

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Name of Claimant

Ann F. Cogswell

and

93-03370

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Ben D. Trevor

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### **REPRESENTATION OF PARTIES**

Ann F. Cogswell ("**Claimant**") was represented by John M. Cogswell, Esq., Denver, Colorado.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("**Respondent MLPF & S**") and Ben D. Trevor ("**Respondent Trevor**") were represented by Lisa S. Kahn, Esq. and Laura Metcalf, Esq., Davis, Graham & Stubbs, L.L.C., Denver, Colorado.

### **CASE INFORMATION**

The Statement of Claim was filed on or about August 27, 1993. Submission Agreement of Claimant Ann F. Cogswell was signed on August 16, 1993.

Motion to Dismiss Stale Claims and Statement of Answer was filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Ben D. Trevor on or about December 29, 1995. Submission Agreement of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. was signed on July 8, 1997 by Thomas Klusartis. Submission Agreement of Respondent Ben D. Trevor was signed on July 8, 1997.

### **HEARING INFORMATION**

A pre-hearing conference was held on February 11, 1997 for one (1) session. The hearing was held on Tuesday, April 8, 1997 for one (1) session, Monday, July 7, 1997 for three (3) sessions, Tuesday, July 8, 1997 for two (2) sessions and Wednesday, July 9, 1997 for three (3) sessions in Denver, Colorado for a total of one (1) pre-hearing and nine (9) hearing sessions.

### **CASE SUMMARY**

Claimant alleged that Respondent Trevor made investments in various limited partnerships which were unsuitable in light of her financial situation and investment objectives. Specifically, Claimant alleged that the limited partnership investments were of high risk and would not be liquid for many years into the future. In addition, Claimant alleged that the investments were tax shelters and Claimant did not need tax shelters. Claimant further alleged that Respondent MLPF & S misrepresented the value of the limited partnership interests on her monthly account statements up to December, 1991. It was alleged that the actions of respondents also constituted fraud, breach of fiduciary duty.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that although the statement of claim alleges wrongdoing in connection with the purchase in 1985 and 1986 of three limited partnership investments of \$50,000 each, these investments comprised only a portion of the entire portfolio. It was stated that the Claimant and Respondent Trevor worked to establish a portfolio of diversified investments including blue chip stocks, municipal bond trusts, tax exempt funds, Government National Mortgage Association (GNMA) securities, and a few growth stocks. Respondents also stated that the limited partnership investments were designed to provide income and tax benefits to the Claimant. Respondents further stated that Claimant decided to purchase the partnership interests after discussions with respondent Trevor, receipt of prospectuses and consulting with her ex-husband, who worked at Shearson. Respondents raised numerous affirmative defenses including that the claims were not eligible for arbitration pursuant to the NASD Code of Arbitration Procedure.

### **RELIEF REQUESTED**

Claimant requested an award directing Respondents, jointly and severally, to pay damages in an amount equal to her original investment plus interest thereon at the legal rate, less income received and less any amount that may be derived from a sale of the securities, such amounts to be proved at the hearing, costs of this proceeding, including reasonable attorneys' fees, and exemplary damages since the injury complained of is attended by circumstances of fraud and wanton and willful conduct. Claimant amended her request for relief at the hearing to withdraw the request for rescission and out of pocket calculation and substituted a request for economic damages plus costs of this proceeding, including reasonable attorneys' fees, and exemplary damages since the injury complained of is attended by circumstances of fraud and wanton and willful conduct.

Respondents requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorneys' fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondents filed an action for an order permanently staying the arbitration, on the grounds that the dispute was not eligible under Rule 10304 (then §15) of the NASD Code of Arbitration Procedure. Pursuant to the Order entered on July 22, 1996 by Richard P. Matsch, Chief Judge, United States District Court for the District of Colorado in matter Civil Action No. 94-M-147, the parties were ordered to proceed with the arbitration of the breach of fiduciary duty claim.

The parties have agreed that the Award in this matter may be executed in 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 Regulation, Inc. Office of Dispute Resolution.

### **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. Based upon the evidence and testimony presented, the claims asserted in this matter shall be and hereby are dismissed and denied in their entirety.
2. Each party shall bear its own costs, expenses and fees, including attorneys' fees and expert witness fees, incurred in this matter not specifically enumerated herein.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were nine (9) sessions x \$750 and one (1) session x \$300 = \$7050 in forum fees. Pursuant to Rule 10332(b) 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 Rule 10332(c) of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimant Ann F. Cogswell. Claimant Ann F. Cogswell shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$2775 as forum fees. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$3525 as the balance due for forum fees.

No surcharge is assessed in this matter pursuant to Rule 10333 of the NASD Code of Arbitration Procedure since this matter was filed prior to the effective date of the Rule.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain postponement fees in the amount of \$375 previously deposited by Claimant. The NASD Regulation, Inc. Office of Dispute Resolution shall retain postponement fees in the amount of \$375 previously deposited by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. **Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.**

/s/ James B. Eichberg

James B. Eichberg  
Public Arbitrator, Presiding Chair

Dated:

July 17, 1997

/s/ Vincent P. Fitzgerald

Vincent P. Fitzgerald, CPA  
Public Arbitrator

July 31, 1997

/s/ William M. Pendleton, Esq.

William M. Pendleton, Esq.  
Industry Arbitrator

July 18, 1997