

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Elliott M. McDowell, Sr. and
Dorothy M. McDowell, husband
and wife,
Claimants,

v.

Merrill Lynch, Pierce, Fenner &
Smith, Inc.; H. Michael Frank;
Robert Callaghan; Richard Pello;
Sunand G. Bal; Sutro & Co., Inc.;
and Hunter A. Sauls, Jr.,
Respondents.

and

93-02837

Merrill Lynch, Pierce, Fenner &
Smith, Inc.; H. Michael Frank;
Robert Callaghan; Richard Pello;
Sutro & Co., Inc.; Sunand G. Bal;
and Hunter A. Sauls,
Counterclaimants,

v.

Elliott M. McDowell,
and Dorothy M. McDowell
Counterrespondents.

REPRESENTATION OF PARTIES

Elliott M. McDowell, Sr. and Dorothy M. McDowell, husband and wife ("Claimants") were represented by Dianna Cook, Esq., of Renaud, Cook & Videan, Geiger & Drury, P.A., Phoenix, Arizona, and Michael Salcido, Esq., of the Law Offices of Michael Salcido, Scottsdale, Arizona.

Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), H. Michael Frank ("Frank"), Robert Callaghan ("Callaghan") and Richard Pello ("Pello") (collectively referred to as the "Merrill Lynch

Respondents") were represented by Dennis M. Pape, Esq., Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, New York.

Hunter Sauls ("Sauls") was represented by Martin R. Galbut, Esq., of Galbut & Associates, Phoenix, Arizona.

Sunand G. Bal ("Bal") and Sutro & Co., Inc. ("Sutro") were represented by Michael J. Meehan, Esq., of , Tucson, Arizona.

CASE INFORMATION

Claimants' Statement of Claim was filed on or about July , 1993. Claimants' Submission Agreements were signed on July 19, 1993. Claimants' Answer to Sutro and Bal's Counterclaim was filed on or about January 21, 1994. Letter sent on behalf on the Claimants dismissing the claims against Pello, Frank, and Callaghan was filed on or about , 1995. Letter filed on behalf of the Claimants dismissing the claims against Merrill Lynch and Sauls for the time that Sauls was a Merrill Lynch employee was filed on or about June 14, 1995.

Respondents' joint Answer and Counterclaim was filed on or about November 18, 1995. Respondents' Submission Agreements were signed on or about November 18, 1993.

Sutro's, Bal's, and Saul's joint Answer and Counterclaim was filed on or about November 22, 1993.

HEARING INFORMATION

A Pre-Hearing conference was held on March 23, 1995, lasting a total of One (1) session. Hearings were held on April 3, 4, 5, 6, 7, 10, and 11, and 12 1995, for two (2) sessions each day. Additional hearing sessions were held on July 17, 18, 19, 20, and 21, 1995, for two (2) sessions each day. There were a total of 26 hearing sessions for this arbitration. The hearings were held in Scottsdale, Arizona. Due to a settlement with the Claimants, the Merrill Lynch Respondents did not participate in the July hearing

sessions.

CASE SUMMARY

Claimants alleged that Sauls: Churned their account in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(b), and Securities and Exchange Commission Rule 10b-5 promulgated thereunder, 17 C.F.R. Section 240.10(b)(5); committed statutory securities fraud in violation of A.R.S. Section 44-1991; violated A.R.S. Sections 13-2301(D)(4)(r) and 13-2314.01(A), et seq.; breached their fiduciary duty; made misrepresentations; and made unauthorized trades. Claimants further alleged that Merrill Lynch, Sutro, Frank, Callaghan, Pello, Bal and other managers: Failed to monitor Claimants' accounts or to supervise their employee and agent Sauls adequately; and recklessly tolerated or ratified Sauls' deceit concerning the balance in the Claimants' accounts or unsuitable investment strategy.

For their Answer, the Merrill Lynch Respondents jointly and individually denied each and every allegation of wrongdoing and liability set forth in or implied by the Statement of Claim. Respondents also asserted the following defenses: Claimants were warned of the risks they chose to assume; all transactions recommended to Claimants were suitable based on their stated investment objectives; Claimants' account was not churned; at all times, Claimants were in full control of their account, with the vast majority of the transactions being unsolicited investment ideas of the Claimants; the amount of trading was not excessive for a speculative account; Claimants were always fully aware of the performance of their account; Claimants' federal securities law, RICO, and Arizona securities law claims are time barred; all transactions entered in Claimants' account were authorized and ratified by Claimants; Respondents properly exercised their supervisory duties over Sauls, as well as Claimants' account; all losses sustained by Claimants were due to their orders and directions; the NASD Arbitration Panel did not have authority to award punitive damages. In addition, the Merrill Lynch Respondents filed a Counterclaim asserting that this arbitration claim had been brought in bad faith and is frivolous, having no basis in fact.

