

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Marcia M. Roubik

No. 91-00169

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Thomas R. Valaika
Larry H. Lovitsch

REPRESENTATION OF PARTIES

For Claimants: Paul D. Carrier, Esq. of Fishman & Merrick, Chicago, Illinois.

For Respondents: Peter A. Cantwell, Esq. and Steve Boulton, Esq. of Cantwell & Cantwell, Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed: January 14, 1991.

Claimant, Marcia Roubik's Submission Agreement signed on: January 10, 1991.

Joint Statement of Answer filed by Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc, Thomas R. Valaika, and Larry H. Lovitsch on: April 8, 1991.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed on: April 3, 1991.

Respondent Thomas R. Valaika's Submission Agreement signed on: April 3, 1991.

Respondent Larry H. Lovitsch Submission Agreement signed on: April 3, 1991.

Stipulation of parties undated re discovery, executed: December 4, 1991.

Memoranda re Damages

Claimant's memo of January 17, 1992, re punitive damages.
Respondents' memo of January 21, 1992, re punitive damages.
Respondents' reply brief of April 3, 1992, re punitive damages.
Claimant's reply memo of April 16, 1992, re punitive damages.
Respondents' supplemental memo of June 23, 1992, re punitive damages.
Claimant's reply memo of June 29, 1992, re punitive damages.

Other Pleadings and Memoranda

Claimant's memo of July 10, 1991, to dismiss.
Claimant's memo of April 16, 1992, re scheduling, memo to dismiss and attachments.
Claimant's reply of April 16, 1992, to Respondents' December 3, 1991 discovery request and exhibits.
Claimant's motion of April 16, 1992 for order to compel.
Claimant's motion of April 16, 1992, in support of request for order to compel.
Claimant's reply of August 8, 1992, to Respondents' request to exclude evidence.

Correspondence

Fishman & Merrick Letter of July 31, 1991, request for pre-hearing on discovery.
Fishman & Merrick Letter of October 8, 1991, re motion to dismiss non compliance with discovery.
Cantwell & Cantwell letter of October 30, 1991, response to Claimant's motion to dismiss discovery.
Fishman & Merrick Letter of October 31, 1991, intent to file motion to dismiss re punitive damages.
Cantwell & Cantwell letter of November 21, 1991, request intent of Claimant.
Cantwell & Cantwell letter of November 21, 1991, response to Claimant's motion to dismiss.
Fishman & Merrick Letter of November 22, 1991, Claimant's statement of intent.
Fishman & Merrick Letter of November 25, 1991, request to hold rulings.

Cantwell & Cantwell letter of December 3, 1991, request for discovery and exhibits.
Fishman & Merrick Letter of March 30, 1992, re discovery.
Cantwell & Cantwell letter of April 3, 1992, request for ruling Section 32(e).
Fishman & Merrick Letter of April 6, 1992, re discovery and delay of hearing.
Cantwell & Cantwell letter of June 10, 1992, request for adjournment.
Fishman & Merrick Letter of June 12, 1992, reply for request for adjournment.
Cantwell & Cantwell letter of June 24, 1992, request for adjournment.
Fishman & Merrick Letter of July 2, 1992, request to limit evidence to disclosures.
Cantwell & Cantwell letter of July 2, 1992, reply to request to limit evidence.
Fishman & Merrick letter of August 6, 1992, re discovery.
Cantwell & Cantwell letter, 10 pages, of August 10, 1992, re discovery and supplementary answer to Respondents' request of January 2, 1991, five (5) pages and exhibits.
Fishman & Merrick letter of August 25, 1992, re discovery
Cantwell & Cantwell letter, eight (8) pages, of September 1, 1992, reply to motion to limit evidence.
Cantwell & Cantwell letter, eight (8) pages, of September 1, 1992, reply and exhibits.
Fishman & Merrick letter of September 8, 1992, re discovery.

HEARING INFORMATION

Pre-Hearing conference: September 29, 1992. One (1) session.

Hearing dates:	October 26, 1992. Two (2) sessions.
	October 27, 1992. Three (3) sessions.
	October 28, 1992. Two (2) sessions.
	October 29, 1992. Two (2) sessions.
	October 30, 1992. Two (2) sessions.
	November 6, 1992. Two (2) sessions.
	January 25, 1993. Two (2) sessions.
	January 26, 1993. Two (2) sessions.
	January 27, 1993. Two (2) sessions.
	January 28, 1993. Two (2) sessions.
	January 29, 1993. Two (2) sessions.
	February 1, 1993. Two (2) sessions.
	February 2, 1993. Two (2) sessions.
	February 4, 1993. One (1) session.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant, Marcia Roubik ("Claimant") alleged breach of contract, violation of NYSE Rules 405 and 408 (a) and (c), violations of AMEX Rules 411 and 421, violation of NASD Rules Art. III, Sections 2 and 27, negligence, breach of fiduciary duty, common law fraud, misrepresentations and omissions, unauthorized transactions, and unsuitability by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), Larry H. Lovitsch ("Lovitsch"), and Thomas R. Valaika ("Valaika") (or as may be more generally referred to as "Respondents"). The allegations set forth above, arose out of transactions in the following securities (amongst others more specifically covered during the hearing): Walgreen Co. stock; AMN Financial Enterprises, Inc.; Commonwealth Edison; Borg Warner; Brockway, Inc.; Federal Paper Board; Ogden Corp.; Compaq Computer; American General Corp.; Echlin, General Signal Corp.; Greyhound Corp.; MCA, Inc.; Texas Utilities; and Whirlpool.

