

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Nancee W. Black

92-03435

Name of Respondent

Merrill Lynch Pierce Fenner & Smith Inc.

REPRESENTATION

Claimant Nancee W. Black ("Black") appeared at the hearing pro se.

Respondent Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") was represented at the hearing by John K. Shannon, Jr., Esq. of Merrill Lynch Pierce Fenner & Smith, Inc. of New York, New York.

CASE INFORMATION

The Statement of Claim was filed with the NASD by Claimant Black on October 8, 1992. The Uniform Submission Agreement was signed by Black on September 24, 1992.

The Statement of Answer was filed by Respondent Merrill Lynch on December 21, 1992. The Uniform Submission Agreement was signed by Dennis M. Pape, Vice President-Private Client, on behalf of Merrill Lynch on January 6, 1993.

HEARING INFORMATION

The hearing was held on February 13, 1995 and February 14, 1995, at the NASD Executive Office in Washington, D.C. for a total of three (3) hearing sessions.

CASE SUMMARY

Claimant Black stated in her Statement of Claim that between February 1985 through May 1986, she deposited a total of \$601, 043.44 to her account. Claimant further stated that the registered representative assigned to her account, Kirk W. Thrush ("Thrush") outlined a conservative investment strategy for the account, and that Claimant made it clear to Thrush that her investment objectives

were safety of investment and steady monthly income. Claimant alleged that Thrush ignored her instructions, failed to follow the conservative investment strategy that he had laid out, and proceeded to trade repeatedly in risky stocks and highly speculative Merrill Lynch limited partnerships. Claimant further alleged that Thrush convinced her to heavily utilize margin trading, and that as a result of excessive margin trading by Thrush, Claimant was required to pay large amounts of margin interest. Claimant further alleged that from August of 1986 until December 1988, Thrush traded the account actively for the purpose of generating commissions without regard for the quality of stock purchased, that she was charged unnecessary and inappropriate commissions and mark-ups, and that Thrush made misrepresentations regarding the profitability of the account. Claimant alleged that the activities of Thrush constituted: violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, Section 11-702 of the Maryland Securities Act, and Article III Section 2 of the NASD Rules of Fair Practice; negligence; breach of fiduciary duty; and breach of contract. Claimant further alleged that Respondent Merrill Lynch failed to properly supervise the activities of Thrush, and that Merrill Lynch is liable for Thrush's actions under the common law doctrine of respondeat superior and as a controlling person under Section 20 of the Securities Exchange Act.

Respondent Merrill Lynch in its Answer denied each and every allegation of wrongdoing and liability set forth in the Statement of Claim. Respondent Merrill Lynch stated that: Claimant is an investment consultant and has acted as a real estate developer; Claimant had a margin account with a pre-existing debit balance prior to the time that Thrush was assigned to her account; Claimant never set forth safety or preservation of capital as her investment objectives; Claimant's stated investment objectives were trading and speculation; Claimant placed many unsolicited orders based on her own research; Claimant made several speculative investments in highly-leveraged horse breeding partnerships, real estate investments and tax shelters, and acted as a finder in at least one of these deals; Claimant maintained a margin account at another broker-dealer; Claimant's account did not lose money, but rather increased in value by more than \$67,000 during the period from February 1985 through December 1988; and Claimant withdrew over \$737,700 from her account.

Respondent set forth the following affirmative defenses in its Answer: the Claimant's claims are barred by the applicable statutes of limitations; all investments and strategies recommended to Claimant were suitable based upon her stated investment objectives; Claimant approved every transaction prior to entry; Claimant's losses were due to her own negligence and contributory negligence; Respondent did not exercise defacto trading authority over Claimant's account; Respondent breached no duty owed to Claimant; Respondent breached no contract with Claimant; and Respondent properly supervised Thrush and Claimant's account.

RELIEF REQUESTED

Claimant Black requested compensatory damages in the amount of \$300,000, 10% of her initial investment per annum from February 1, 1985 to January 1, 1990, \$50,000 representing compensation for emotional stress, punitive damages in an amount not less than \$125,000, attorney fees, and costs.

Respondent Merrill Lynch requested that the Statement of Claim be dismissed in full and that they be awarded their costs.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Merrill Lynch filed a Motion to Compel a more specific Statement of Claim, asserting that it did not meet the requirements of Section 25(a) of the NASD Code of Arbitration Procedure ("the Code"), and the NASD Arbitration Guidelines for the Service of Pleadings. Claimant Black filed a response. After due consideration, the Panel denied Respondent's Motion.

Respondent Merrill Lynch filed a Motion to Dismiss based on applicable Statutes of Limitations. The Claimant Black filed a response. The Panel decided to hold this Motion in abeyance until hearing. At hearing, the Panel heard oral argument from the parties. After due deliberation, the Panel decided to deny Respondent's Motion.

Respondent Merrill Lynch filed a Motion to Dismiss pursuant to Section 15 of the NASD Code of Arbitration Procedure ("the Code"). Claimant Black filed a response in which she agreed not to submit any claims concerning transactions made prior to September 24, 1986. Therefore, Respondent's Motion was rendered moot.

The parties have agreed that the Award in this matter may be executed by counterpart copies. The parties have also 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:

1. The Statement of Claim filed by Claimant Nancee W. Black is denied and dismissed in its entirety.
2. Each of the parties shall bear their own costs and expenses incurred, other than those specifically provided for herein.
3. Any relief not specifically provided for herein is denied.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed:

3 hearing sessions x \$750 = \$2,250.

Pursuant to Section 43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$200, and the hearing session deposit in the amount of \$750 previously paid to the NASD by Claimant.

The panel has ordered that the Claimant pay additional forum fees to the NASD in the amount of \$375 and Respondent pay \$1,125 to the NASD.

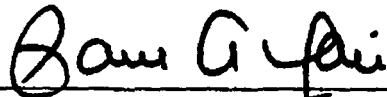
The panel has ordered that the Claimant pay a postponement fee in the amount of \$750 to the NASD.

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

By The Arbitration Panel:

Dated:

3/13/95



Paul A. Yates, Presiding
Public Arbitrator

Marshall Passman
Public Arbitrator

Carol Corbett
Industry Arbitrator

Date Award Served By the NASD: March 14, 1995

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