

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Erika Davis

90-03498

Name of Respondent(s)

Merrill Lynch, Pierce Fenner & Smith, Inc.
Frank J. Phillips, Jr.

REPRESENTATION

For Claimant: Erika Davis was represented by H. Victor Thomas, Esq. of Bennett, Brooks, Baker & Lange, L.L.P., Houston, Texas.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. and Frank J. Phillips, Jr. were represented by Kathy D. Patrick, Esq. and Jennifer J. Josephson, Esq. of Gibbs & Ratliff, Houston, Texas.

CASE INFORMATION

Statement of Claim filed: December 13, 1990

Amendment to the Statement of Claim filed: January 7, 1991

Claimant's Submission Agreement signed on: December 7, 1990

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Frank J. Phillips, Jr. on: March 7, 1991

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed on: March 5, 1991 by Michael J. Stewart

Respondent Frank J. Phillips, Jr.'s Submission Agreement signed on March 6, 1991

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Dates/Sessions: October 18, 1991 for three (3) sessions

November 5, 1991 for three (3) sessions

Hearing Location: Houston, Texas

CASE SUMMARY

Claimant Erika Davis ("Davis") alleged that Respondent Frank J. Phillips, Jr. ("Phillips"), while employed by or acting as an agent for Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), misrepresented or

failed to inform Davis of the nature of and risk involved in an investment in the Merrill Lynch Keystone CUST B4 "junk bond" funds. Davis further alleged that the investment was unsuitable for a woman of her age who depended upon the income from the principal of this investment as her sole means of support and income, and who requested that the money be invested in high-quality low-risk investments which would preserve and protect her principal. Pursuant to these allegations, Davis asserted claims for violations of Section 10b of the Securities and Exchange Act of 1933 and Rule 10b-5 promulgated thereunder; breach of the fiduciary duty owed to Davis; common law fraud; negligence and gross negligence; and breach of contract.

Respondents Merrill Lynch and Phillips generally denied the factual allegations made in the Statement of Claim, alleging that Davis was fully informed of the risks of the investment and received an "Application and Prospectus" on the Keystone B-4 Fund which clearly stated that the fund included a substantial number of lower grade bonds. In addition, Respondents alleged that they did not recommend the purchase of unsuitable securities in light of Davis's investment objectives, but that the purchase was made at Davis's instigation and request after full disclosure of the inherent risks because of her stated need for higher monthly income from her investment. Respondents further asserted as affirmative defenses the doctrines of waiver, ratification and estoppel.

RELIEF REQUESTED

Claimant Davis requested entry of an award against Respondents for damages in an amount in excess of \$50,000.00; prejudgment and post judgment interest in the maximum amounts allowed by law; costs and expenses of arbitration; reasonable and necessary attorneys' fees; punitive damages in the amount of \$250,000.00; and such other and further relief to which Davis may show herself justly entitled. Davis thereafter amended her claim to change the amount of punitive damages requested to an unspecified amount.

Respondents Merrill Lynch and Phillips requested that the arbitration panel hold that Davis take nothing.

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 undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Statement of Claim and Amendment are hereby dismissed and denied in their entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated

herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: Six (6) sessions x \$500.00 = \$3,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$150.00 claim filing fee and the \$500.00 hearing session deposit previously filed by the Claimant Erika Davis. Claimant Erika Davis is liable for and shall pay to the NASD additional forum fees in the sum of \$925.00. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to the NASD additional forum fees in the sum of \$1,575.00.

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

BY THE ARBITRATION PANEL

Dated:

Judith H. Swinney
Judith H. Swinney, Esq.
Public Arbitrator
Chairperson

January 20, 1992

Walton L. Huff
Walton L. Huff
Public Arbitrator

January 14, 1992

John C. Booth, Jr.
John C. Booth, Jr.
Industry Arbitrator

January 22, 1992

Date Served: _____