Claimant stated that the acts and omissions complained of occurred over a period dating from July of 1985 through approximately October 30, 1990. Claimant asserted that both she and her mother, Edna Roubik, were unsophisticated investors and had completely relied on the advice and direction of Respondents. Claimant also alleged that Respondents had assumed de facto control over Claimant's and her mother's joint CMA account, and had made numerous unauthorized and unsuitable "in-and-out" trades in her account which were contrary to her "Blue Chip" investment objective. Claimant alleged that the trades had been made solely to generate fees and commissions for Respondents. Claimant alleged that there were 387 transactions involving 128 different securities, and also alleged that Respondents netted approximately \$145,000.00 in commissions, caused the account to incur a \$113,750.00 federal tax liability. Claimant further alleged that after commissions, the account achieved a net loss from trading activity of approximately \$56,000.00.

In their Answer, Respondents generally denied all charges of wrongdoing and liability, and all claims for damages alleged in the Statement of Claim. Respondents alleged that Claimant's accounts at MLPFS had been serviced at all times in a lawful, competent, and professional fashion. Respondents specifically denied any and all allegations of Breach of Contract, Negligence, Breach of Fiduciary Duty and Common Law Fraud. Respondents further specifically denied all allegations of any violations of NYSE, AMEX, and NASD Rules. In addition, Respondents asserted the following affirmative defenses:

1. The Statement of Claim failed to allege claims upon which relief can be granted.

2. Claimant is estopped from asserting the claims set forth in the Statement of Claim due to her own acts and conduct.

3. Claimant, with full knowledge of the facts, ratified, approved, accepted, acquiesced and confirmed in all respects the acts complained of in the Statement of Claim.

4. Claimant failed to exercise due diligence and was reckless in the supervision of her financial affairs, and, in particular, the operation of her MLPFS account.

5. Claimant was negligent in the supervision of her affairs, and, in particular, the operation of her MLPFS account.

6. Claimant suffered no damages by reason of the acts complained of in the Statement of Claim.

7. Claimant failed to mitigate her alleged damages if any.

8. The claims asserted in the Statement of Claim are time-barred by the applicable statutes of limitation and/or the equitable doctrine of laches.

Respondents generally admitted the allegations contained in the Statement of Facts designated "A. The Parties" subdivisions 1, 2, 2A, 2C, 3, & 4.

RELIEF REQUESTED

Claimant requested an award of:

Counts I, II, III, and IV - \$900,000.00, plus interest, costs, forum fees, punitive damages in an amount of not less than 20 times Claimant's actual damages, and attorneys' fees against Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

Counts V, VI, and VII - \$900,000.00, plus interest, costs, forum fees, punitive damages in an amount of not less than one (1) times Claimant's actual damages, and attorneys' fees against Respondent Larry H. Lovitsch.

Counts VIII, IX, and X - \$900,000.00, plus interest, costs, forum fees, punitive damages in an amount of not less than one (1) times Claimant's actual damages, and attorneys' fees against Respondent Thomas R. Valaika.

Respondents requested that the Statement of Claim be dismissed in its entirety, that the cost of this proceeding be assessed against the Claimant, and that the arbitration panel award the Respondents such other and further relief as the panel deemed just and proper.

OTHER ISSUES CONSIDERED & DECIDED

At the close of Claimant's case, Respondents made a Motion to Dismiss. After hearing oral argument from the parties, and deliberation, the panel denied the Motion.

The parties have agreed that the Award in this matter may be executed by 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, the briefs, 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:

The undersigned arbitrators find the Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc., Larry H. Lovitsch, and Thomas R. Valaika guilty of:

1. Lack of supervision;
2. Churning; and
3. Violation of suitability Rules.

The undersigned arbitrators further find that this misconduct was such that punitive damages should be awarded. However, the panel believes that the law of New York, the forum of the

parties, precludes such an award.

Respondents Merrill Lynch Pierce, Fenner & Smith, Inc., Larry H. Lovitsch, and Thomas R. Valaika are jointly and severally liable for, and shall pay to the Claimant, Marcia M. Roubik, the sum of \$500,000.00 as satisfaction of her claims herein.

Claimant, Marcia M. Roubik's claims for punitive damages and attorneys' fees are hereby denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear their own costs of this arbitration, including attorneys' fees, except as set forth more fully below.

Claimant, Marcia M. Roubik, shall bear the costs of one-half (1/2) of the forum fees incurred in this arbitration. Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc., Larry H. Lovitsch, and Thomas R. Valaika are jointly and severally liable for, and shall bear one-half (1/2) of the forum fees incurred in this arbitration.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

1 pre-hearing conference session X \$300.00 = \$300.00

28 hearing sessions X \$1,500.00 = 42,000.00
Total \$42,300.00

Less:

Claimant's hearing deposit (1,500.00)
Claimant's interim deposit (9,750.00)
Respondents' interim deposits (9,900.00)
Net Due \$21,150.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$300.00, and shall retain the hearing session deposit in the amount of \$1,500.00, and

retain the interim hearing session deposit in the amount of \$9,750.00 previously paid to the NASD by the Claimant.

Pursuant to Section 43(c) of the Code, the NASD shall retain the interim hearing session deposits in the amount of \$9,900.00 previously paid to the NASD by the Respondents.

Additional forum fees in the amount of \$9,225.00 are assessed against Claimant, Marcia M. Roubik.

Additional forum fees in the amount of \$11,925.00 are assessed jointly and severally against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., Larry H. Lovitsch, and Thomas R. Valaika.

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

CONCURRING ARBITRATORS

Dated:

February 5, 1993

/s/Harry D. Strouse
Harry D. Strouse
Presiding Chair
Public Arbitrator

February 5, 1993

/s/Richard L. Merrick
Richard L. Merrick
Public Arbitrator

February 5, 1993

/s/John Detmer
John Detmer
Industry Arbitrator

Date of Service by the NASD:

Feb 9, 1993