

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

James P. Evans and Joan D. Evans
Claimants,

and

No. 96-00580

Merrill, Lynch, Pierce, Fenner & Smith, Inc.,
Nicholas Thomas Stafford and Vernon Eddie Alexander
Respondents.

REPRESENTATION OF PARTIES

Claimants, James P. Evans and Joan D. Evans, were represented by Steven E. Clark, Esquire of de la Garza & Clark, located in Dallas, Texas.

Respondents, Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Vernon Eddie Alexander, were represented by Greg May, Esquire of Munsch, Hardt, Kopf, Harr & Dinan, located in Dallas, Texas.

Respondent, Nicholas Thomas Stafford of Northeast Securities, located in Dallas, Texas represented himself in these proceedings.

CASE INFORMATION

James P. Evans' and Joan D. Evans' Statement of Claim was filed on or about February 8, 1996.

James P. Evans' and Joan D. Evans' Submission Agreement was signed on February 8, 1996.

Merrill, Lynch, Pierce, Fenner & Smith, Incorporated's Statement of Answer was filed on or about April 8, 1996.

Merrill, Lynch, Pierce, Fenner & Smith, Incorporated's Submission Agreement was signed on May 12, 1997 by John R. Cumming, its First Vice-President and Assistant General Counsel.

Vernon Eddie Alexander's Submission Agreement was signed on April 28, 1997.

Nicholas Stafford's Statement of Answer was filed on or about May 16, 1996.

Nicholas Stafford's Submission Agreement was signed on May 15, 1996.

HEARING INFORMATION

A large and complex administrative conference was held on June 6, 1996 for one (1) session. A pre-hearing conference was held on December, 4 1996 for one (1) session. The hearing was held on: April 23, 1997 for two (2) sessions; April 24, 1997 for two (2) sessions; April 25, 1997 for two (2) sessions; and July 29, 1997 for three (3) sessions.

The hearing was held in Dallas, Texas.

CASE SUMMARY

James P. Evans and Joan D. Evans ("Claimants"), brought this action against Respondents Merrill, Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch"), Nicholas Thomas Stafford ("Stafford"), and Vernon Eddie Alexander ("Alexander") (herein after collectively referred to as "Respondents") for the alleged mishandling of Claimants' Merrill Lynch accounts between 1981 and 1994. Stafford was and Alexander is employed as a Financial Consultant for Merrill Lynch.

According to Claimants, in the 1980's, they established an account relationship with Merrill Lynch through Stafford. Claimants assert that between the fall of 1987 and the summer of 1988, Stafford used Claimants' funds from their IRA accounts, their individual accounts and the employee profit-sharing and retirement plans of James Evans sports medicine clinic, J.P. Evans & Associates, to make a series of purchases of Merrill Lynch limited partnership units without any discretionary trading authorization from them. Claimants further asserted that despite their investment objectives of safety, quality and return, and despite their reliance on Merrill Lynch's expertise in selecting, trading and advising its clients, Stafford purchased Merrill Lynch limited partnership units for Claimants that were high-risk, illiquid and which lacked a ready and available market in which to trade or sell these investments. Claimants stated that nearly \$272,000 of Claimants funds were used to acquire the units in question. Claimants alleged that Stafford churned the accounts for the purpose of his own personal gain and benefit, and furthermore, did not inform Claimants of the activity in their accounts.

After Stafford's termination from Merrill Lynch, Claimants alleged that Merrill Lynch continued to conceal information about Stafford's activities, and that when Alexander took over their case he failed to address the existence of the Merrill Lynch limited partnership units acquired by Stafford. When the units were finally addressed, Claimants alleged that both Alexander and Merrill Lynch urged him to hold the units and failed to apprise them of a time at which the units could be sold that would return their investment or minimize their losses. Also, they alleged that Merrill Lynch and Alexander failed to give guidance or information which would have allowed them to analyze whether and when to sell or hold the units. Claimants maintained that when Dr. Evans closed his sports medicine clinic, he was forced to purchase the units from the profit-sharing plan with funds from his own IRA account; and, that because of the values which Merrill Lynch allegedly supplied, Claimants

incurred further losses when those values provided showed the original cost, when the current value was actually less than that amount. Claimants asserted the following causes of action: (1) common law fraud; (2) fraud in a stock transaction (TBCC 27.01); (3) breach of fiduciary duty; and, (4) the discovery rule and doctrine of fraudulent concealment.

