

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimants

David Pease

and

90-03623

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
and Gerald A. Kearns

REPRESENTATION OF PARTIES

Claimant, David Pease was represented by David M. Foster, Esq. of David M. Foster, P.C. of Farmington Hills, Michigan and Anthony V. Trogan, Esq. of Weisman, Trogan, Young & Schloss, P.C. of Birmingham, Michigan.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald A. Kearns were represented by Martin S. Cohen, Esq. of Merrill Lynch, Pierce, Fenner & Smith, Inc. of New York, New York and Clarence L. Pozza, Jr., Esq. of Miller, Canfield, Paddock & Stone of Detroit, Michigan.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") by Claimant, David Pease on December 20, 1990.

Claimant, David Pease's Submission Agreement was signed on January 21, 1991 by David Pease.

A Motion to Dismiss with a separate compilation of authorities was filed with the NASD on May 14, 1991 by Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald A. Kearns.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement was signed on May 10, 1991 by George A. Schieren, First Vice President.

Respondent, Gerald A. Kearns' Submission Agreement was signed on April 16, 1991 by Gerald A. Kearns.

Claimant, David Pease filed a Response to Respondents' Motion to Dismiss with the NASD on May 20, 1991.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc, and Gerald A. Kearns filed a Reply to the Claimant's Motion to Dismiss with the NASD on May 24, 1991.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. filed a one page Joint Statement of Answer and Counter-claim with the NASD on November 22, 1991.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald A. Kearns filed a document dated March 31, 1992 with the NASD which was entitled Supplemental Authority in Support of Motion to Dismiss.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald A. Kearns filed a brief on issues of Statutes of Limitation, Punitive Damages and Choice of Law with the NASD on or about April 9, 1992.

Claimant, David Pease filed a Brief on Issues of Statutes of Limitations, Punitive Damages and Choice of Law with the NASD on or about April 20, 1992.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald A. Kearns filed a Reply Brief in Support of Respondents' Motion to Dismiss with the NASD on July 10, 1992

HEARING INFORMATION

Telephonic pre-hearing conferences which lasted for one hearing session each were held on May 26, 1992 and June 25, 1992 with the Panel Chairman.

The hearing was held on July 14, 1992, July 15, 1992, August 25, 1992, August 26, 1992 and October 1, 1992 and lasted a total of ten (10) hearing sessions.

The hearing was held in Southfield, Michigan.

CASE SUMMARY

Claimant, David Pease ("Pease") alleged in his Statement of Claim that Respondent, Gerald A. Kearns ("Kearns") opened various accounts for Pease with Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Pease alleged that he met Kearns at a social gathering because they lived in the same neighborhood. Pease alleged that Kearns cultivated the business relationship because he knew that Pease owned a successful business and was making a significant amount of money from the business. Pease alleged that Kearns and Pease met socially on numerous occasions.

Pease alleged in his Statement of Claim that he incurred trading losses of \$1,243,826.00 for the year 1983, trading losses of \$656,391.00 for the year 1984, trading losses of \$561,872.00 for the year 1985, and trading losses of \$101,911.00 for the year 1986. As a result of these losses, Pease alleged that he was forced to borrow money from his business and friends, liquidate his profit sharing plan, sell the stock in his company to pay back the money borrowed from his company, lost his job, sold his home and was hospitalized for thirty days.

Pease alleged that during his business relationship with Merrill Lynch and Kearns, it was recommended that he invest in the commodities market and that other safer and conservative investments were not recommended to him even though Merrill Lynch and Kearns knew that he could not sustain such catastrophic losses. Pease only sought damages in his Statement of Claim for the years of 1984, 1985 and 1986 due to the statute of limitations.

Pease asserted that the allegations in the Statement of Claim supported causes of action for breach of fiduciary duty by making unsuitable recommendations to purchase speculative commodities, fraudulent misrepresentation, innocent misrepresentation, violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, Michigan and New York Blue Sky Laws, negligence and violations of 18 U.S.C. Section 1961 et seq. ("RICO").

In their Motion to Dismiss, Merrill Lynch and Kearns alleged that the "Claimants (sic) Demand for Arbitration" dated December 20, 1990 be dismissed because the claims are either barred by applicable statutes of limitation or failed to state a cause of action upon which relief can be granted. Merrill Lynch and Kearns alleged that Pease opened a non-discretionary commodity speculative account in Merrill Lynch's Detroit Michigan office on or about

February 23, 1977. Merrill Lynch and Kearns alleged that Pease who at the time was thirty years old, "lived in a \$200,000 dollar house" and owned a successful business from which he was "making a significant amount of money" traded this account until May of 1978 when it became inactive. On or about June 28, 1979, Pease opened a new non-discretionary commodities speculative account. Merrill Lynch and Kearns alleged that the Commodity Account Agreement contained clauses which detailed the high degree of risk involved in trading in commodities and advised the account holder that trading commodities was a speculative venture. Merrill Lynch and Kearns alleged that Pease traded commodities until December 3, 1986 when the account became inactive. Merrill Lynch and Kearns alleged that Pease provided Merrill Lynch with at least nine (9) statements of Financial Condition showing this time period which assured Merrill Lynch of his substantial financial worth.

Merrill Lynch and Kearns alleged that the Demand for Arbitration was received by the NASD on December 26, 1990 and that it is at this time the various statutes of limitation ceased to run. Merrill Lynch and Kearns asserted that there were blatant deficiencies in the various counts of the demand for arbitration and that there was a conspicuous absence of a claim for violation of the antifraud provisions of the Commodity Exchange Act. Merrill Lynch and Kearns asserted this was for two reasons. First, Merrill Lynch and Kearns cited case law which held that there is a two year statute of limitations on such a claim and this statute had expired and second that both the Commodity Futures Trading Commission and the courts have held that a broker had no obligation under the Commodity Exchange Act to stop trading for a financially unsuitable client.

