

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

PBA of the New York State Troopers, Inc.

93-04888

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc
Thomas J. Gerber

REPRESENTATION

For Claimant appeared Richard L. Burstein, Esq. of Fernandez & Burstein, P.C., Albany, New York.

For Respondents Merrill Lynch Pierce Fenner & Smith Inc. and Thomas J. Gerber appeared Howard Meyers, Esq. of Meyers & Maistrow, New York.

CASE INFORMATION

The Statement of Claim was filed November 23, 1993. Claimant's Submission Agreement was signed on November 9, 1993.

The Statement of Answer was filed by Respondents Merrill Lynch Pierce Fenner & Smith Inc. and Thomas J. Gerber on January 13, 1994. Respondents Merrill Lynch Pierce Fenner & Smith Inc. and Thomas J. Gerber's submission Agreements were signed on January 13, 1994.

HEARING INFORMATION

Hearing Dates/Sessions:	October 18, 1995	Two Sessions
	October 19, 1995	Two Sessions
	January 10, 1996	Two Sessions
	January 11, 1996	Two Sessions
	February 12, 1996	Two Sessions
	February 13, 1996	Two Sessions

The hearings on October 18 and 19, 1995 and January 9-11, 1996 were held at the Best Western Hotel in Albany, New York. The hearings on February 12 and 13, 1996 were held at the Marriott Hotel in Albany, New York.

CASE SUMMARY

Claimant is a not-for-profit corporation formed to further the interests of its members and to improve their general welfare. Claimant alleged that its funds were entrusted to Merrill Lynch Pierce Fenner & Smith ("Merrill Lynch") and Thomas J. Gerber ("Gerber") collectively ("Respondents"), to manage with an expectation that they would be prudently investing in safe quality investments which would provide safety and a reasonable rate of return. However, Claimant alleged that Respondents invested its funds in unsuitable speculative stocks, limited partnerships, and other poor quality investments. Further, Claimant alleged that hundreds of purchases and sales transactions were made, many without proper authorization and many without the knowledge or consent of the Claimant and that such activity resulted in extremely high and excessive brokerage commissions to Respondents and significant losses to its investment portfolio.

Claimant alleged that Gerber recommended that it transfer its account from Key Bank and open a new account at Merrill Lynch and that Claimant followed his advice and liquidated its AT&T, Arco and Federal Farm Credit Bank bonds, certain liquid assets and money market trust funds held at Key Bank to effect the transfer. Thereafter, Respondents allegedly recommended and purchased a number of unsuitable investments including a number of limited partnerships and tax shelters such as the MLH Income Realty Partnership IV ("MLH IV"), Merrill Lynch Media Partnership ("Media Partners") and the MLH Income Realty Partnership V ("MLH V") and that they failed to advise it as to the risks associated with these transactions. Claimants further alleged that Respondents churned its account and failed to meet its stated investment objectives and that as a result, Claimant suffered significant losses.

Claimant alleged that Respondents are liable for breach of contract, breach of fiduciary duties, violations of the NASD Rules of Fair Practice and the Securities and Exchange Acts, as well as common law fraud and concealment and that Merrill Lynch is also liable under the theory of respondeat superior. Claimant also alleged that Respondents made misstatements of facts and omissions, misrepresentations, concealment and other deceitful conduct designed to conceal their fraud and that they led Claimant to believe that its investments were safe, secure and well managed.

Respondents maintained that they deny each and every allegation of wrongdoing set forth in the Statement of Claim. Respondents further maintained that Claimant invested in three limited partnerships between 1984 and 1986. Respondents also maintained that as of December 1993, MLH IV allegedly made cumulative cash distributions to investors totalling over 55% of the amount invested; MLH V has made cumulative cash distributions to investors totalling over 45% of the amount invested; and Media Partners was sold by Claimant in 1989 for a profit.

Respondents asserted that Claimant approved each and every transaction in advance and that Claimants received confirmations of each and every transaction in the account as well as monthly account statements. Furthermore, Respondents asserted that Claimant retained the firm of Coopers & Lybrand to audit its account and that they provided Coopers & Lybrand with year-end balances for the prior year and the year-end market value of Claimant's investments. Accordingly, Respondents maintained that Claimant and its independent auditors were regularly and routinely provided with timely and complete information regarding the activity and the performance of the account.

