

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Theodore G. Fitch Trust
Theodore G. Fitch
Elizabeth S. Fitch Trust
Elizabeth S. Fitch

95-03536

Name of Respondent

Merrill Lynch Pierce Fenner & Smith Inc

REPRESENTATION

For Claimants: Guy M. Burns, Jr., Esq. of the law firm of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., Tampa, Florida.

For Respondent: Keith Olin, Esq. of the law firm of Morgan, Lewis & Bockius, Miami, Florida.

CASE INFORMATION

Statement of Claim filed: July 24, 1995

Claimants' Submission Agreements signed on: July 17, 1995 and October 10, 1995

Statement of Answer filed by Respondent on: November 24, 1995

Statement of Amended Answer filed by Respondent on: May 20, 1996

Respondent's Submission Agreement signed on: November 22, 1995

HEARING INFORMATION

Four hearing sessions were conducted in the above matter on July 11 and 12, 1996 in Tampa, Florida.

CASE SUMMARY

Claimants alleged that their Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") broker, Arthur Borham, purchased and sold securities in their accounts without authorization, made unsuitable securities purchases, and otherwise excessively traded their accounts. In particular, Claimants contended that Mr. Borham purchased Merrill Lynch mutual funds and bonds without their authorization and that he further purchased and sold various securities without their authorization. Claimants also contended that the mutual funds, bonds and Merrill Lynch Consults accounts were unsuitable. In addition, the Claimants maintained that there was an excessive amount of trading in their accounts which generated significant commission revenues for Merrill Lynch. The Claimants sought damages under Chapter 517 of the Florida Statutes. Claimants also brought counts for breach of fiduciary duty, churning and negligence. Claimants next alleged that the accounts declined in value by a total of \$66,773.16 while they were maintained at Merrill Lynch. More specifically, the Claimants alleged that the Elizabeth Fitch Trust Consults Account declined in value by \$5,410.70 and the Theodore G. Fitch Trust Consults Account declined by \$3,330.90, Mr. Fitch's CMA Trust Account declined in value by \$23,335.65, and Mrs. Fitch's CMA Trust Account declined in value by \$34,695.91. Claimants alleged that Merrill Lynch generated a total of \$28,897.00 in commission revenues during the fifteen months in which the accounts were open in 1993 and 1994.

Respondent denied the allegations of unauthorized trading, unsuitable securities and excessive trading. Specifically, the Respondent maintained that each and every transaction which occurred in the accounts, including the initial investments in mutual funds and bonds, was discussed with and approved by Claimants in advance of the transaction. Merrill Lynch further maintained that all transactions were consistent with the Claimants' stated investment objectives of growth and income and a moderate risk tolerance level. In addition, Merrill Lynch maintained that the trading in the accounts was not excessive under any measure of trading activity and that, in fact, the vast majority of the transactions were initiated by the Claimants themselves. Next, Merrill Lynch asserted various affirmative defenses including ratification, waiver, estoppel, laches, assumption of risk and failure to mitigate damages.

RELIEF REQUESTED

Claimants requested compensatory damages in the sum of \$66,773.16, punitive damages, the costs of the action and such further relief as the arbitrators deemed appropriate.

Respondent requested a dismissal of all claims against them and such other and further relief as is deemed just and proper.

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.

AWARD

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

1. All claims by the Claimants be and hereby are dismissed in all respects.
2. The Claimants' request for punitive damages is denied.
3. Each party shall bear their respective costs including attorneys' fees.

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 (\$500.00 x 4 sessions).

1. Claimants are hereby assessed \$2,000.00 for which the NASD shall retain the \$800.00 previously deposited in partial satisfaction thereof leaving a balance due to the NASD of \$1,200.00.
2. The NASD shall retain the nonrefundable filing fee of \$150.00 previously paid by the Claimant to the NASD.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/s/
Constance J. McCaughey, Esq.

Public

/s/
Ernestine M.R. Zipoy

Public

/s/
Joseph I. Amonette

Industry

Date of Decision: October 8, 1996