

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

ROBERT L. PIERCE, JR.

Claimant

and

MERRILL LYNCH, PIERCE, FENNER &  
SMITH, INC. AND STEPHEN LOFTUS

Respondents

CASE NO. 89-01995

CASE SUMMARY

In a Statement of Claim filed with the NASD on or about July 13, 1989, Claimant Robert L. Pierce, Jr. ("Pierce") alleged that Respondents Merrill Lynch, Pierce & Smith, Inc. ("Merrill Lynch") and Stephen Loftus ("Loftus") violated Section 10(b) of the 1934 Securities Exchange Act and Rule 10(b)5 promulgated thereunder, violated the Kansas Securities Act, committed fraud and breached fiduciary duties owed to Pierce. The allegations asserted in the Statement of Claim in support of these causes of action included the following:

- 1) Loftus urged Pierce to buy and sell options without apprising Pierce of the risks inherent in such trading;
- 2) This trading activity was unsuitable for Pierce;
- 3) Loftus failed to enter an order to buy back 10 Genentech puts and to sell 1000 shares of Genentech stock on or about October 16, 1987, upon the request of Pierce; and
- 4) Loftus incorrectly informed Pierce on or about October 22, 1987 that the equity in Pierce's account was between \$21,000 and \$26,000 which caused Pierce to buy 10 Merck puts and 10 Pepsi calls. Pierce alleged he would not have placed these orders if he had been told of the proper equity in his account.

In their joint Statement of Answer filed with the NASD on or about September 14, 1989, Merrill Lynch and Loftus denied the allegations of the claim. Merrill Lynch and Loftus alleged that all of the transactions in question were suitable given Pierce's stated investment objective and that at no time did Loftus fail to follow Pierce's trading instructions. Additionally, Merrill Lynch and Loftus alleged that Pierce was provided with an options disclosure statement which informed him in writing of the risks involved in trading options. Further, Merrill Lynch and Loftus alleged that Pierce told Loftus that he was seeking "extraordinary" rates of return and that he was willing to take on the risks necessary to achieve such return. Pierce also allegedly informed Loftus that he had experience trading in the stock market and indicated that he was familiar with stop loss orders, limit orders and short selling.

Loftus and Merrill Lynch also asserted that Pierce made an unsolicited sale of 10 Genentech puts on October 15, 1987 which Loftus advised against. Loftus and Merrill Lynch also asserted that Pierce rejected Loftus' recommendation to sell one half of Pierce's Genentech stock because Pierce felt that the market had "hit bottom" and would rise. Merrill Lynch and Loftus also denied that Pierce was told that the equity in his account was between \$21,000 and \$26,000 as alleged. Merrill Lynch and Loftus also asserted certain affirmative defenses including, but not limited to, estoppel, ratification and waiver. In summary, Merrill Lynch and Loftus alleged that Pierce was an experienced investor who was completely informed of the on-going market conditions by Loftus during October 1987 and that Pierce's own actions and trading strategies caused the losses he incurred.

#### RELIEF REQUESTED

Pierce requested compensatory damages of \$42,520.49, punitive damages of \$50,000, return of his \$500.00 filing fee and his costs incurred in this matter. Merrill Lynch and Loftus requested that the claim be denied in its entirety and that the costs of the proceeding be assessed against Pierce.

#### AWARD

On Friday, June 15, 1990 and Thursday, June 28, 1990 in Kansas City, Missouri during a hearing lasting three (3) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on May 31, 1989 by Claimant Robert L. Pierce, Jr., signed but not dated by Francis C. Musselman on behalf of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. and signed on September 11, 1989 by Respondent Stephen R. Loftus.

The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has decided in full and final resolution of the issues submitted for determination as follows:

1. In satisfaction of all claims jointly asserted against Merrill Lynch and Loftus by Pierce, Merrill Lynch and Loftus are jointly and severally liable for and shall pay to Pierce the sum of Fourteen Thousand One Hundred Twenty Five Dollars and no cents (\$14,125.00);

2. No punitive damages are awarded and this claim asserted by Pierce shall be and is hereby specifically dismissed;

3. The parties shall each bear their respective costs, expenses and attorneys' fees incurred in this matter;

4. Pursuant to Section 43(b) and (c) of the Code of Arbitration Procedure, Pierce and Merrill Lynch are each assessed and shall pay to the NASD, the sum of \$250 as pre-hearing conference fees; and

5. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain as forum fees, the \$500.00 filing fee previously deposited with the NASD by the Claimant Pierce and Merrill Lynch is assessed and shall pay to the NASD additional forum fees of \$1,000.00.

By the Panel

Dated: 7-5-90 /S/ Bernard D. Craig, Jr. Esq.  
Presiding Chair

Dated: 7-6-90 /S/ Michael William Gear

Dated: 7-9-90 /S/ Lonnie L. Cunningham

Date Served: 7-27-90