

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Donald Roger Klein

and

91-02424

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
and David A. Stulberg

REPRESENTATION OF PARTIES

Donald Roger Klein ("Claimant") was represented by Anthony V. Trogan, Esq., of Weisman, Trogan, Young & Schloss, P.C., Birmingham, Michigan.

Merrill Lynch, Pierce, Fenner & Smith, Inc. and David A. Stulberg ("Respondents") were represented by Clarence Pozza, Esq. of Miller Canfield Paddock & Stone, Detroit, Michigan.

CASE INFORMATION

The Statement of Claim was filed on or about August 6, 1991. Submission Agreement of Claimant Donald Roger Klein was signed on July 30, 1991.

Statement of Answer was filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David A. Stulberg, on or about October 23, 1991. Submission Agreement of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. was signed on October 22, 1991 by George A. Schieren. Submission Agreement of David A. Stulberg was signed on September 26, 1991.

HEARING INFORMATION

A pre-hearing conference was held on June 10, 1992 for one (1) session. The hearing was held on Thursday, June 2, 1994 for one (1) session, Friday, June 3, 1994 for two (2) sessions, and Monday, June 6, 1994 for three (3) sessions in Southfield, Michigan for a total of six (6) hearing and one (1) prehearing sessions.

CASE SUMMARY

Claimant alleged that subsequent to October, 1987, he determined that he wanted to eliminate all risk from his portfolio so that his investments and estate planning would no longer be subject to any loss. Claimant stated that he advised Respondents of this desire and requested that they review his portfolio and sell off all positions which carried a hint of risk of loss. As a result, numerous transactions were made in the account and he was advised by Respondents that all of the remaining positions in his portfolio were appropriate for his stated investment objectives. Claimant further alleged that Respondents failed to advise him of several positions which were not appropriate for his then stated investment objectives, including positions in Franklin Savings, General Development and VMS Mortgage Partners.

The allegations contained in the Statement of Claim were denied by the Respondents including any allegations that they were guilty of fraud, misrepresentations, breach of fiduciary duty or any common laws. Respondents stated that Claimant's original discussion with Respondents centered around the fact that the Claimant wanted the bulk of his retirement assets invested conservatively but not that he wanted only investments that entailed no risk. Finally, Respondents stated that the Claimant's account was handled in accordance with his directives, recommendations were made based upon his expressed investment objectives and was otherwise handled in a professional manner without any wrongdoing by the Respondents. Respondents also asserted the following affirmative defenses:

- * the Statement of Claim fails to allege claims upon which relief can be granted;
- * Claimant is estopped from asserting the claims set forth in the Statement of Claim due to his own acts and conduct;
- * Claimant ratified, approved, accepted, acquiesced in and confirmed in all respects the acts complained of in the Statement of Claim;
- * Claimant failed to exercise due diligence and was reckless in the supervision of his financial affairs and in particular the operation of his Merrill Lynch accounts;
- * failure to mitigate; and
- * the claims asserted in Statement of Claim are barred by the applicable Statutes of Limitations and the equitable doctrine of laches.

RELIEF REQUESTED

Claimant requested an award jointly and severally against all Respondents in the following amounts: \$163,000 as out of pocket loss; interest at the rate of 12%; costs; actual attorneys' fees as allowed by the panel; exemplary and punitive damages as allowed by the panel in an amount determined by the panel; RICO damages as allowed by the panel in an amount determined by the panel; and the rescission of all transactions and payment of all monies necessary to make Claimant whole.

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 them such other relief as is deemed just and proper.

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 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. The claims asserted in this matter shall be and hereby are dismissed and denied in their entirety.
2. Each party shall bear its own costs, expenses and fees, including attorneys' fees and expert witness fees, if any, incurred in this matter not specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There were six (6) sessions x \$750 = \$4,500 and one (1) session x \$300 = a total of \$4,800 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §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 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with the N.A.S.D. by the Claimant.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. shall pay to the NASD the sum of \$4,050 which is the balance due for forum fees. Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrator's signatures:

Dated:

s/ Robert J. Scafuri, Esq.
Robert J. Scafuri, Esq.
Public Arbitrator, Presiding Chair

June 28, 1994

s/ E. Daniel Grady
E. Daniel Grady
Public Arbitrator

June 27, 1994

Concurring in decision and dissenting in the assessment of forum fees:

s/ Bruce F. Coleman
Bruce F. Coleman
Industry Arbitrator

July 5, 1994