

NASD DISPUTE RESOLUTION AWARD
NASD DISPUTE RESOLUTION

CASE: 04-07905

Olga Fairchild, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gilbert Zucker, Respondents

ATTORNEYS:

Claimant Olga Fairchild ("Claimant") appeared *pro se*, Union City, CA.

For Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gilbert Zucker (collectively "Respondents") appeared Angela A. Turiano, Esq., in-house counsel, Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, NY.

NATURE OF DISPUTE: Customer v. Member and Associated Person.

DATE FILED: November 12, 2004.

CASE SUMMARY: Claimant alleged that Respondents made unsuitable recommendations based upon her age. Claimant further alleged that Respondents misrepresented Claimant in the investment of her life savings. Claimant maintained that due to Respondents' actions, her account suffered losses. Claimant's claim involved various corporate bonds, municipal bond funds, options, and mutual funds.

ARBITRATOR'S REPORT: See attached Exhibit "A".

Claim Data

Claim: \$25,000.00

Filing Fees: \$0.00

Award Data

Award: \$.00

Filing Fees: \$425.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) The claims of Claimant are dismissed in their entirety. 2) All other relief requests are denied. 3) NASD Dispute Resolution shall retain the \$425.00 filing fee that the Claimant deposited previously. 4) Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay claimant \$425.00 as reimbursement of the filing fee.

OTHER FEES: Pursuant to Rule 10333 of the Code, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

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ARBITRATOR


Helmut F. Furth, Esq. - Sole Public Arbitrator

AFFIRMATION

I, Helmut F. Furth, Esq., 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.



Helmut F. Furth, Esq.

 February 15, 2005

Signature Date

February 17, 2005

Date of Service (For NASD-DR office use only)

ARBITRATOR'S EX. 1

ARBITRATOR'S REPORT

The purpose of this report is to state the basis of my rulings in the case of *Olga Fairchild v. Merrill Lynch, Pierce, Fenner, & Smith, Inc. and Gilbert Zucker*. Case No. 04-07905, which I have decided pursuant to Rule 10302(f) of the NASD Dispute Resolution Code of Arbitration Procedure on the papers submitted, without a hearing.

Papers submitted by the parties. The claimant is appearing *pro se*. Her Statement of Claim alleges, in substance, that in January 1998 she opened an account at Merrill Lynch in the amount of \$128,000, representing her life savings. She advised Gilbert Zucker, a financial consultant at Merrill Lynch, that she was interested in a higher rate of return than she could obtain in a bank account but wanted "safety" with regard to principal. Initially the accounts were invested, at Mr. Zucker's recommendation, in high-yield mutual funds. In March 1999 and again in late 1999, at Mr. Zuckerman's recommendation, several investment changes were made. Over the ensuing three years, the account suffered losses, net of withdrawals, in the estimated amount of \$29,000. Claimant alleges that Mr. Zuckerman's recommendations were "unsuitable" and that he "misrepresented" to her the investment of her life's savings. Claimant attached to her Statement of Claims a number of documents relating to her account and copies of correspondence with Merrill Lynch. Claimant did not request a hearing.

Respondents' Answer denies any wrongdoing. In a Supplemental Answer, verified by Mr. Zucker, respondents submitted additional information, and documents, relating to the handling of the account. The documents include, among others, trade confirms showing that in March 1999 there took place the unsolicited sale of two securities (ML Corp BD High Income and Alliance North American) and the unsolicited

purchase of two securities (ML Basic Value and Alliance Growth). Respondents do not deny that the other transactions in the account, prior to February 2003, were solicited, but assert that two of the securities bought late in 1999, AIM Global Science and Technology Fund and Seligman Growth Fund, were less conservative than two funds from the same fund families that Mr. Zuckerman had also recommended. Respondents do not dispute that claimant's account sustained significant losses during the period 2000 through 2002, which they attribute to the general decline in the stock market during those years.

My ruling on the merits of the claims. Claimant is not entitled to recovery of damages because the evidence does not support the conclusion that, even if her investment objective was "safety" of principal, the securities recommended by Mr. Zuckerman were unsuitable for an investor in claimant's financial position. There is no evidence that Mr. Zuckerman misrepresented the securities to claimant. Claimant does not deny that she received copies of the prospectuses relating to the funds in which she invested. The decline in the value of the securities occurred across-the-board, including the securities purchased by claimant on an unsolicited basis and the less conservative securities selected by claimant from among the ones proposed by Mr. Zuckerman in late 1999,

It may be noted that several other issues are raised by the pleadings, and in the preceding correspondence between the parties, such as whether or not only Mr. Zuckerman or also other account representatives at Merrill Lynch, handled claimant's investments. However, these issues are collateral to the gravamen of the complaint and their resolution, either way, would not affect the outcome of the case. The concern expressed by claimant in her letter of September 19, 2003, regarding the recommendation

of "B" instead of "A" shares is adequately answered by respondents' explanation in their Supplemental Answer.

