

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

PUBLIC

Name of Claimants

David Smith, Norma Smith, David Smith as
Custodian for David E. Smith Basic Plan
(an IRA Account Plan) and David and Norma
Smith, on behalf of David & Norma Smith
Pension Plan

CASE #89-02790

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc
David Matta

REPRESENTATION

For Claimant: Maurice A. Nernberg, Jr., Esq. of the law firm of
Nernberg & Cooney, P.C.

For Respondent: Link Christin, Esq. of the law firm of Cindrich & Titus

CASE INFORMATION

Claimants Norma & David Smith's Submission Agreement signed on October 5, 1989.

Claimants the David & Norma Smith Pension Plan's Submission Agreement signed on December 20, 1989.

Claimant David E. Smith Basic Plan's Submission Agreement signed on December 20, 1989.

Joint Statement of Answer filed by Respondents on January 12, 1990.

Respondent, David Matta's Submission Agreement signed on January 5, 1990.

Respondent, Merrill Lynch Pierce Fenner & Smith Inc. ("Merrill Lynch") Submission Agreement signed on November 30, 1989.

HEARING INFORMATION

Hearing Dates/Sessions: March 14, 1994 - two sessions
March 15, 1994 - one session

Hearing Location: Pittsburgh, PA

CASE SUMMARY

Claimants alleged that Respondents, contrary to the best interests of Claimants disregarded the explicit instructions of Claimants, purchased securities without authorization, churned Claimants' brokerage accounts, purchased securities in numerous investments with a high risk factor, purchased and sold securities totally unsuited to Claimants' investment needs and objectives and without authority thus generating commissions for their own pecuniary gain which constituted a conversion. Claimants further alleged the Respondents misrepresented the status of Claimants' accounts and traded without regard to the investment objectives of Claimants and acted in a fraudulent manner and breached the fiduciary duties owed to the Claimants. Claimants further alleged Respondents violated the Securities and Exchange Acts of 1933 and 1934, state law and the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Respondents maintained to the extent that Claimants allege violations of the Securities and Exchange Acts of 1933 and 1934 of RICO and of state law, such allegations state erroneous conclusions of law and it is further specifically denied that Respondent Merrill Lynch or any person in its employ, including Respondent David Matta, excessively or improperly traded in Claimants' brokerage accounts, disregarded instructions of Claimants, purchased securities without authorization, "churned" Claimants' brokerage accounts, purchased or sold securities unsuited to Claimants' investment needs or objectives or purchased securities or other investments with a high risk factor without authorization. Respondents further maintained on the contrary, as evidenced by Claimants' New Account Information Form Claimants' own investment objective was to seek aggressively price appreciation including making investments which carried speculative risk factors and even before Claimants first sought brokerage services from Respondents. Claimants were sophisticated investors with significant experience in investment decisions. Respondents further maintained while Claimants held accounts with Merrill Lynch, each trade, purchase or sale made in their account was either authorized by one or the other of the Claimants in advance or was within express price parameters set by the Claimants for particular investments discussed with Respondent Matta and any investment recommendation made by Respondent Matta to Claimants was suitable to Claimants' stated investment objectives and

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risk factors and was made for the sole purpose of furthering Claimants' best interests. Respondents further maintained pursuant to frequent (almost daily and sometimes several times per day) telephone conversations between one or the other of the Claimants and David Matta, Claimants authorized all trades, purchases and sales to be made in their accounts and expressed satisfaction with the results and in addition, Claimants received monthly statements which identified and confirmed the investments that were made in Claimants' accounts and, by Claimants' failure to communicate any dissatisfaction to Respondents further approved both the type of investments chosen as well as the level of activity in their accounts.

RELIEF REQUESTED

Claimants requested damages in the sum of in excess of \$500,000 which includes \$192,947.47 in market losses and at least \$61,240.60 in commissions. Additional losses include damages for the lost opportunity to earn the market rate of return on the equity in their Merrill Lynch accounts, valued as of November 1984, treble RICO damages, punitive damages, attorney's fees and interest.

Respondents requested that the Statement of Claim be denied in its entirety and that attorneys' fees and costs be awarded to Respondent Merrill Lynch Pierce Fenner & Smith, Inc.

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. The Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and David Matta be and hereby are liable jointly and severally and shall pay to the Claimants jointly and severally the sum of \$50,000 inclusive of interest.
2. The Claimants' request for punitive damages is denied.
3. The Claimants' request for treble or RICO damages is denied.
4. Each party shall bear their respective costs including attorneys fees.

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FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

3 sessions X \$1000 = \$3,000 minus Claimants hearing session deposit of 1000
= net \$2,000 due.

The Claimants be and hereby are liable jointly and severally and shall pay to the NASD the sum of \$500.00 representing forum fees.

The Respondents be and hereby are liable jointly and severally and shall pay to the NASD the sum of \$1,500.00 representing forum fees.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Public/Industry


Name _____

Name Robert C. Devlin
Robert C. Devlin, Esq.

Public

Harry E. Gerhard, Jr.
Harry E. Gerhard, Jr.

Public


Carl Hohnbaum

Industry

Date of Decision: April 5, 1994