

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Farideh R. Bagne,  
Stephon B. Bagne, and  
Alexander A. Bagne

Claimants,

v.

No: 95-01598

Merrill Lynch, Pierce, Fenner & Smith, Inc., and  
Anne M. Cook-Kuhnle

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimants Farideh R. Bagne ("Dr. Bagne"), Stephon B. Bagne, and Alexander A. Bagne (collectively referred to as "Claimants") were represented by John S. Barr, Esq. of Maloney, Barr & Huennekens located in Richmond, Virginia. Claimants had been previously represented by Farideh R. Bagne, Esq.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Anne M. Cook-Kuhnle ("Cook-Kuhnle") (collectively referred to as "Respondents") were represented by Arthur H. Sobel, Esq. of Merrill Lynch located in New York, New York.

### **CASE INFORMATION**

The Statement of Claim was filed on or about March 30, 1995.

Claimants' Joint Submission Agreement was signed on March 29, 1995.

The Statement of Answer was filed on or about June 5, 1995.

Respondent Merrill Lynch's Submission Agreement was signed on June 6, 1995 by Arthur H. Sobel, First Vice President and Assistant General Counsel of Merrill Lynch.

Respondent Anne M. Cook-Kuhnle's Submission Agreement was signed on June 1, 1995.

The Amended Statement of Claim was filed on or about December 8, 1995.

Claimants' Post-Hearing Memorandum as to Punitive Damages and Attorney's Fees was filed on or about July 22, 1996.

Respondents' Post-Hearing Memorandum as to Punitive Damages was filed on or about August 5, 1996.

### HEARING INFORMATION

The telephonic pre-hearing conferences were held on:

September 14, 1995 for (1) session; and  
October 31, 1995 for (1) session.

The hearing was held on:

June 4, 1996 for three (3) sessions; and  
July 2, 1996 for two (2) sessions.

The hearing was held in Southfield Michigan.

### CASE SUMMARY

Claimants alleged that Respondent Anne M. Cook-Kuhnle, a Financial Consultant with Respondent Merrill Lynch, recommended that Claimant Farideh R. Bagne transfer \$504,059.49 from CMA Money Market fund to Pilgrim Adjustable Rate Securities Trust IV (the "Pilgrim trust"). Claimants asserted that Respondent Cook-Kuhnle assured Dr. Bagne that the principal would be safe and would be available at any time. Claimants maintained that Respondent Cook-Kuhnle was aware of Claimants' conservative investment approach, concerns, and objectives. Claimants contended that Respondent Cook-Kuhnle called Dr. Bagne and stated the price of the Pilgrim trust had gone down and that the value of the fund was now worth \$408,082. Claimants maintained that Respondent Cook-Kuhnle advised Dr. Bagne not to sell the Pilgrim trust and made assurances that the Pilgrim trust would stabilize. Claimants asserted that Respondent Cook-Kuhnle never returned Dr. Bagne's calls or contacted her subsequent to that conversation.

Claimants alleged that Dr. Bagne subsequently sold all her shares of the Pilgrim trust for a total of \$353,608. Claimants contended that Respondents were guilty of mishandling the funds, misrepresentation, breach of fiduciary duty, fraudulent representation, negligence, and mismanagement. Claimants also contended that Respondents' actions constituted a violation of the Michigan Uniform Securities Act.

Respondents denied all liability to Claimants in the Statement of Answer. Respondents alleged that the decision to purchase the Pilgrim trust was made by Dr. Bagne, and that Dr. Bagne was both informed and aware of the nature and extent of the risks involved with the Pilgrim trust. Respondents asserted that the Pilgrim trust was never presented as a substitute for a money market fund, and that Dr. Bagne understood this distinction. Respondents contended that a prospectus explaining the Pilgrim trust was delivered to Claimants prior to the consummation of the purchase of their interest. Respondents maintained that the value of the Pilgrim trust fell as a result of adverse market conditions for bonds in general and for subordinated adjustable rate mortgage securities in particular, rather than a sudden deterioration in the fundamental quality of the underlying trust assets. Respondents alleged that Respondent Cook-Kuhnle called Dr. Bagne and told her to sell her interest in the Pilgrim trust. Respondents asserted that, had Dr. Bagne heeded Respondents advice, Dr. Bagne would have received net proceeds of \$487,006.

#### **RELIEF REQUESTED**

Claimants requested an award of damages in the amount of \$191,337.96, the amount allegedly lost as a result of investing in the Pilgrim trust, plus interest. Claimants also requested an award of all costs, including legal, secretarial, expert witness, and case preparation.

Respondents requested that an award be rendered dismissing the Statement of Claim in its entirety and granting to Respondents the amount of their costs, fees and disbursements.

#### **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.

Respondents' Motion to submit additional evidence after the conclusion of the hearing was denied.

### AWARD

After considering the pleading, 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) That Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay to Claimants Farideh R. Bagne, Stephon B. Bagne, and Alexander A. Bagne compensatory damages in the amount of Two Hundred Thousand Dollars and No Cents (\$200,000.00);
- (2) That Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay to Claimants Farideh R. Bagne, Stephon B. Bagne, and Alexander A. Bagne attorney fees in the amount of Forty Thousand Dollars and No Cents (\$40,000.00). The panel finds that attorney fees are recoverable pursuant to applicable New York and Michigan law;
- (3) That all claims against Respondent Anne M. Cook-Kuhnle are hereby dismissed in their entirety with prejudice; and
- (4) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby dismissed in their entirety with prejudice.

### FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 per pre-hearing session. There were five (5) hearing sessions  $\times$  \$750 = \$3,750 in forum fees. There were two (2) pre-hearing sessions  $\times$  \$300 = \$600. Total forum fees = \$4,350. Pursuant to §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 §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 previously deposited by the Claimants. NASD Regulation, Inc. Office of Dispute Resolution shall refund the hearing session deposit in the amount of \$750 previously deposited by the Claimants.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay forum fees in the amount of \$4,350. Pursuant to §10333 of the NASD Code of Arbitration Procedure, Respondent Merrill Lynch,

NASD Regulation, Inc.  
Arbitration No. 95-01598  
Award Page 5 of 5

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Pierce, Fenner & Smith, Inc. is liable for, and shall pay the member surcharge in the amount of \$350.

**Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Concurring Arbitrators' Signatures

\s\ Marc E. Thomas  
Marc E. Thomas, Esq.  
Chairperson  
Public Arbitrator

September 30, 1996  
Dated:

\s\ Gordon F. Knight  
Gordon F. Knight, Ph.D  
Panelist  
Public Arbitrator

September 25, 1996  
Dated:

Dissenting Arbitrator's Signature

I Dissent only with respect to the panel's ruling to dismiss all claims against Respondent Anne M. Cook-Kuhnle.

\s\ Harold I. Gach  
Harold I. Gach, Esq.  
Panelist  
Industry Arbitrator

September 27, 1996  
Dated:

For NASD use only:  
Date award served on the parties: October 9, 1996