

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Penelope Leonard,
Claimant.

v. No. 92-03424

Merrill Lynch Pierce Fenner & Smith, Inc., and
Tom Marlas,
Respondents

REPRESENTATION OF PARTIES

Penelope Leonard ("**Claimant**") was represented by Donald E. Casey, Esq., of Springer, Casey, Dienstag & Devitt, P.C., Chicago, Illinois.

Merrill Lynch Pierce Fenner & Smith, Inc., and Tom Marlas ("**Respondents**") were represented by Peter A. Cantwell, Esq. of Cantwell & Cantwell, Chicago, Illinois.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about October 16, 1992. Claimant's Submission Agreement was signed on November 12, 1992.

Respondents' Statement of Answer was filed on or about January 25, 1993. Respondents' Submission Agreements were signed on December 24, 1992, and January 25, 1993, respectively.

HEARING INFORMATION

Pre-hearing conferences were held on August 23, 1993 for one (1) session, and June 13, 1995 for one (1) session.

The hearing was held on September 27 and 28, 1993 for two (2) sessions each day, December 21, 1993 for one (1) session, October 16, 17, and 18, 1995 for two (2) sessions each day, and December 11 and 13, 1995 for two (2) sessions each day in Chicago, Illinois for a total of 15 sessions.

CASE SUMMARY

Claimant alleged that Respondents: Without her prior authorization sold and converted securities in her account, and purchased other unsuitable securities which resulted in market losses; forged her signature on customer agreements for account number 637-38788; breached their fiduciary duty; violated state and federal securities laws and regulations and also the rules of the NASD and other

applicable securities exchanges; failed to disclose that the investments purchased for her account were speculative and not suitable for her; made trades for Claimant without her prior authorization; made unauthorized trades on margin; and breached their contract, either express or implied, with her. Claimant also alleged that Merrill Lynch failed to adequately and properly supervise Marlas. The allegations arose out of transactions in the following securities: Consul Restaurant Corp. stock; Phone Mate Inc. stock; Chanter Cons LTD ADR stock; American Brands Inc. stock; CSX Corp. stock; International Business MACH Corp. stock; Joy Manufacturing Co. stock; Kimberly-Clark Corp. stock; Texaco Incorporated stock; CAM-Net Communications stock; Centerior Energy Corp. stock; Omni Resources stock; Lockheed Corp. 10 calls; Lockheed corp. stock; units of Malaysia Fund; and units of Duff & Phelps Selected Utilities.

Respondent denied the allegations set forth in the Statement of Claim. In addition, Respondents asserted the following affirmative defenses: Claimant is barred by the applicable statutes of limitations, laches, and estoppel from bringing her claim against Respondents; Claimant fails to state a claim upon which relief can be granted; Claimant's damages alleged in the Statement of Claim were caused by a third party - her husband, Louis Leonard - not Respondents; Claimant is barred from recovery because she directed, authorized, consented to, acquiesced in, and/or ratified the transactions in question in her trading accounts with Respondents; Claimant is barred from recovery because she failed to exercise that degree of diligence required in the handling of her trading accounts with Respondents; Claimant controlled the trading that accrues in her accounts with Respondents; all transactions upon which Claimant bases her allegations against Respondents were properly conducted in accordance with applicable rules and regulations; Claimants damages are solely the result of Claimant's and Louis Leonard's conduct; and Claimant failed to mitigate her damages.

RELIEF REQUESTED

Claimant requested an award of: Compensatory damages, the exact amount of which could not be determined but was believed to total between \$75,000.00 and \$100,000.00; punitive damages for all losses sustained as a result of Respondents' alleged misconduct; forum fees; costs; interest; and reasonable attorneys' fees incurred in bringing this action.

Respondents requested that the panel deny the relief requested in the Statement of Claim in all respects.

OTHER ISSUES CONSIDERED & DECIDED

On or about February 5, 1993, Claimant filed a Motion to Strike Affirmative defenses. On or about March 11, 1993 respondents filed their Response to the motion. After consideration of the motion and response, and deliberation, the arbitrators denied Claimant's motion.

