

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Claimant

David Stratman

92-01862

Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.:

Karen Bard:

John E. Blackmon

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REPRESENTATION

For Claimant: David Stratman appeared pro se.

For Respondents: Merrill Lynch, Pierce, Fenner and Smith, Inc., Karen Bard and John E. Blackmon were represented by Joseph L. Hood, Esq. of Scott, Hulse, Marshall, Feuille, Finger and Thurmond, P.C., located in El Paso, Texas.

CASE INFORMATION

Statement of Claim filed: June 3, 1992.

Claimant's Submission Agreement signed on: June 1, 1992.

Joint Statement of Answer of Respondents Merrill Lynch, Pierce, Fenner and Smith, Inc., Karen Bard and John E. Blackmon filed: August 7, 1992.

Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Submission Agreement signed on: July 24, 1992 by Michael J. Stewart, First Vice-President and Assistant General Counsel, Merrill Lynch, Pierce, Fenner and Smith, Inc.

Respondent, Karen Bard's Submission Agreement signed: September 1, 1992.

Respondent, Joseph E. Blackmon's Submission Agreement signed: September 1, 1992.

Claimant's Motion to Preclude Answer filed: August 21, 1992.

Respondent's Response to Motion to Preclude Answer filed: August 19, 1992.

Claimant's Amendment to Statement of Claim and Renewed Motion to Preclude Answer filed:  
December 1, 1992.

### HEARING INFORMATION

Pre-Hearing Conference: None held.  
Hearing Date/Sessions: February 18, 1993 for Two (2) sessions.  
Hearing Location: Albuquerque, New Mexico.

### CASE SUMMARY

Claimant David Stratman ("Stratman") alleged that Respondents Karen M. Bard ("Bard") and John E. Blackmon ("Blackmon"), while employed by or acting as an agent for Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. ("Merrill Lynch"), placed his monies in unsuitable investments, misrepresented the commissions to be paid and failed to honor an offer settlement Merrill Lynch made to him to resolve the dispute. Stratman specifically alleged that:

1. In June of 1991, Stratman met with Bard to discuss investment in mutual funds, advising Bard that his investment objectives were extremely conservative, that he expected no future earnings after his retirement in 1992 and that he would invest only in mutual funds that met these objectives. In addition, Stratman stated that expenses and commissions were also a prime concern;
2. Bard recommended investing \$225,000.00 in four Merrill Lynch load funds: the Merrill Lynch Growth Fund, Merrill Lynch Capital Fund, Merrill Lynch Global Fund and Merrill Lynch Corporate Bond Fund. Bard stated that the funds were safe investments, that the "load" funds were more suitable than the "no-load" versions because the load would not exceed 1.5% if he signed a Notice of Intent pledging to purchase an additional \$25,000.00 within the next year, and that the recommendations were made at the suggestion of her supervisor, Blackmon;
3. On June 2, 1991, Stratman agreed to purchase the funds without receiving the prospectus;

4. Upon his return from a trip which he began June 5, 1991, Stratman read the prospectuses and confirmations and determined that the commissions were significantly more than 1.5 %, the investments were not suitable and the expenses high:

5. On July 25, 1991, Stratman requested that the transactions be reversed. He made repeated complaints until Blackmon sent him an offer of settlement on August 23, 1991;

6. On November 26, 1991, Stratman accepted the offer, but Merrill Lynch refused to honor the offer.

Stratman's amended pleading added an additional claim, alleging that on August 7, 1992, Merrill Lynch had enforced the pledge he signed to purchase additional by threatening that he make the purchase or his account would be debited an unspecified amount. Stratman asserted that this action was unlawful and designed to intimidate him during litigation.

Based upon the above allegations, Stratman alleged breach of fiduciary duty; violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; violations of Rule 10b-10 and Section 12(2) of the 1933 Securities Act; violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); breach of contract; and violation of the NASD Rules of Fair Practice, Article III, Section 2 and the NYSE "Know Your Customer" rule.

Respondents Merrill Lynch, Bard and Blackmon denied the material allegations of the Statement of Claim, alleging that:

1. In early May of 1991, Stratman first contacted Bard and requested that the \$250,000.00 invested in Money Market Funds be used to purchase Class B shares in the Global Bond Fund, erroneously assuming he would pay no sales load for Class B shares. Bard informed Stratman that the investment might be inappropriate because of currency exchange risks, the lack of diversification and the benefit of buying Class A instead of Class B shares. Bard offered to discuss additional funds, but Stratman insisted upon the purchase of the Global Bond Fund with the full amount. An order ticket was prepared, but not executed as it was after trading hours. Stratman faxed a message to Bard the next morning asking her not to buy the shares;

2. Approximately one month later, Stratman came to the office unannounced and told Bard he wanted to invest the funds held in his CMA as he was leaving for Europe. After discussing the various possibilities for an hour, Bard and Stratman

decided to purchase the four funds at issue, which it was felt would provide a sufficient balance of income and growth. The orders were executed and the order tickets reflected that the orders were read to the customer and were unsolicited. Additionally, the letter of intent was executed, which enabled Stratman to take advantage of the sales load breakpoint applicable to all four funds and significantly reduced the sales load he paid:

