

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Norma Stern Trust

96-01164

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc  
Federated Securities Corp.  
David Nethery

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**CASE SUMMARY**

In a claim filed with the National Association of Securities Dealers, Inc. ("NASD") on March 15, 1996, the Norma Stern Trust ("Claimant"), through its trustee Norma Stern, who appeared Pro Se, alleged that based on the recommendation of Respondent David Nethery ("Nethery"), a registered representative of Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch"), Claimant purchased a total of \$10,000 worth of shares in Fortress Texas Municipal Income Fund ("Fund"). Claimant further alleged that around a year after the purchase, she received a letter from Respondent Federated Securities Corp. ("Federated") stating that the Fund would be closed out. The Claimant further alleged that she called Nethery about the closeout, however, he said that he knew nothing about it. Claimant contended that when Nethery chose to sell the aforementioned shares, the market was at a low resulting in the shares being sold at a loss. Claimant asserted that she would have held onto the shares indefinitely or until a more appropriate time to sell the shares. Consequently, Claimant contended she should not "shoulder this loss", since Federated made the decision to close out the fund and Merrill Lynch liquidated this holding. Claimant contended that due to the wrongdoing of the Respondents, she suffered damages for which they should be held liable.

Respondents Merrill Lynch and Nethery, through their in-house counsel, Christopher D. Cavouti, denied any and all allegations of wrongdoing or liability in Claimant's claim for damages. Respondents maintained that Claimant purchased shares of this Fund through Nethery who acted on Claimant's specific instructions to liquidate the shares in question following the

notice from Federated that the Fund would be closed. The Respondents also maintained that neither Merrill Lynch nor Nethery was involved or took part, in any way, in Federated's decision to close the Fund and that they had no involvement in the management or decision making of the Fund. The Respondents asserted that neither Merrill Lynch nor Nethery had any prior knowledge or notice of Federated's intention to close the Fund before Claimant was notified of the decision to close the fund; and further, that they acted solely to facilitate the purchase of the shares of this Fund for Claimant.

Respondent Federated, through its Director of Compliance, Kenneth W. Pegher, Jr., maintained that the Statement of Claim appears to be a question of suitability. Respondent further maintained that it merely distributes a "family of funds" to a network of retail brokerage firms (e.g. Merrill Lynch) and, therefore, had no role with respect to issues of regarding suitability. Federated also maintained that the investment executive of the retail brokerage firm determines the suitability of the investment, not the distributor. Federated further contended that it was the timing of the bond market which caused the Claimant to incur a loss, not the actions of Federated; therefore, the claims against it should be dismissed.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The arbitrator reviewed and considered all documentation submitted by the parties concerning Respondent Federated Securities Corp.'s Motion to Dismiss pursuant to Section 16 of the NASD Code of Arbitration Procedure. The Motion is granted.

#### **RELIEF REQUESTED**

Claimant Norma Stern Trust requested \$1,846.14 in actual damages.

Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and David Nethery requested that the claims of the Claimant be dismissed.

Respondent Federated Securities Corp. requested that the claims of the Claimant be dismissed.

#### **AWARD**

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, James B. Eichberg, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on April 13, 1996; Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and David Nethery on June 4, 1996; and Respondent Federated Securities Corp. on June 4, 1996.

And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of the Claimant, Norma Stern Trust against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David Nethery are dismissed in their entirety.
2. Respondent Federated Securities Corp.'s Motion to Dismiss is granted.
3. The \$50.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant shall be retained by the NASD, Inc.

**AFFIRMATION**

I, **JAMES B. EICHBERG**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

  
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Signature of Arbitrator

DATE OF DECISION: August 30, 1996