

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between )

Name of Claimant(s) )

Mary L. Ferrarini )

Case No. 90-00618

Name of Respondent(s) )

Donaldson Lufkin & Jenrette Securities )  
Fenner Financial, Inc. )  
James Fenner )  
Philip Leon )

REPRESENTATION

For Claimant, Mary Ferrarini ("Ferrarini"): Philip Snyderburn, Esq. of Snyderburn, Rishoi & Swann.

For Respondent, Donaldson, Lufkin & Jenrette Securities ("DLJ"): Bennett Falk, Esq. of Morgan Lewis & Bockius.

For Respondent, Fenner Financial, Inc. ("Fenner Financial"): Leslie King O'Neal, Esq. of McDonough, O'Neal & O'Dell.

Respondent, James Fenner ("Fenner") was pro se but had previously been represented by Arthur Louv, Esq. of Arnold Matheny & Egan.

Respondent, Philip Leon ("Leon") was pro se.

CASE INFORMATION

Statement of Claim filed: March 1, 1990 and amended on October 31, 1990. Claimant's Submission Agreement signed: October 30, 1990.

Respondent, DLJ's, Statement of Answer and Third Party Claim filed: May 16, 1990. Respondent, DLJ's, Submission Agreement signed: May 5, 1990 by Thomas Franko on behalf of DLJ.

Respondents, Fenner Financial and Fenner's, Statement of Answers filed: May 21, 1990 and amended on July 12, 1991. Respondents, Fenner Financial and Fenner's, Submission Agreements signed by Fenner individually and on behalf of Fenner Financial on May 16, 1990. Respondents, Fenner Financial and Fenner's, Answer to the Third Party Claim filed: July 12, 1991.

Respondent, Leon, did not file a Statement of Answer or sign a Submission Agreement as required by Sections 12 and 25 of the Code (See Other Issues).

### HEARING INFORMATION

On July 15, 16 and 17, 1991; March 3, 4 and 5, 1992; July 27, 28 and 29, 1992 in Tampa, Florida, hearings lasting 18 sessions were conducted.

### CASE SUMMARY

Claimant alleged that Respondents were liable for: failure to supervise; civil theft; common law fraud; breach of fiduciary duty; and, federal securities fraud. Claimant alleged that Leon, as authorized agent of DLJ and Fenner Financial, forged and stole various checks payable to Claimant, for which Leon was charged criminally and plead guilty, and that Leon purchased and sold stocks and bonds in Claimant's account without her consent.

Respondents, Fenner Financial and Fenner, denied all allegations of wrongdoing and alleged that: Leon was not acting within the scope of his employment; and Leon was convicted of theft but not of forgery. Fenner Financial and Fenner asserted affirmative defenses including; failure to state a claim; claims of negligence by brokers seeking recovery for economic loss are barred absent proof of personal injury or property damage; ratification; waiver; estoppel, and, comparative negligence.

Respondent, DLJ, denied all allegations of wrongdoing and alleged that: DLJ had no contractual relationship with Leon, did not employ Leon, had no duty to supervise Leon and had no fiduciary duty to Claimant.

Respondent, DLJ, alleged the affirmative defenses of: contributory negligence; estoppel; waiver; statute of limitations and laches.

Respondent, DLJ, filed a Third Party Claim against Fenner Financial, Fenner and Leon for contribution.

Respondents, Fenner Financial and Fenner, answered the Third Party Claim and alleged that it was premature.

Respondent, Leon, failed to file an Answer.

### RELIEF REQUESTED

Claimant requested damages in the amount of \$128,000.00, plus interest, costs, attorney's fees, treble and other punitive damages.

Respondents, Fenner Financial and Fenner, requested dismissal of the claim and Third Party Claim.

Respondent, DLJ, requested dismissal of the claim, plus costs and fees and requested contribution from Fenner Financial, Fenner and Leon.

### OTHER ISSUES CONSIDERED & DECIDED

1. This Panel finds that Respondent, Leon, was required to sign a Submission Agreement and to file an Answer pursuant to Sections 12 and 25 of the NASD Code of Arbitration Procedure. Respondent, Leon, being a person

associated with an NASD member firm at the time this controversy arose.

2. This Panel finds that jurisdiction exists pursuant to Section 12 of the Code and pursuant to the form U-4 executed by Respondent, Leon.

3. For the reasons set forth in the record of proceedings and contained in Arbitrator's Exhibit #2, this Panel found due notice to Respondent, Leon, and, pursuant to Section 29 of the Code, this Panel proceeded with the arbitration and enters this Award as if each party had entered an appearance in the matter submitted.

4. Subsequent to the commencement of this hearing and prior to its conclusion, the Claimant settled her claims with Respondents, Fenner Financial and Fenner, and, therefore, no ruling is made as to Claimant's claims against those Respondents.

5. The parties that appeared 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, and Respondent, Leon, neither appearing at the hearing nor requesting an adjournment thereof, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, DLJ and Leon, are found liable, jointly and severally, and shall pay to the Claimant the amount of \$50,000.00 inclusive of interest.

2. Respondent, DLJ, is found to have been grossly negligent in their check disbursement and distribution policy and, although such negligence was not the primary cause of Claimant's losses, the Panel will refer this matter to the NASD's District Business Conduct Committee for review.

3. Claimant's request for attorney's fees, costs, punitive and treble damages is denied.

4. Respondent, DLJ's, request for fees and costs is denied.

5. Third Party Respondents, Fenner Financial and Fenner, are found not liable to Third Party Claimant, DLJ, and therefore, the Third Party claims against them are hereby dismissed.

6. This Panel finds that, in light of the finding of joint and several liability between DLJ and Leon, DLJ's Third Party claim against Leon will be deemed moot.

#### OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$13,500.00 (18 sessions x \$750 per session).
2. Respondent, DLJ, is hereby assessed \$13,500.00, \$550.00 of which shall be paid directly to the Claimant, and \$12,950.00 of which shall be paid to the National Association of Securities Dealers, Inc.
3. The NASD shall retain the non-refundable filing fee of \$200.00 paid by the Claimant.
4. Respondent, DLJ, shall reimburse the Claimant \$200.00 for the non-refundable filing fee.
5. The NASD shall retain the session deposit of \$550.00 paid by Claimant in partial satisfaction of such forum fees.

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

Concurring Arbitrators' Signatures

/S/  
Brian G. Mooney, Esq.

Public

/S/  
Theodore F. Chive

Public

/S/  
Regar Mickler

Industry

Date of Decision: September 30, 1992