

961010

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Anita K. Winkis f/k/a
Anita K. Wheeler,

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Securities Dealers Inc.

1996

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9503297

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith Inc. and
Blaine M. Goldberg

REPRESENTATION

For Claimant Anita K. Winkis f/k/a Anita K. Wheeler ("Winkis"): Richard J. Winkis, Esq.,
West Palm Beach, Florida.

For Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Blaine M.
Goldberg ("Goldberg"): Scott J. Link, Esq. and John C. Kelly, Esq. of Ackerman, Link &
Sartory, P.A., of West Palm Beach, Florida.

CASE INFORMATION

Statement of Claim filed: July 11, 1995.

Claimant's Submission Agreement signed on: July 5, 1995.

Claimant's response to Respondents' Answer and Affirmative Defenses filed on: August 12,
1996.

Joint Answer filed by Respondents Merrill Lynch and Goldberg on: September 28, 1995.

Respondents' Submission Agreement signed on: September 28, 1995.

HEARING INFORMATION

On August 19, 1996 in Fort Lauderdale, Florida, hearings lasting (2) sessions were conducted.

CASE SUMMARY

Claimant, **Winkis** alleged that Respondents' Merrill Lynch and Goldberg committed negligence by breaching their fiduciary duty to Claimant who opened an account with Respondents where all of Claimant's assets would be in the form of stock and exercised stock options from The Home Depot. **Winkis** claims that Goldberg's actions and omissions constitute negligence regarding: (1) the failure to ascertain the cost basis of the subject stock, (2) the formulation and tender of a recommendation to the client based on incomplete information which was readily available and easily obtainable, (3) the failure to warn the client about the certain foreseeable tax consequences attendant to the recommendation and (4) permitting the client to consent to the sale of the subject stock when Respondent knew or should have known the client's consent was not informed consent. Claimant alleges that Merrill Lynch is vicariously liable for the actions of its agent which were performed within the scope of her affiliation and employment. **Winkis** also claims damages for intentional infliction of emotional distress.

Respondents, Merrill Lynch Pierce, Fenner & Smith Inc. ("Merrill Lynch") and the Estate of Blaine Goldberg, denied each and every allegation of wrongdoing in the Statement of Claim. Specifically, Blaine Goldberg was not a registered Investment Advisor or Certified Financial Planner and did not hold herself out to be an accountant or tax advisor. Respondents do not bear responsibility for the personal income taxes resulting from the sale of Claimant's Home Depot stock. Respondents fulfilled all obligations under federal, state and regulatory rules and laws.

Respondents' recommendation to sell the Home Depot stock was based on Claimant's stated investment objectives of total return (capital appreciation and income) from quality investments. At the time Claimant made the decision to sell the stock she was aware that it had a low cost basis and that, in previous years, Claimant would be responsible for paying taxes on any capital gains resulting from the sale.

RELIEF REQUESTED

Claimant requested the following damages:

1. **\$131,954.00** in compensatory damages.
2. Interest at 8% from the date of sale to the date the award is paid.
3. **\$33,003.00** in actual compensatory damages incurred on the sale of additional stock sold to pay the tax liability plus interest.
4. **\$172,957.00** in punitive damages.
5. **\$329,914.00** in treble damages.
6. **\$14,500.00** in compensatory damages for negligent infliction of emotional distress.

Respondents requested that the claim be dismissed for failure to state a claim for which relief may be granted.

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 originals remain on file with the NASD.

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 and Goldberg are not found liable and, therefore, the claim is hereby dismissed.
2. Claimant's request for interest, punitive damages, and treble damages is denied.

OTHER COSTS

Other than the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the panel has assessed Forum Fees in the amount of \$2,000.00 (two sessions X \$1,000.00 = \$2,000.00).

1. Claimant is hereby assessed Forum Fees in the amount of \$1,000.00 for which the NASD shall retain the \$1,000.00 previously deposited in full satisfaction thereof.

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2. The NASD shall retain the non-refundable filing fee of \$250.00 paid by the Claimant.
3. Respondents are hereby jointly and severally assessed Forum Fees in the amount of **\$1,000.00** payable to the NASD.
4. Respondents are liable for and shall pay to the NASD the postponement fee of \$1000.00.

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

Concurring Arbitrators' Signatures

/s/
Mitchell A. Yelen, Esq.

Public/Chairman

/s/
Michael Dean

Industry

/s/
Gordon Keith Grandy

Public

Date of Decision: October 9, 1996

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