

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)	
)	
<u>Name of Claimant(s)</u>)	
)	
Louis Kraxner)	
)	
<u>Name of Respondent(s)</u>)	Case No. 90-00112
)	
Merrill Lynch Pierce Fenner & Smith Inc)	
John D. Kirchhoefer)	
)	

REPRESENTATION

For Claimant, Louis Kraxner ("Kraxner"): John P. Marinelli, Esq. of the Law Offices of John P. Marinelli, P.A.

For Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill") and John D. Kirchhoefer ("Kirchhoefer"): Michael Olney of Merrill.

CASE INFORMATION

Statement of Claim filed: January 8, 1990 and amended on January 7, 1991 and May 1, 1991. Claimant's Submission Agreement signed: December 28, 1989.

Respondents' Statement of Answer filed: April 26, 1990 with a Reply to the Amended Claim filed January 14, 1991. Respondents' Submission Agreements signed by Kirchhoefer on April 3, 1990, and by George Schieren on behalf of Merrill on April 25, 1990.

HEARING INFORMATION

On March 25 and September 27, 1991, in Tampa, Florida, Pre-hearing conferences lasting two (2) sessions were conducted via telephone conference call. The conference on March 25, 1991, was conducted without an arbitrator and the conference on September 27, 1991, was conducted with an arbitrator.

On February 20, 21 and July 9, 1992, in Tampa Florida, hearings lasting six (6) sessions were conducted.

CASE SUMMARY

Claimant alleged that Respondents were liable for executing unauthorized transactions by purchasing certain stocks contrary to Claimant's instructions. Claimant alleged that Kirchhoefer acted fraudulently and breached his fiduciary duty to Claimant.

Respondents denied all allegations of wrongdoing and alleged that: the trades were authorized; Claimant did not complain about the trades until after the October, 1987 market crash; and denied that any fraud or breach of fiduciary duty occurred. Respondents asserted the affirmative defenses of: failure to state a claim; waiver; estoppel; ratification; good faith; compliance with applicable laws, rules and regulations; statutes of limitations; failure to mitigate damages; unclean hands; arbitrators are not empowered to award punitive damages; Claimant has waived any claim for punitive damages and punitive damages are not awardable under New York State Law.

RELIEF REQUESTED

Claimant requested damages in the amount of \$12,818.65, plus interest, costs, attorney's fees and punitive damages in excess of \$50,000.00.

Respondents requested dismissal of the claim plus costs and attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, Merrill and Kirchboefer, are found not liable and, therefore, all claims against them are hereby dismissed.
2. Claimant's request for attorney's fees, costs, and punitive damages is denied.
3. Respondents' request for costs and attorney's fees is denied.

OTHER COSTS

1. The NASD, Inc. shall refund to the Claimant the \$400.00 postponement fee paid for the Claimant's first postponement request which was denied. The NASD shall retain the \$400.00 postponement fee paid by Claimant for the second postponement request which was granted.
2. In light of the fact that Respondents' postponement request was made subsequent the Claimant's Amendment of his Statement of Claim, the postponement fee which Respondents should have paid was \$500.00, since Respondents only paid \$400.00, they are hereby assessed the additional \$100.00.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$3,300.00 (one Pre-hearing Conference with an arbitrator x \$300.00 plus six sessions x \$500.00 per session). Respondent, Merrill, is hereby assessed \$3,300.00, \$500.00 of which shall be paid directly to the Claimant, and \$2,800.00, of which shall be paid to the National Association of Securities Dealers, Inc. The NASD shall retain the \$500.00 previously deposited by Claimant in partial satisfaction of such fees. Additionally, Respondent, Merrill, is hereby assessed and shall pay to Claimant the \$150.00 non-refundable filing fee previously paid by Claimant. The NASD shall retain the \$150.00 non-refundable filing fee paid by Claimant in full satisfaction of such fee.

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

Concurring Arbitrators' Signatures

/S/
James R. Kennedy, Jr., Esq.

Public

/S/
James A. Smith, IV

Public

/S/
Allison Hardage

Industry

Date of Decision: August 11, 1992