

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Orthopedic Surgery Associates, P.C.  
Pension Trust

92-03834

Name of Respondent

Merrill Lynch Pierce Fenner & Smith Inc.

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**REPRESENTATION**

For Claimant, ORTHOPEDIC SURGERY ASSOCIATES, P.C. PENSION TRUST: Thomas B. Bourque, Esq. of the law firm of Conlin, McKenney & Philbrick, P.C.

For Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.: Charles L. Henderson, Esq. of Merrill Lynch Pierce Fenner & Smith, Inc.

**CASE INFORMATION**

Statement of Claim filed: November 6, 1992.

Claimant's Submission Agreement signed on: December 7, 1992.

Statement of Answer filed by Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., on: May 19, 1993.

Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.'s, Submission Agreement signed on: May 7, 1993.

**HEARING INFORMATION**

Hearing Date/Sessions: October 20, 1993 / Two Sessions

Hearing Location: Embassy Suites located at 28100 Franklin Road, Southfield, Michigan, 48034.

### CASE SUMMARY

Claimant, ORTHOPEDIC SURGERY ASSOCIATES, P.C. PENSION TRUST, alleged that Respondent engaged in improper trading of securities in its account, after a valid, executed transfer order had been presented to, and received by, Respondent, and which resulted in a loss to Claimant.

Claimant alleged that on October 13, 1987 it authorized Respondent to accept transaction orders in its account from Provident Investment Counsel ("PIC"). Claimant further alleged that on May 7, 1992, it presented to Respondent, a properly executed transfer order which instructed Respondent to transfer Claimant's entire securities account and cancel all open orders for the account. Claimant further alleged that on May 21, 1992, Respondent executed orders to sell certain stocks in Claimant's account despite having received the transfer order two weeks earlier.

Claimant further alleged that on or about May 22, 1992, Respondent transferred the actual stock certificates and other securities out of Claimant's account pursuant to the transfer instructions. Claimant alleged that on or before June 2, 1992, Respondent realized it did not possess the stocks it had sold on May 21, 1992, and was required to purchase those same stocks, to cover the previous sell order, at a loss of \$11,740.30. Claimant alleged that Respondent, without authority, deducted the loss of \$11,740.30 from the final funds transferred to Claimant.

Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH INC., denied all allegations in the Statement of Claim. Respondent alleged that it was authorized to accept orders from PIC, and on May 21, 1992 PIC instructed Respondent to sell various securities from Claimant's account, and Respondent complied. Respondent alleged that this sale resulted in a short position of approximately \$204,000.00 in Claimant's account, which Respondent covered by repurchasing the securities.

Respondent asserted the following affirmative defenses: (i) the Statement of Claim failed to state a claim upon which relief can be granted, (ii) the Statement of Claim failed to establish a legal theory under which Respondent could be held liable for the alleged damages, (iii) Claimant is barred from recovery because it directed, authorized, consented to, acquiesced in, and/or ratified all transactions in its account with Respondent, (iv) Claimant made all decisions regarding this account, and any losses suffered were caused by Claimant's decisions and due to market conditions outside the control of Respondent, (v) each transaction was expressly authorized and approved by Claimant prior to its execution, (vi) Respondent is not liable because it acted properly and in good faith, (vii) all transactions complained of were properly conducted in accordance with applicable rules and regulations; all transactions were separately confirmed in writing and reflected on monthly statements; Claimant never made timely complaint or objection about its account, (viii) Claimant's damages are speculative, (ix) Claimant failed to mitigate its damages.

**RELIEF REQUESTED**

Claimant, ORTHOPEDIC SURGERY ASSOCIATES, P.C. PENSION TRUST, requested: damages of \$11,740.30, plus interest and costs.

Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH INC., requested: that all claims against it be dismissed, and that it be awarded costs and expenses.

**AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and , the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH INC., be and hereby is liable, and shall pay, to the Claimant, ORTHOPEDIC SURGERY ASSOCIATES, P.C. PENSION TRUST, the sum of \$7,500.00, plus pre-judgment interest at the legal rate from November 6, 1992 to October 20, 1993, plus post-judgment interest at the legal rate thereafter until date of payment of the award.
2. Each party shall bear their respective costs including attorneys' fees.

**FORUM FEES**

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

non-refundable filing fee: \$100.00  
2 sessions X \$300.00 = \$600.00  
Total: \$700.00

Forum fees Assessed Against:

The Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., be and hereby is liable, and shall pay, to the NASD, the sum of \$700.00 to represent forum fees.

1. The Respondent shall satisfy the above amount by reimbursing the claimant \$400.00 which represents the \$100.00 non-refundable filing fee and the \$300.00 hearing session deposit already paid to the NASD and paying the balance of \$300.00 to the NASD.

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The Respondent, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., be and hereby is liable, and shall pay, to the NASD, the sum of \$400.00 to represent forum fees.

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

**ARBITRATORS' SIGNATURE**

*Gordon F. Knight*  
Gordon F. Knight, Ph.D.

Public Arbitrator

*Hand-written changes made after discussion  
with James Sando 1/11/94*

DATE OF DECISION: January 25, 1994


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

**ARBITRATOR'S SIGNATURE**

Name

Public/Industry

  
Robert E. Parker, Esq.

Public Arbitrator

1/15/94.

DATE OF DECISION: January 25, 1994

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

**ARBITRATOR'S SIGNATURE**

Name

Public/Industry

  
Gordon F. Knight, Ph.D

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Public Arbitrator

DATE OF DECISION: January 25, 1994