In their Answer, Sutro, Bal and Sauls, unless otherwise admitted therein, denied the allegations contained in the Statement of Claim. Sutro, Bal and Sauls also asserted that the claim is barred by the affirmative defenses of: Statutes of limitations; ratification; waiver; estoppel; laches; failure to mitigate or minimize losses. In addition, Sutro, Bal and Sauls filed a Counterclaim alleging that the Claimants initiated this proceeding in bad faith and without probable cause as Claimants had no facts to support the allegations or the legal theories based thereon, nor could honestly or reasonably believe that there were valid grounds for the action. Sutro, Bal and Sauls also asserted that because of Claimants' malicious action, they have suffered financial loss and damage to their reputations.

For their Answer to the Counterclaim of Sutro, Bal, and Sauls, Claimants restated and replead the allegations contained in the Statement of Claim. Claimants categorically denied each and every allegation of wrongdoing contained in the Counterclaim. Claimants further asserted that: In spite of Sutro's admission that Sutro were aware of the history of Claimants' account, which would include Merrill Lynch's decision to restrict Claimants' trading, they allowed Sauls to trade on behalf of Claimants' account at more than twice the level of activity the account traded while with Merrill Lynch, while at the same time initiating similar types of trades; Bal recognized the unsuitability of the trades as was evidenced by his ultimate termination of the Claimants' ability to consummate certain trades at Sutro after discussions with the Claimants; and alleged that Sauls elected to leave his employment at Merrill Lynch, because Merrill Lynch would not allow him to take further advantage of Claimants; further that Sutro was aware of same when it employed Sauls.

RELIEF REQUESTED

In their Statement of Claim, Claimants requested the following remedies:

1. Claimants' out-of-pocket losses in Merrill Lynch account no. 410-96192, \$2,373,988.00, and their losses in Sutro account no. 814-05549, \$337,008, plus the moneys the Claimants' accounts would

have earned if Sauls properly met his legal and professional duties to the Claimants.

2. All commissions Respondents made on the Claimants' account.
3. Treble damages pursuant to A.R.S. Section 13-2314.
4. Punitive damages in an amount to be determined by the arbitration panel.
5. Claimants' attorneys' fees pursuant to A.R.S. Sections 12-341.01(A), 13-2314.01(A), or 44-2001.
6. Claimants' costs pursuant to A.R.S. Section 12-341 and N.A.S.D. Code of Arbitration Procedure (the "Code") Paragraph 3743, Section 43(c).

Further, in their Answer to Counterclaim of Sutro & Co., et al., Claimants requested that the arbitrators dismiss all claims made against them and to award to Claimants all relief requested in the Statement of Claim.

the Merrill Lynch Respondents requested that the arbitrators dismiss all claims made against them and assess costs of this proceeding against the Claimants. In addition, the Merrill Lynch Respondents asserted a Counterclaim award of \$50,000.00 as damages to compensate them for the time, effort and out-of-pocket expenses necessary to defend this action.

Sutro, Bal, and Sauls requested the following award:

1. The claim be dismissed in its entirety;
2. Sutro, Bal, and Sauls be awarded general damages, including but not limited to their attorneys' fees, cost and expenses in responding to and defending this claim and damages for harm to their reputations; and
3. Such other relief as the arbitrators deem just and proper.

OTHER ISSUES CONSIDERED & DECIDED

Prior to the commencement of the July, 1995, hearing sessions, Claimants filed notice of settlement with the Merrill Lynch Respondents. The Merrill Lynch Respondents did not participate in the July hearing sessions.

The parties have agreed that the Award in this matter may be executed by 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 original(s) remain on file with the NASD.

AWARD

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

1. Claimants claims made against Sutro, Bal, and Sauls are, and each of them, denied and dismissed with prejudice.
2. All Respondents' Counterclaims, including, but not limited to attorneys' fees are, and each of them, denied and dismissed with prejudice.
3. Each party shall bear its own costs and expenses associated with this arbitration.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

1 Pre-hearing conference session x \$300.00 = \$300.00

26 hearing sessions x \$1,500.00 = \$39,000.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$300.00, and shall retain the hearing session deposit in the amount of \$1,500.00 previously paid to the NASD by the Claimants.

Pursuant to Sections 25(b)(1) and 43(c) of the Code, Merrill Lynch

is assessed a Counterclaim filing fee in the amount of \$500.00.

Pursuant to Sections 25(b)(1) and 43(c) of the Code, Sutro, Bal and Sauls are jointly assessed a Counterclaim filing fee in the amount of \$500.00.

Additional forum fees in the amount of \$37,800.00 are assessed against the Claimants.

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

CONCURRING ARBITRATORS

Dated:

Name:

9-13-95

s/s

Herbert H. Neuer
Herbert H. Neuer
Presiding Chair
Public Arbitrator

9-1-95

s/s

Howard W. Shannon
Howard W. Shannon
Public Arbitrator

9-8-95

s/s

Marvin J. Klein
Marvin J. Klein
Industry Arbitrator