Allocation of NASD-Dispute Resolution arbitration fees. While, on the basis of my finding that claimant is not entitled to recover damages, I could properly allocate the arbitral fees 50-50 between the parties, or even assess them in their entirety against claimant, I have concluded that they should be paid in their entirety by respondent Merrill Lynch (not by respondent Gilbert Zuckerman). Accordingly, claimant's filing fee should be remitted to her by Merrill Lyoch. In making this ruling I take into account the fact that Merrill Lynch did not respond to claimant's initial complaint letter of March 31, 2004 until September 8, 2004; apparently did not respond at all (until filing its Supplemental Answer in this proceeding) to claimant's query in her letter of September 19, 2004 regarding the reason for recommending "B" instead of "A" shares; and apparently did not respond to the June 30, 2004 invitation to mediate until September 2, 2004, despite the fact that the Mediation Administrator's letter of June 30, 2004, requested a response by not later than July 21, 2004. I am also taking into account claimant's age and financial condition.

February 8, 2005



Arbitrator

NASD DISPUTE RESOLUTION MODIFIED AWARD
NASD DISPUTE RESOLUTION

CASE: 04-07903

Olga Fairchild, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gilbert Zucker, Respondents

ATTORNEYS:

Claimant Olga Fairchild ("Claimant") appeared *pro se*, Union City, CA.

For Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gilbert Zucker (collectively "Respondents") appeared Angela A. Turiano, Esq., in-house counsel, Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, NY.

NATURE OF DISPUTE: Customer v. Member and Associated Person.

DATE FILED: November 12, 2004.

CASE SUMMARY: Claimant alleged that Respondents made unsuitable recommendations based upon her age. Claimant further alleged that Respondents misrepresented Claimant in the investment of her life savings. Claimant maintained that due to Respondents' actions, her account suffered losses. Claimant's claim involved various corporate bonds, municipal bond funds, options, and mutual funds.

ARBITRATOR'S REPORT: See attached Exhibit "A".

Claim Data

Claim: \$25,000.00
Filing Fees: \$0.00

Award Data

Award: \$.00
Filing Fees: \$425.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) The claims of Claimant are dismissed in their entirety. 2) All other relief requests are denied. 3) NASD Dispute Resolution shall retain the \$425.00 filing fee that the Claimant deposited previously. 4) Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay claimant \$425.00 as reimbursement of the filing fee. 5) The Arbitrator recommends the expungement of all reference to the above captioned arbitration from Respondent Gilbert Zucker's registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 04-16, Respondent Gilbert Zucker must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive. Pursuant to Rule 2130 of the NASD Code of Arbitration Procedure, the arbitrator has made the following affirmative finding of fact: the claim, allegation, or information is factually impossible or clearly erroneous.

OTHER FEES: Pursuant to Rule 10333 of the Code, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

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Helmut F. Furth, Esq.

Sole Public Arbitrator

AFFIRMATION

I, Helmut F. Furth, Esq., 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.

Helmut F. Furth
Helmut F. Furth, Esq.

August 5, 2005
Signature Date

August 4, 2005
Date of Service (For NASD-DR office use only)

ARBITRATOR'S EX. 1

ARBITRATOR'S REPORT

The purpose of this report is to state the basis of my rulings in the case of *Olga Fairchild v. Merrill Lynch, Pierce, Fenner, & Smith Inc. and Gilbert Zucker*. Case No. 04-07905, which I have decided pursuant to Rule 10302(f) of the NASD Dispute Resolution Code of Arbitration Procedure on the papers submitted, without a hearing.

Papers submitted by the parties. The claimant is appearing *pro se*. Her Statement of Claim alleges, in substance, that in January 1998 she opened an account at Merrill Lynch in the amount of \$128,000, representing her life savings. She advised Gilbert Zucker, a financial consultant at Merrill Lynch, that she was interested in a higher rate of return than she could obtain in a bank account but wanted "safety" with regard to principal. Initially the accounts were invested, at Mr. Zucker's recommendation, in high-yield mutual funds. In March 1999 and again in late 1999, at Mr. Zuckerman's recommendation, several investment changes were made. Over the ensuing three years, the account suffered losses, net of withdrawals, in the estimated amount of \$29,000. Claimant alleges that Mr. Zuckerman's recommendations were "unsuitable" and that he "misrepresented" to her the investment of her life's savings. Claimant attached to her Statement of Claims a number of documents relating to her account and copies of correspondence with Merrill Lynch. Claimant did not request a hearing.

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My ruling on the merits of the claims. Claimant is not entitled to recovery of damages because the evidence does not support the conclusion that, even if her investment objective was "safety" of principal, the securities recommended by Mr. Zuckerman were unsuitable for an investor in claimant's financial position. There is no evidence that Mr. Zuckerman misrepresented the securities to claimant. Claimant does not deny that she received copies of the prospectuses relating to the funds in which she invested. The decline in the value of the securities occurred across-the-board, including the securities purchased by claimant on an unsolicited basis and the less conservative securities selected by claimant from among the ones proposed by Mr. Zuckerman in late 1999,

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February 8, 2005



Arbitrator