

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Craig Fagerness

93-02488

Name of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.
Jeffrey Ament

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on June 24, 1993, Claimant Craig Fagerness, who appeared Pro Se, alleged that when he opened his account with Respondent Jeffrey Ament last December 1992, he explained to him that he was very bearish and gave Respondent Jeffrey Ament a book titled "Bankruptcy 1995", at which time, Claimant's hope was to convince Respondent Jeffrey Ament that the market was definitely going down and because of this book and the markets high valuation Claimant was very comfortable with short positions. Claimant further alleged that on about January 10, 1993 he bought 2 Put options on a pharmaceutical stock, Alza at \$4.25 and at the time of purchase he told Respondent Jeffrey Ament he would like to get \$7.50 a option, at which time, on January 12, 1993 Claimant went short 200 shares on the retailer, The Gap whereby Respondent Jeffrey Ament said the target price was \$28.00 and Claimant said that was fine with him. Claimant contended that on January 12, 1993, upon confirming the transaction during a call from Boston, he very specifically told Respondent Jeffrey Ament not to make any transactions in his account without first talking to him at which time, Claimant was very comfortable with these positions as he felt that the medical industry was going to get hit with Clinton's health plan whereby Claimant felt there may be a national sales tax put on that would hurt retailers and Claimant also felt the overall market was going down because of the federal budget deficit. Claimant further contended that upon his return on February 3, 1993, he returned Respondent Jeffrey Ament's call and was informed that on February 2nd, Respondent Jeffrey Ament had closed out the Put options on Alza at \$6.25 and the short on The Gap at \$35.50 whereby the puts on Alza gave him a gain of \$225.00 and the short on The Gap lost him \$1,000.00, at which time, Claimant was absolutely taken back; however, Respondent Jeffrey Ament gave him a big pitch saying if it went higher Claimant would really be in trouble, whereby Claimant reluctantly went along with getting another

position in Lonestar Steakhouse. Claimant asserted that the next day he told Respondent Jeffrey Ament that he wanted him to replace the positions, at which time, Respondent Jeffrey Ament got very upset and told Claimant he should cash out and find another broker whereby Claimant kept insisting and Respondent Jeffrey Ament said he would see what he could do. Claimant further asserted that Respondent Jeffrey Ament later called back to inform Claimant he would replace his positions but that it was not a good idea, the positions were going against Claimant, at which time, Claimant being very concerned about his relationship with Respondent Jeffrey Ament, Claimant very reluctantly told him to leave it as it now was. Claimant further alleged that the fact is that Respondent Jeffrey Ament intimidated him into accepting transactions that were made without his permission, and Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s failure to supervise, caused him to incur losses.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey Ament, by and through their in-house counsel Christopher D. Cavuoti, Esq., maintained that Claimant Craig Fagerness placed a call to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. in December, 1992, looking to speak with a Financial Consultant about investing, at which time, Respondent Jeffrey Ament took the call and a discussion ensued about Claimant's desire to "short the market" due to his bearish outlook. Respondents further maintained that Respondent Jeffrey Ament advised Claimant that he was bullish on the market and that shorting stocks was not a part of his philosophy; however, Respondent Jeffrey Ament advised Claimant that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. had analysts that gave specific trading recommendations that included both long and short positions, at which time, Claimant was excited about the possibility and scheduled an appointment to come in to visit Respondent Jeffrey Ament in the Minneapolis office to discuss this further. Respondents contended that at this meeting with Claimant, Respondent Jeffrey Ament showed him the research recommendations that included both upside and downside points whereby Respondent Jeffrey Ament advised Claimant that it was important to have a buy and sell discipline, which is described as buying and selling at pre-agreed target prices, at which time, Claimant understood this concept and readily agreed to this strategy. Respondent further contended on January 11, 1993, Claimant authorized the purchase of 2 Put AZA 045 Alza Corp. options at a premium of \$4.25 and on January 20, 1993 Claimant also authorized the short sale of 200 shares of Gap, Inc. at \$31.75, whereby for each of these transactions, Respondent Jeffrey Ament gave Claimant the upside and downside target prices at which he would close these positions, and Claimant agreed to these targets. Respondents asserted that in early February, 1993, the Alza Put hit its target price and the position was closed resulting in a \$200.00 profit at which time, the Gap short position was also closed when it hit the upside target price whereby Respondent Jeffrey Ament, unable to reach Claimant, left a message on Claimant's answering machine confirming the transactions. Respondents further asserted that when Claimant called the office to speak to Respondent Jeffrey Ament the next day, he was in agreement with Respondent Jeffrey Ament over the transactions and clearly this was in line with the buy and sell discipline referred to earlier; however, the following day, Claimant called Respondent Jeffrey Ament because he wanted to renege on the transactions, at which time, Respondent Jeffrey Ament explained to him that the transaction could not be reversed and that

he was being unrealistic in his profit expectations. Respondents further contended that after further discussion, Respondent Jeffrey Ament advised Claimant that if he could not make clear decisions and stick with them he should transfer his account to someone else. Respondents further asserted that the fact that the market moved to benefit Claimant at a later date after the transactions were executed does not mean that Respondent Jeffrey Ament made improper investment recommendations. Respondents further maintained that Claimant understood that there were target prices agreed to beforehand and once these prices were hit, the sell transactions would be executed, thus Claimant's allegations of unauthorized trading are not supported by the facts and the claim should be denied.

RELIEF REQUESTED

Claimant Craig Fagerness requested the sum of \$1,750.00 in actual damages.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey Ament requested the claim be denied and that the cost of this proceeding be assessed against Claimant.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Lawrence R. Commers, Esq., was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on June 14, 1993, by the Respondent Jeffrey Ament on September 27, 1993 and by the Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on October 11, 1993.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claim of Claimant Craig Fagerness against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey Ament is dismissed.
2. The parties shall bear their respective costs.
3. The \$50.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Craig Fagerness shall be retained by the NASD, Inc. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jeffrey Ament are jointly and severally liable and shall pay to the Claimant the sum of \$50.00, as reimbursement.

AFFIRMATION

I, LAWRENCE R. COMMERS, ESQ., do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

A handwritten signature in cursive script, reading "Lawrence R. Commers", written over a horizontal line.

Signature of Arbitrator

DATE OF DECISION: January 25, 1994