

**NASD REGULATION, INC. AWARD**

**NASD REGULATION, INC.**

In the Matter of the Arbitration Between

Name of Claimant

Robert C. Malenchek

95-03910

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc  
Charles M. Anderson

**REPRESENTATION**

For Claimant, Robert C. Malenchek, ("claimant") appeared George V. Cornell, III, Esq., Staten Island, New York.

For Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill") and Charles Anderson ("Anderson") appeared Charles L. Henderson, Esq. of Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, New York.

**CASE INFORMATION**

Statement of Claim filed: August 14, 1995.

Claimant's Submission Agreement signed on: August 2, 1995.

Statement of Answer filed by Respondents Merrill and Anderson on: October 31, 1995.

Respondent Merrill's Submission Agreement signed on: October 31, 1995.

Respondent Anderson's Submission Agreement signed on: October 3, 1995.

**HEARING INFORMATION**

Hearing Dates/Sessions:	January 15, 1997	Two sessions
	January 16, 1997	Two sessions
	January 20, 1997	Two sessions

Hearing Location: The hearings were held at the City Midday Club, 140 Broadway, New York, New York.

**CASE SUMMARY**

Claimant alleged that he opened an account with Merrill through Anderson on or about April 18, 1991. Claimant maintained that he made it clear to Anderson that he was seeking a safe, conservative income

generating retirement plan. Claimant stated that Anderson accordingly recommended a portfolio of income generating tax exempt municipal bonds and other conservative tax free investments. Claimant alleged that he developed a strong relationship with Anderson over the ensuing three year period and totally relied upon the advice and direction of Anderson relative to the handling of his account.

Claimant further alleged that Anderson made a radical departure from the claimant's stated financial objectives and prior trading strategy on January 28, 1994 when Anderson recommended that claimant invest his entire portfolio of approximately \$281,328.60 in the Worldwide Dollar Vest Fund (the "Fund"), a proprietary offshore fund. Claimant alleged that he followed Anderson's advice and also alleged that Anderson never, at any time prior to making this investment, revealed the risks attributed to the Fund or the nature of the Fund's objectives. Claimant asserted that the Fund was a speculative, non-diversified, closed-end over the counter income fund in which Merrill was a principal or market maker.

Claimant alleged that when he telephoned Anderson to question him regarding the Fund's steady decline in value, Anderson advised him that although the value was decreasing, the dividends were increasing. Claimant alleged that Anderson advised him to hold on to his shares of the Fund. Claimant alleged that, after his son suffered a serious heart attack, he relied upon Anderson to an even greater extent than he had before. Claimant asserted that Anderson recommended that he sell his shares of the Fund on or about February 27, 1995. Claimant alleged that he sold his shares for approximately \$164,108.25 for a loss of \$117,220.35.

Claimant maintained that the Fund was an unsuitable investment because it did not comport with his express financial objectives. Claimant maintained that, by placing 100% of claimant's portfolio in the Fund, Anderson exposed claimant to an inappropriate level of risk.

Claimant contended that Merrill's branch manager had a duty to review all new account documents and order tickets to ensure suitability. Claimant maintained that, had Merrill instituted adequate supervisory procedures, claimant's account would have been restricted thereby mitigating or altogether avoiding claimant's losses.

Claimant further alleged that the acts committed by respondents Merrill and Anderson involved the purchase and sale of securities within the meaning of the Securities Act of 1933 and the Securities Act of 1934 and the regulations promulgated thereunder. Claimant alleged that respondents had a duty to recommend securities that were suitable for claimant. Claimant also alleged that respondents were liable to claimant, even though he received a prospectus, for failing to explain material facts regarding the risks and nature of the Fund to claimant.

Respondents denied the claimant's claims in their entirety. Respondents alleged that claimant owned a successful plastics company when he was referred by a business partner to Anderson. Respondents alleged that claimant advised Anderson that he earned \$200,000 a year and had a net worth of \$5 million. Respondents also asserted that claimant was not a novice investor.

