

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimants

James and Geraldine R. Parks

and

91-02276

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc. and
Thomas Gavin

REPRESENTATION OF PARTIES

Claimant James and Geraldine R. Parks was represented by James H. Bingaman, Esq., Fayetteville, Arkansas.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. was represented by Scott E. Daniel, Esq. of Hilburn, Calhoun, Harper, Pruniski & Calhoun, Ltd., North Little Rock, Arkansas.

Respondent Thomas Gavin was represented by Charles L. Stutte, Esq., Fayetteville, Arkansas.

CASE INFORMATION

The Statement of Claim was filed on or about July 25, 1991. Submission Agreement of Claimants James and Geraldine R. Parks was signed on July 19, 1991.

Statement of Answer was filed by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on or about September 30, 1991.

Statement of Answer of Respondent Thomas Gavin was filed on or about September 30, 1991. Submission Agreement of Respondent Thomas Gavin was signed on September 27, 1991.

HEARING INFORMATION

A pre-hearing conference was held on Monday, May 4, 1992 for one (1) session.

The hearing was held on Wednesday, February 24, 1993 for two (2) sessions, Thursday, February 25, 1993 for two (2) sessions and Monday, May 17, 1993 for two (2) sessions in Little Rock Arkansas for a total of six (6) regular and one (1) pre-hearing sessions.

CASE SUMMARY

Claimants James and Geraldine Parks ("Claimants") alleged that Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill") and Thomas Gavin ("Gavin") violated provisions of the Arkansas Securities Act and the Securities Exchange Act of 1934. Claimants also alleged that Respondents committed common law fraud in the mismanagement of funds entrusted and invested with them. Specifically, Claimants alleged that Respondents sold unregistered securities, employed a scheme or device to defraud them, made untrue statements of material facts, and omitted to state material facts, and churned the account.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. denied the allegations set forth in the Statement of Claim and stated that no fraud or deceit were occasioned upon the Claimants. Merrill Lynch further stated that the Claimants through Mr. Parks were aware of the nature of the investments and did not complain in a timely manner. It was further stated that the losses incurred in the Claimant's account were a result of market activity and not activities for which Merrill Lynch was responsible. Affirmative defenses including but limited to the following were asserted by Merrill Lynch: the claims are barred by the doctrines of authorization, acquiescence ratification, waiver, and estoppel; the claims are barred by the applicable statute of limitations; the alleged losses were proximately caused by the Claimants' own conduct or negligence; failure to mitigate; and assumption of the risk.

Respondent Thomas Gavin stated that speculation was part of the Claimant's overall investment strategy and that the very first trades made in the account were speculative. Respondent Gavin stated that he had obtained authorization from Mr. Parks prior to each trade, that at no time did he ever disregarded or ignore the Claimants' investment objectives or use anything less than his best efforts and judgment to see that the objectives were fulfilled. Mr. Gavin also stated that he had fully explained to Mr. Parks how to read the CMA statements and that certain option holdings would not be reflected on the statement. The allegations of misrepresentation were denied. Mr. Gavin further stated that certain option contracts were allowed to expire because they were either hedges or in a losing position near the expiration date and rather than sell the contract to generate a commission, he elected to wait and see if the market positions would change.

RELIEF REQUESTED

Claimants requested an award of \$46,268.51 in lost profit, lost income, and commission fees paid, plus costs and attorney's fees, interest at the rate of 6% per annum until the award is paid in full. In addition, Claimants requested an award of punitive damages in the amount of \$200,000.00 and any further relief to which they may prove themselves entitled.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested that the claims be denied, that forum fees be assessed against the Claimants, and that it be granted all other just and proper relief to which it is entitled.

Respondent Thomas Gavin requested that the claims be denied.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and offered testimony at the hearing, is bound by the determination of the arbitration panel on all issues submitted.

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 original(s) remain on file with the N.A.S.D..

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. Respondent Thomas Gavin shall be and hereby is liable for and shall pay to the Claimants James and Geraldine R. Parks the sum of six thousand dollars (\$6,000.00).
2. There is a finding of no liability against Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.
3. Each party shall bear its own costs, expenses and attorney's fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the N.A.S.D. Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("N.A.S.D.") shall retain the non-refundable filing fee in the amount of \$200.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the N.A.S.D. by the Claimants. Claimants shall pay to the N.A.S.D. the sum of \$750.00; Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. shall pay to the N.A.S.D. the sum of \$1,600.00; Respondent Thomas Gavin shall pay to the N.A.S.D. the sum of \$1,600.00 as additional forum fees.

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Forum fees are calculated at the rate of \$750.00 per hearing session and \$300.00 for each prehearing conference, if any. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

s/ W. Bradford Sherman, Esq.
W. Bradford Sherman, Esq.
Public Arbitrator, Presiding Chair

June 1, 1993

s/ John L. Porter
John L. Porter
Public Arbitrator

June 5, 1993

s/ Thomas Pearce Wilson, Esq.
Thomas Pearce Wilson, Esq.
Industry Arbitrator

June 1, 1993