3. In July, Stratman called Bard and expressed his dissatisfaction with the funds, which had declined approximately six percent in their net asset values, fearing that this would result in an annual loss of 72 percent. Bard reassured him that one month was not indicative of an investment's long-term value. A few days later, Stratman came to see Bard, complaining that Merrill Lynch had gouged him on the sales load and that he was unwilling to pay more than a 1 1/2 percent sales load, even though this was not communicated to Bard in the earlier meetings. Bard discussed the matter, calculated the sales load actually paid, explained she could not adjust the sales loads and reminded Stratman that his failure to honor the letter of intent would result in a higher commission than he paid. Stratman then spoke to Blackmon, who promised to investigate the matter;

4. On July 25, 1991, Blackmon and Stratman met. Blackmon told Stratman that he had concluded there had been no misrepresentation of the sales load charged, but would attempt to accommodate Stratman as a matter of professional courtesy. After review of the account status, Stratman prepared a "letter of agreement" in which he stated he would absorb a "total loss" not to exceed \$5,493. Blackmon agreed to reverse the trades and adjust the loss by the amount of capital gains, dividends and interest the funds had paid Stratman, but would not sign Stratman's letter because the unrealized loss he had calculated was based on the net asset value of the funds that day and not the next day when the liquidation would take place. On July 26, Blackmon entered the liquidation order reversing Stratman's purchase of the funds. However, Stratman called and reneged on the deal and Blackmon reversed the liquidation order;

5. On August 2, 1991, Stratman faxed to Blackmon a draft settlement agreement which called for him to receive interest on the monies he had used to purchase the mutual funds calculated at the yield available on the CMA money market fund. In addition, Stratman proposed that he be permitted to trade, commission free, for an unspecified period of time;

6. On August 22, 1991, Stratman and Blackmon met again. Blackmon offered to liquidate Stratman's position; adjust the realized loss by adding to the proceeds of the liquidation the amount of capital gains, dividends and interest Stratman had received; credit Stratman with the difference between this sum and his original

investment of \$225,044.45; and credit him with interest on the \$225,044.45, calculated on the basis of the CMA money market fund yield, for the period from July 25, 1992 through the settlement date of the transaction. Stratman refused, claiming he was entitled to retain the capital gains, dividends and interest income he received from his investment;

7. On August 23, 1991, Blackmon faxed a letter to Stratman reiterating the proposed settlement. Three months later, Stratman faxed his acceptance. In discussing the matter with Stratman, it was discovered that Stratman's acceptance was based upon Merrill Lynch not adjusting his loss by the amount of gains, dividends and income he had received. Stratman was advised that there was no deal.

In addition, Respondents asserted the following affirmative defenses:

1. Stratman's claims for breach of fiduciary duty and suitability claims have no basis in fact;
2. Stratman's claim under 10(b) of the Securities Exchange Act and Rule 10b-5 based upon misrepresentation or non-disclosure of the sales loads was barred because he failed to exercise due diligence;
3. Stratman's claims founded upon Rule 10b-10 fail as a matter of law because Merrill Lynch did not act in an "agency" capacity as contemplated within Rule 10b-10(a)(7);
4. Stratman's claims under section 12(2) of the Securities Act of 1933 based upon oral misrepresentations are barred as a matter of law as the prospectuses warned that oral misrepresentations were not authorized;
5. Stratman's RICO claim fails as a matter of law as he does not allege and cannot prove the essential elements of the claim;
6. Stratman cannot recover for breach of contract because he waited an unreasonable period of time before accepting Merrill Lynch's offer, his acceptance did not constitute an unconditional assent to all terms of the offer and the contract is unenforceable because there was no writing stating a definite quantity of securities to be purchased by Merrill Lynch; and
7. Any recovery by Stratman should be rescissional and offset by any capital gains, dividends and interest income he was paid.

### **RELIEF REQUESTED**

Claimant Stratman requested that the arbitration panel enter an award in his favor for compensatory damages in the amount of \$20,000.00; treble damages or punitive damages in the amount of \$60,000.00; lost return on investments in the amount of \$20,000.00; and attorneys' fees based on the "bad Faith" exception or RICO provisions and fees for filing this action. In addition, Stratman's amendment requested additional relief for the purchase of additional shares worth \$25,000.00 which he was coerced into purchasing.

Respondents Merrill Lynch, Bard and Blackmon requested that Stratman's claims against them be dismissed and that forum fees be assessed against Stratman.

### **OTHER ISSUES CONSIDERED & DECIDED**

On February 2, 1993, after review of Stratman's Motion to Preclude Answer and all replies, the panel determined that it would take the Motion under advisement and unless specifically granted during the hearing on the merits, the Motion would be denied. At hearing, the panel determined that the Motion would be denied.

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 Amendments are hereby dismissed and denied in their entirety, and Claimant David Stratman shall take nothing on his requests for Compensatory, treble and punitive damages;
- 2) The parties shall bear their own costs of this arbitration, including attorney's fees, except for those specifically enumerated herein.

**FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) sessions x \$500.00 per hearing session = \$1,000.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$150.00 and the hearing session deposit of \$500.00 previously deposited by the Claimant, David Stratman. In addition, Claimant David Stratman is liable for and shall pay to the NASD additional forum fees in the sum of \$500.00.

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

Concurring Arbitrators' Signatures

Name

Date

Peter J. Broullire III, Esq.  
Peter J. Broullire III, Esq.  
Public Arbitrator  
Chairperson

May 3, 1993

George F. Bingham, Esq.  
George F. Bingham, Esq.  
Public Arbitrator

May 3, 1993

Carol Jones  
Carol Jones  
Industry Arbitrator

May 26, 1993

Date of Service on Parties:

5-27-93