clear that the Fund's investment objective "is long-term capital appreciation." The Claimant does not deny that she understood and agreed to invest in a Fund with "long-term capital appreciation" and, again, on the basis of these representations it was reasonable for the Claimant to continue to hold her shares anticipating capital appreciation.

AWARD

That the Respondent shall pay to the Claimant the sum of \$16, 263.98 within thirty (30) days of the date of this Award. In the event that the sum is not paid within thirty (30) days, then the outstanding amount shall bear interest at the legal rate for judgments in the State of Florida. No prejudgment interest is awarded. Each side shall bear their own costs and fees in connection with this claim. All costs of the arbitration shall be equally divided between the parties.

August 23, 2004



Meah R. Teal, Esq.