On or about July 23, 1993, Claimant filed a Motion for Leave to file Amendment to Statement of Claim, and a proposed Amendment to the Statement of Claim. After review of the relevant documents, and deliberation, the panel declined to accept Claimant's proposed amendment. On or about September 10, 1993, Claimant filed a Request for Reconsideration of her July 23, 1993

Motion for Leave to file Amendment to Statement of Claim. After review of the request, and response, the arbitrators denied Claimant's Request for Reconsideration.

On or about August 23, 1993, upon notification, for the first time, of the name of Claimant's expert witness, Jack Parks, Chairperson David disclosed that: She had worked on a regulatory basis with Mr. Parks, until 1980, while employed at the CBOE; a client of her current firm made a transaction with William Blair while Mr. Parks was Director of Compliance; she has not dealt with Jack Parks in over six (6) years; she had no social or current relationship with Mr. Parks; she has never retained his services as an expert witness; and that clients of her current firm have had business relationships with Mr. Parks. Ms. David affirmatively stated that she could hear the case fairly and impartially. On or about September 17, 1993, Respondents filed a request that Robin David Recuse herself. Claimant dissented from the request. The matter was then submitted to Ms. David for her consideration. After consideration of the parties relative positions, and Canon II(E) of the Code of Ethics for Arbitrators in Commercial Disputes, Chairperson David declined to recuse herself from the panel.

During the December 21, 1993 hearing session, the panel took up the issue of the Claimant's alleged non-compliance with prior discovery orders and Respondents' prior Requests that the panel issue a Sanction Order against the Claimant. After hearing from the parties, and deliberation, the panel: held the Request for Sanctions in abeyance; and ordered that the parties work out a stipulation as to discovery and exhibits prior to another hearing session being held with the arbitrators. On June 13, 1995, the matter of the ordered Stipulation, and the parties failure to reach an agreement, was turned over to the Chairperson for resolution. During a pre-hearing conference held with the parties on June 13, 1995, further direction was given to the parties regarding the exhibits to the Stipulation. During the September, 1995 hearing sessions, the panel again took up the issue of Claimant's alleged failure to comply with the panel's directives. In lieu of filing a stipulation, the Claimant submitted the Stipulation document as her affidavit. The panel accepted the document as such for the record.

On or about August 7, 1995 Arbitrator Albert Grinton withdrew from this panel. Arbitrator Mary Beth Wheeler was appointed, and participated in the October and December, 1995 hearing dates. The parties did not object to Arbitrator Wheeler's participation on this panel.

At the close of Claimant's case, Respondents made an oral Motion to Dismiss the case. After hearing argument from the parties, and deliberation, the arbitrators required the parties to file the motion and responses in written form prior to their decision on the matter. After receipt and review of the motion and responses, and hearing further argument from the parties on December 11, 1995, and deliberation, the arbitrators denied Respondents' motion.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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:

Claimant's claims are, and each of them, denied and dismissed with prejudice.

Respondents' requests for sanctions against the Claimant are, and each of them, denied.

Except as set forth in this Award, each party shall bear its own costs and attorneys' fees associated with this arbitration.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each pre-hearing conference, if any. There were 15 regular sessions x \$500 = \$7,500 and two (2) pre-hearing conference sessions x \$300 = \$600 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (the "Code"), 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 Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$150 and shall **retain** as forum fees the hearing session deposit in the amount of \$500 previously deposited with the NASD by the Claimant. The NASD shall also **retain** the interim forum fees in the amount of \$900.00 previously paid by the Claimant.

Pursuant to §43(c) of the Code, the NASD shall **refund** the interim forum fees in the amount of \$900.00 previously paid by the Respondents.

Additional forum fees in the amount of \$6,160 are assessed against the Claimant.

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

Dated:

Robin David
Robin David
Public Arbitrator, Presiding Chair

s/s

January 25, 1996

Mary Beth Wheeler
Mary Beth Wheeler
Public Arbitrator

s/s

January 25, 1996

Frederick M. Rizzo
Frederick M. Rizzo
Industry Arbitrator

s/s

January 25, 1996