Merrill Lynch and Kearns asserted that each of the claims asserted in the Demand for Arbitration were time barred by applicable statutes of limitation and that the self-regulatory rules of the NASD and New York Stock Exchange relied upon by Pease did not afford him a private cause of action for recovery and in any event were inapplicable to a claim for damages arising out of trading in a commodities account.

Pease's reply to the Respondents' Motion to Dismiss asserted that there was a six year statute of limitation under Section 15 of the NASD Code of Arbitration Procedure and that the American Arbitration Association Case of Peterzell v. Dean Witter Reynolds, Inc. stood for the proposition that a brokerage firm had a fiduciary duty to prevent a customer from trading inappropriately, losing large amounts of money and putting excessive amounts of net worth at risk. Pease asserted that this was the situation Pease was placed into by Merrill Lynch and Kearns.

In their Reply to the Claimant's Response to the Motion to Dismiss, Merrill Lynch and Kearns alleged that the Peterzell arbitration award has no bearing on the pending case or motion because it had no precedential value since it was only an arbitration award and not a court decision. Merrill Lynch and Kearns also argued that even if the panel found that the Peterzell decision applied, it was not precedent because it was decided pursuant to application of Florida law and not Michigan law.

Merrill Lynch and Kearns filed a letter dated November 22, 1991 wherein they asked the NASD to treat their Motion to Dismiss as an Answer to the Statement of Claim filed in this matter. In addition, Merrill Lynch and Kearns also asked that the debit balance in Pease's commodities trading account in the amount of \$9,518.09 be treated as a Counter-claim and that interest be awarded on this sum and an award of attorneys' fees incurred by Merrill Lynch and Kearns be assessed against Pease for making them defend a spurious and meritless claim.

RELIEF REQUESTED

Pease requested compensatory damages in the amount of \$450,000.00, treble damages of \$1,350,000.00 and punitive damages at three times the compensatory damages in the amount of \$1,350,000.00.

Merrill Lynch and Kearns requested dismissal of the Statement of Claim, an award on their Counter-claim of \$9,518.09 for the debit balance in Pease's commodity account, plus interest on this sum and an award of attorney's fees incurred to defend what they termed a spurious and meritless claim.

PROCEDURAL ISSUES CONSIDERED & DECIDED

At the beginning of the hearing on July 14, 1992, the arbitration panel heard oral arguments on the Motion to Dismiss Pease's claim based on applicable statutes of limitation asserted by Respondents, Merrill Lynch and Kearns. Respondents' Motion to Dismiss was referred to as one in the nature of a Motion for Summary Judgment by Claimant's counsel, Anthony Trogan, Esq. Following oral argument on the motion by counsel, the arbitration panel decided not to close the case. The panel then proceeded to take opening statements. Following opening statements of the parties' counsel, Claimant began his case in chief.

Near the close of the hearing sessions on August 26, 1992, the Respondents' Co-counsel, Martin Cohen, Esq. asserted that the Respondents Merrill Lynch and Kearns would move to dismiss the Claimant's Statement of Claim after the Claimant completed their case in chief on the basis that the failed to state a cause of action.

At the hearing on October 1, 1992, Claimant concluded his case in chief and rested his case. Thereafter, the Respondents, Merrill Lynch and Kearns, through their Co-counsel, Martin Cohen, Esq., reasserted their motion for directed verdict, or a motion for summary judgment, or a motion for failure to state a prima facie case. The panel heard extensive argument on the motion and went into executive session.

Following executive session, the panel issued its ruling on Respondents' motion and ruled to grant the motion.

AWARD

After considering the pleadings, the briefs, the testimony and evidence presented at the hearing and the parties' oral arguments on the Motions, after Claimant rested his case, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Merrill Lynch's and Kearns' Motion to Dismiss Pease's Claim is granted and Pease's Claim is denied and dismissed in its entirety with prejudice;
2. Merrill Lynch's Counter-claim for the debit balance in Pease's commodity account, interest and attorney's fees incurred to defend the Claim is also denied and dismissed in its entirety with prejudice; and,
3. Other than forum fees which are addressed below, the parties shall each bear their own costs, expenses and attorney's fees incurred in this matter.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the NASD shall retain the non-refundable filing fee in the amount of \$250.00 and shall retain the hearing session deposit in the amount of \$1,000.00 previously deposited with the NASD by the Claimant, Pease. The NASD shall also retain the non-

refundable Counter-claim filing fee in the amount of \$500.00 and shall retain the hearing session deposit in the amount of \$300.00 previously deposited with the NASD by Respondent, Merrill Lynch.

Pease is assessed additional Forum Fees in the amount of \$4,300.00. Merrill Lynch is assessed additional Forum Fees in the amount of \$5,000.00.

Forum fees were calculated at the rate of \$1,000.00 per hearing session and \$300.00 for each prehearing conference.

Additional Forum Fees assessed to the parties are payable to the NASD.

Panel Members Concurring:

Dated:

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OCTOBER 2 1992

October 2, 1992

Nathaniel Share
Nathaniel Share, Esq.
Presiding Chair
Public Arbitrator

Mauricio Kohn
Mauricio Kohn
Public Arbitrator

William D. Seibert
William D. Seibert, Esq.
Industry Arbitrator

Date Served by the NASD: 10-5-92