

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Name of Claimant**

Robert L. Bartley

93-05284

**Name of Respondents**

Merrill Lynch, Pierce Fenner & Smith, Inc.;  
Frederick F. Alvira

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**REPRESENTATION**

For Claimant: Robert L. Bartley ("Bartley") was represented by J. Kinsley Cotton, Esq. of Drolet, Freeman, Preston, Cotton, Sterling & Norris, P.C., located in Bloomfield Hills, Michigan.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") was represented by Thomas J. Mullaney, Esq. of Merrill Lynch, Pierce, Fenner & Smith, New York, New York.

Frederick F. Alvira ("Alvira") did not appear.

**CASE INFORMATION**

Statement of Claim filed: December 22, 1993.

Claimant's Submission Agreement signed on: December 17, 1993.

Statement of Answer filed by Merrill Lynch on: March 14, 1994.

Submission Agreement by Merrill Lynch signed on March 14, 1994 by Thomas J. Mullaney, Merrill Lynch, Pierce, Fenner & Smith, Inc.

Frederick F. Alvira did not file an executed Submission agreement.

Alvira's Answer filed on: April 5, 1994.

Merrill Lynch's Amended Statement of Answer filed: July 6, 1994.

### **HEARING INFORMATION**

Pre-Hearing Conference: March 21, 1995 for One (1) session before One (1) arbitrator.  
Hearing Dates/Sessions: March 27, 1995 for Two (2) sessions;  
March 28, 1995 for Two (2) sessions;  
May 3, 1995 for Three (3) sessions.  
Hearing Location: Southfield, Michigan.

### **CASE SUMMARY**

Claimant Bartley alleged that Respondent Alvira, while employed by or acting as an agent for Respondent Merrill Lynch, engaged in fraud, forgery and abuse of the broker/client relationship through churning, unauthorized trading and forged margin account authorizations. Bartley specifically alleged that:

- 1) Bartley had been unemployed since 1981 due to a mental disability. In January of 1988, he opened an account at PaineWebber. Alvira became his "investment executive" at PaineWebber in January of 1989. Bartley followed Alvira to Merrill Lynch when Alvira left PaineWebber in April 1989;
- 2) Bartley's investment objectives, communicated to Alvira, were to preserve capital while realizing some modest growth and income. Respondents recommended that Bartley's portfolio concentrated on conservative growth and income with little risk;
- 3) Soon after Bartley's account was at Merrill Lynch, Alvira submitted to Merrill Lynch a Cash Management Account Agreement with Bartley's forged signature on it which permitted margin trading in Bartley's account. Alvira's aggressive trading resulted in margin calls which Alvira blamed Bartley for writing NSF checks;
- 4) Other account documents contained Bartley's forged signature. These actions were not limited to Bartley, but occurred to other customers of Alvira;
- 5) After Alvira gained control of the account, he began making unauthorized buys and sells in the account, without informing Bartley of the risks involved in the transactions. When Bartley requested information, Alvira would misrepresent the status of the account, taking advantage of Bartley's age, health and unsophistication; and

- 6) Alvira's control of Bartley and the account permitted him to conduct excessive trading in light of Bartley's investment objectives.

Based upon the above allegations, Bartley asserted claims for common law fraud; violation of Rule 10b-5 under Section 10(b) of the Securities and Exchange Act of 1934; violation of the Michigan Blue Sky Laws; breach of common law duties, fiduciary duties and negligence; violation of RICO, 18 U.S.C. Section 1961-1968; and breach of contract. In addition, Alvira asserted claims against Merrill Lynch under Respondent Superior.

Respondent Merrill Lynch denied the material allegations of the Statement of Claim, asserting that:

- 1) Bartley remained in control of his account at all times and all transactions were properly authorized;
- 2) All documentation for Bartley's account was properly authorized. Bartley received confirmations for all transactions and monthly statements for the Cash Management Account showing the value of the investment, the amount of borrowing power and the total amount of margin debt;
- 3) Bartley's account at Merrill Lynch was less than half of his investment assets;
- 4) In June of 1992, Alvira's branch manager wrote to Bartley asking for any comments he had about his account. When a written reply was not received, the branch manager contacted Bartley and was told that Bartley was pleased with the handling of his account;
- 5) Bartley's children were involved in the account and met with Alvira regarding his financial status; and
- 6) The claims involving other customers are irrelevant and prejudicial, and there is no factual similarity between the cases.

In addition, Merrill Lynch asserted several affirmative defenses, including the following:

- 1) Bartley has not pleaded any case under the RICO act against Merrill Lynch;
- 2) The prayer for punitive damages is insufficient as an matter of law;
- 3) There is no express or implied contract to manage Bartley's account;
- 4) Claimant did not object to the transactions after receiving the monthly

statements and confirmations and has therefore ratified all transactions; and

5) The claims are barred by the applicable statutes of limitations.

Respondent Alvira denied all allegations of wrong doing.

#### **RELIEF REQUESTED**

Claimant Bartley requested entry of an award against Respondents for actual damages of \$52,081.00 for account losses and lost investment opportunity; interest at an amount to be determined; punitive, exemplary or treble damages; and attorneys' fees.

Respondent Merrill Lynch requested that the Statement of Claim be dismissed.

Respondent Alvira requested that Bartley not receive any recovery.

#### **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(s) remain on file with the NASD. >

Respondent Alvira did not file an executed Submission Agreement or appear at hearing, but did file an answer. The panel finds that Respondent Alvira is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure. In addition, the panel determined that Alvira received due notice of the hearing and that pursuant to Section 29 of the NASD Code of Arbitration Procedure, the arbitration would proceed in his absence.

#### **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) Respondents Merrill Lynch, Pierce, Fenner and Smith, Inc. and Frederick F. Alvira are jointly and severally liable for and shall pay to Claimant Robert R. Bartley the sum of \$48,000.00 as actual damages;
- 2) The claims for punitive, exemplary or treble damages, including the RICO claim, are hereby dismissed with prejudice and denied in their entirety;

3) The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and

4) Any relief not specifically awarded are hereby denied.

**FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) pre-hearing conference x \$300.00 = \$300.00; Seven (7) hearing sessions x \$500.00 per session = \$3,500.00; Total Forum Fees = \$3,800.00.

The National Association of Securities Dealers, Inc. shall retain the \$150.00 claim filing fee and the \$500.00 hearing session deposit previously deposited by the Claimant Robert L. Bartley. Claimant Robert L. Bartley is liable for and shall pay additional forum fees of \$1,400.00. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Frederick F. Alvira are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$1,900.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Barry Goldman, Esq.  
Barry Goldman, Esq.  
Public Chairperson

May 30, 1995

/s/ Richard L. Koblinski, Esq.  
Richard L. Koblinski, Esq.  
Industry Arbitrator

May 31, 1995

/s/ Leonard G. Hendricks  
Leonard G. Hendricks  
Public Arbitrator

May 30, 1995

For NASD Use Only

Date of Decision: May 31, 1995