Respondents asserted that claimant advised Anderson that he had excess money and that he wanted to invest in income generating investments. Respondents alleged that, over the next several years, claimant purchased several funds and engaged in discussions with Anderson prior to purchasing each investment. Respondents maintained that Anderson did not have discretion over claimant's account. Respondents contended that, consistent with claimant's investment objective, Anderson recommended the Fund. Respondents maintained that the features of the Fund, a closed-end fund that invested in U.S. dollar denominated securities that were primarily debt securities of government issuers of foreign countries and

high yield, high risk corporate debt securities, was discussed with claimant. Respondents alleged that Anderson advised claimant that the Fund was speculative and subject to potentially greater market volatility than claimant's previous investments. Respondents asserted that claimant did not object to investing in the Fund.

Respondents also alleged that claimant was aware that his investment was declining because he received monthly statements reflecting the decline and because he also had conversations with Anderson. Respondents stated that Anderson suggested selling the Fund but claimant rejected the suggestion because he would not receive the same amount of income.

Respondents also contended that claimant's punitive damage allegations were without merit because claimant had signed a CMA Agreement which provided that claimant's account is governed by New York law which does not permit an arbitration panel to award punitive damages. Respondents alleged that the claimant's claims are barred by the applicable Statutes of Limitations and that the claimant's Statement of Claim failed to state a claim upon which relief could be granted. Respondents also alleged that the Statement of Claim failed to particularize facts establishing a legal theory upon which respondents could be held liable. Respondents asserted that claimant was barred from any recovery because he directed, authorized, consented to and acquiesced in and/or ratified all transactions in his account and made all investment decisions with regard to his account.

#### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$117,220.35 comprised of lost principal; interest to be determined by the panel; disgorgement of commissions and mark-ups; rescission of the security purchased; punitive damages to be determined by the panel; attorney's fees and such other relief as the panel deems just and proper.

Respondents requested dismissal of all claims in addition to costs and expenses incurred in defending this action.

#### **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 NASD Regulation, Inc.

#### **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. The claimant's claims are denied in their entirety.
2. The parties shall bear their respective costs.
3. All other relief requests are denied.

**FORUM FEES**

Pursuant to Section 10332 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the non-refundable \$200 filing fee previously deposited by claimant and have assessed the following Forum Fees:

6 sessions x \$750.00	=	\$4500.00
minus hearing session deposit	-	<u>\$750.00</u>
TOTAL OUTSTANDING		\$3750.00

Claimant be and hereby is liable for the sum of \$2250.00 representing one half of the forum fees assessed. Claimant has previously deposited \$750.00 with NASD Regulation, Inc. Therefore, \$1500.00 is owed to NASD Regulation, Inc. by the claimant.

Respondents be and hereby are jointly and severally liable for \$2250.00 representing one half of the forum fees assessed. Respondents owe \$2250.00 to NASD Regulation, Inc.

Fees are payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures


  
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Robert Pincus, Esq.

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Robert E. Tobin

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Rick F. Suppa

NASD Date of Decision: February 24, 1997

I, Robert Pincus, Esq., do hereby certify that this is my decision in the above-referenced matter.

  
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Robert Pincus, Esq.

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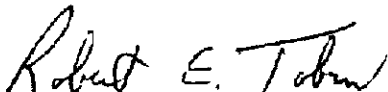
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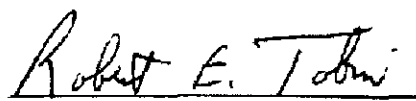
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Robert Pincus, Esq.

  
Robert E. Tobin

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Rick F. Suppa

NASD Date of Decision: February 24, 1997

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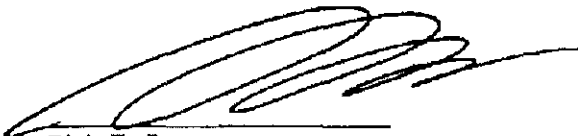
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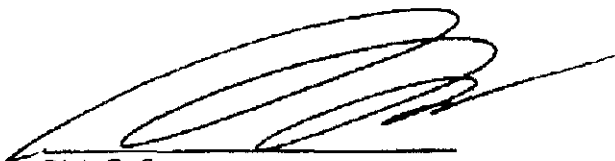
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