Respondents denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on their part. Respondents denied that they misrepresented any material facts to the Claimants, or that they concealed or failed to disclose material facts concerning the limited partnership units in their accounts. They denied that they had committed any acts which constituted common law or statutory fraud. Respondent Merrill denied that it failed to properly supervise its Financial Consultants in connection to Claimants' accounts. Respondents denied they failed to timely advise Claimants of the purchase of the units or that they failed to advise Claimants that the sale of the units would result in losses to the Claimants. Respondents Merrill Lynch and Alexander stated that the Claimants authorized the purchases of the limited partnership units in question and that the existence of these transactions has always been disclosed. Respondents stated that Stafford discussed each investment with the Claimants, and that their failure to complain when the units were acquired as well as when Claimants received every year's monthly and year-end statements sent to Merrill Lynch customers indicated Claimants' knowledge and approval of the accounts. Furthermore, Respondents maintained that when Claimants' CPA Brian Griggs questioned Alexander about the quantity of the limited partnership units, Alexander properly advised that due to Claimants' sound financial situation at the time, as well as the potential loss Claimants would suffer from a sale of the units, holding them would be the most prudent course of action. In addition, Respondents pointed to the actual sale of some of Claimants' limited partnership units that were originally acquired through Stafford. Respondents' argue that Claimants' claims are ineligible for arbitration due to both the NASD Code of Arbitration as well as the Texas statute of limitations. Respondents asserted that not only did they owe no fiduciary duty to the Claimants, but that Claimant's claims were barred by the equitable principles of ratification, estoppel and waiver.

RELIEF REQUESTED

Claimant, James P. Evans and Joan D. Evans, requested an award for: actual damages of \$350,000; punitive damages of \$700,000; and, attorneys' fees and expenses in the amount of \$58,000.

Respondents, Merrill Lynch and Alexander requested that the cause of action against them be dismissed and that the Claimants pay their attorneys' fees and expenses in the amount of approximately \$95,000.

OTHER ISSUES CONSIDERED AND DECIDED

Upon agreement of all parties to this action at the hearing, Respondent Vernon Eddie Alexander's Motion to Dismiss was granted and his record was ordered to be expunged from any allegation of wrongdoing pertaining to this action.

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 Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. That the Statement of Claim is hereby denied in its entirety with prejudice because the panel finds that based upon the testimony of James P. Evans that Claimants' were incapable of recognizing whether they made or lost money in their accounts and relied entirely on the advice of counsel and other professional advisors to ascertain if the made or lost money. Further, based upon evidence submitted, the panel finds that the Claimants made money rather than lost it on their investments.
2. That the Claimants James P. Evans & Joan D. Evans are liable for and shall pay Respondent Merrill Lynch, Pierce Fenner & Smith half of its attorneys' fees and expenses in the amount of fifty thousand dollars (\$50,000) pursuant to the authorities cited in the briefs submitted by the parties;.
3. That the NASD shall remove any and all references to this arbitration from the CRD record of Vernon Eddie Alexander;
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 denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1500 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 and there were 9 hearing sessions x \$1500 = \$13,800 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (the "Code") 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 Code, the NASD Regulation, Inc. Office of Dispute Resolution shall

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retain the non-refundable filing fee of \$300 and shall retain as forum fees the hearing session deposit of \$1500 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants, James P. Evans and Joan D. Evans.

Claimants, James P. Evans and Joan D. Evans, are jointly and severally liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the forum fees of \$12,300 (= \$13,800 total forum fees - \$1500 hearing session deposit.)

Pursuant to § 10333 of the Code, Respondent Merrill, Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the member surcharge of \$500.

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

Concurring Arbitrators' Signatures

/s/ Arthur H. Geffen

August 18, 1997

Arthur H. Geffen, Esq., P.C.
Chairperson
Public Arbitrator

Dated:

/s/ George C. Witte

August 20, 1997

George C. Witte
Panelist
Public Arbitrator

Dated:

/s/ Jack C. Payne

August 20, 1997

Jack C. Payne
Panelist
Industry Arbitrator

Dated:

For NASD use only:

Date Award was served on the parties: September 3, 1997