

NASD DISPUTE RESOLUTION AWARD
NASD DISPUTE RESOLUTION

CASE: 05-03845

Nancy M. Cross, (Claimant) vs. David I. Moffitt and Merrill Lynch, Pierce, Fenner & Smith, Inc., (Respondents)

ATTORNEYS:

For Claimant appeared Jean Cross, Power of Attorney, Prescott Valley, AZ.

For Respondents appeared in-house counsel Emilia M. DeMeo, Esq., New York, NY.

NATURE OF DISPUTE: Customer v. Member and Associated Person

DATE FILED: July 20, 2005

CASE SUMMARY: Claimant alleged that Respondents placed her in investments that were unsuitable for her needs. Claimant further alleged errors/charges; failure to supervise; misrepresentation; churning and omission of facts. Claimant maintained that due to Respondents' actions, she suffered a financial loss. Claimant's claim involved various annuities.

ARBITRATOR'S REPORT: See attached Exhibit A.

Claim Data

Claim: \$11,992.73
Punitive: \$2,000.00
Filing Fees: \$575.00

Award Data

Award: \$.00
Punitive: \$.00
Filing Fees: \$.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 the Claimant are dismissed in their entirety. 2) All requests for punitive damages are denied. 3) All other relief requests are denied. 4) NASD Dispute Resolution shall retain the \$425.00 filing fee that the Claimant deposited previously. 5) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent David I. Moffitt's registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 04-16, Respondent David I. Moffitt must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive. Unless specifically waived in writing by the NASD, parties seeking judicial confirmation of an arbitration award containing expungement relief must name NASD as an additional party and serve NASD with all appropriate documents. Pursuant to Rule 2130 of the NASD Code of Arbitration Procedure, the arbitration panel has made the following affirmative findings of fact: The claim, allegation, or information is factually impossible, false and 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.

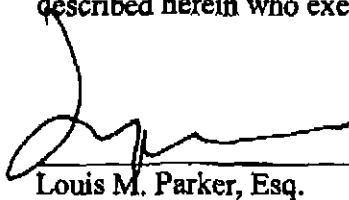
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Award 05-03845

Louis M. Parker, Esq.

Sole Public Arbitrator

AFFIRMATION

I, Louis M. Parker, 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.



Louis M. Parker, Esq.

3/27/06

(Signature Date)

March 30, 2006

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

Exhibit A

Cross v. Moffitt & Merrill Lynch, (NASD Case # 05-03845)

Ruling on Motion to Amend Statement of Claim:

Jean Cross has not submitted any testamentary evidence or order from a probate court that she is, in fact, the legal personal representative of the estate of her deceased sister Nancy Cross or that she is otherwise authorized to bring this claim on behalf of her sister's estate as she alleges in her motion to amend. Regardless, such an amendment would be futile because the annuities in question are not property of the estate of Nancy Cross. For these reasons, it is hereby ordered that the motion to amend the Statement of Claim is denied.

Award on the Statement of Claim:

Jean Cross originally filed the Statement of Claim on behalf of her sister Nancy Cross allegedly under a power of attorney to act on her sister's behalf. However, Claimant submitted no evidence as to whether such a power of attorney even exists, or if it does, what acts Jean Cross was authorized to take on behalf of her sister thereunder. Regardless, whatever authority Jean Cross may have had under the power of attorney expired on November 5, 2005, the date of Nancy Cross's death, because under Arizona law, a power of attorney automatically terminates upon the death of the grantor.

Therefore, Jean Cross has no standing to bring this claim against Respondents. Nor would she have such standing as the personal representative of Nancy Cross's estate even if she could prove that she is the personal representative because the annuities in question are not property of the estate.

However, even if Jean Cross did have standing to bring the claims set forth in the Statement of Claim, she simply has not submitted any evidence whatsoever, let alone evidence sufficient to meet her burden of proof, to support those claims or her conclusory allegations set forth in the Statement of Claim of churning, misrepresentation, non-disclosure, unsuitability, overcharges, or any damages sustained by Nancy Cross before her death in regard to the annuities in question.

To the contrary, the evidence that Respondents submitted with their Answers to the Statement of Claim, which evidence has not and cannot be disputed by Claimant, clearly establishes that Nancy Cross and her beneficiary, her living trust to which the proceeds were paid, did not sustain any losses but realized substantial profits from each and every one of the questioned annuities. Moreover, the "potential" surrender charges that Jean Cross complains about, which constitute the vast majority of the damages claimed, were never incurred because Nancy Cross still held the annuities when she died. Obviously, surrender charges that were never incurred cannot now be claimed as losses or damages.

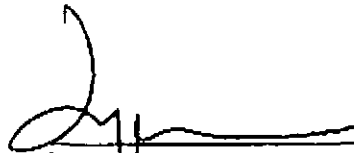
For these reasons, assuming for the purposes of this Award that Claimant has standing to bring these claims, it is hereby ordered that all claims against Respondents are denied in their entirety and dismissed with prejudice.

Assessment of Arbitration Fees:

As set forth above, there is absolutely no factual or legal basis for any of the claims set forth in the Statement of Claim. Because Jean Cross knew or should have known that she had no standing to bring these claims, and that Nancy Cross and/or her living trust, did not sustain any losses from her investments in the annuities in question, and because Jean Cross was not forthright with the NASD by withholding material information in regard to filing this claim, it is hereby ordered that all arbitration fees are assessed against Claimant Jean Cross.

Expungement:

Pursuant to Respondents' request and based on the fact that the claims and allegations set forth in the Statement of Claim are factually impossible, false and/or clearly erroneous, as discussed above, it is hereby ordered that pursuant to NASD Rule 2130, all claims and allegations of wrongdoing set forth in the Statement of Claim should be expunged from Respondent Moffit's CRD record.



Louis M. Parker
Arbitrator

3/27/06