RELIEF REQUESTED

Claimant requested an award of actual losses sustained by diminution in the value of the portfolio in the six years from the date of the institution of this claim to date in the amount of \$418,124.28 together with damages as measured by a "well managed portfolio" of \$1,520,785.00 together with costs, disbursements, expert witness fees, forum fees, printing fees, arbitration fees, legal fees and any other and further amount which this arbitration panel deemed just and appropriate under the circumstances. Claimant, in its Post Hearing Memorandum of Law and Reply Memorandum of Law requested an award in the amount of \$782,376.00.

Respondents requested that the Statement of Claim be dismissed and that costs be assessed against Claimant.

OTHER ISSUES CONSIDERED & DECIDED

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 remains on file with the NASD.

Respondents requested dismissal of any and all claims that pertained to investments made on or prior to November 23, 1987 arguing that such claims must be dismissed as they are ineligible for submission to arbitration under Section 15 of the NASD Code of Arbitration Procedure. Respondents maintained that the six year period prescribed in Section 15 is measured from the date of the purchase or sale of the investment(s) complained of. Therefore, respondents argued, the panel may not entertain any claims that pertain to investments made on or prior to November 23, 1987.

Claimant maintained that the purchase date is not the event or occurrence that gave rise to this dispute. Claimant argued that a claimant's reasonable allegations of discovery are sufficient to set the accrual of the cause of action at the date of discovery. Claimant further maintained that Respondents concealed the fraud and, therefore, under New York Law the Statute for Limitations for claims of fraud is six years from the time plaintiff discovers the fraud or could, with reasonable diligence, have discovered the fraud. Claimant also argued that it set forth a cause of action against Merrill Lynch for failure to supervise. That violation, Claimant alleged, has been a continuing violation which did not occur only on the purchase date of the various securities, but has continued.

AWARD

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

1. Respondents Merrill Lynch Pierce Fenner & Smith and Thomas J. Gerber be and hereby are jointly and severally liable and shall pay to the Claimant, Police Benevolent Association of New York Troopers, Inc., the sum of \$290,000.00 with interest thereon in the sum of \$14,100.00 for a total award of \$432,100.00.
2. Each party shall bear their respective costs, including attorneys' fees and witness fees. except that Respondents are jointly and severally liable and shall reimburse Claimant the sum of \$1,000.00 representing the hearing session deposit previously deposited with the

NASDR.

3. All other claims be and hereby are dismissed.

FORUM FEES


Pursuant to Section 43c of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$250.00 non-refundable filing fee submitted by Claimant and have assessed the following forum fees:

12 Sessions x \$1000= \$12,000.00 - \$1,000.00 hearing session deposit = \$11,000.00

Respondents be and hereby are jointly and severally liable and shall pay to the NASDR, Inc. the sum of \$11,000.00 representing forum fees assessed in this matter.

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

ARBITRATORS' SIGNATURES



Donald G. Hatt, Esq.
Public Arbitrator

Irving D. Fish, Jr.
Industry Arbitrator

Barry Feiden
Public Arbitrator

I, Donald G. Hatt, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules, that this is my decision in the above captioned matter.



Donald G. Hatt

Date of Decision: August 29, 1996

NASDR.

3. All other claims be and hereby are dismissed.

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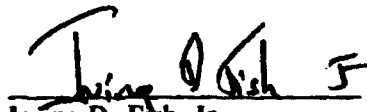
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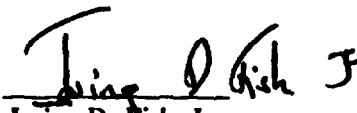
Donald G. Hatt, Esq.
Public Arbitrator



Irving D. Fish, Jr.
Industry Arbitrator

Barry Feiden
Public Arbitrator

I, Irving D. Fish, Jr., do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules, that this is my decision in the above captioned matter.



Irving D. Fish, Jr.

Date of Decision: August 29, 1996

NASDR.

3. All other claims be and hereby are dismissed.

FORUM FEES

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ARBITRATORS' SIGNATURES

Donald G. Hatt, Esq.
Public Arbitrator

Irving D. Fish, Jr.
Industry Arbitrator


Barry Feiden
Public Arbitrator

I, Barry Feiden, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules, that this is my decision in the above captioned matter.


Barry Feiden

Date of Decision: August 29, 1996