

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Merrill Lynch Pierce Fenner & Smith, Inc.

96-01391

Name of Respondent

Samuel E. Miller

REPRESENTATION

Claimant Merrill Lynch Pierce Fenner & Smith, Inc. ("Claimant") was represented by Andrew Quigley, General Counsel, Merrill Lynch Pierce Fenner & Smith, Inc., New York, NY.

Respondent Samuel E. Miller ("Respondent") was represented by Edward K. Black, Esq., Moloney & Black, Louisville, KY.

CASE INFORMATION

The Statement of Claim was filed March 29, 1996.
Claimant's Uniform Submission Agreement was signed March 26, 1996.

Respondent's Statement of Answer was filed December 26, 1996.
Respondent's Uniform Submission Agreement was signed November 4, 1996.

HEARING INFORMATION

Hearing Date/Sessions: April 3, 1997/two sessions

Hearing Location: Seelbach Hotel
Louisville, KY

CASE SUMMARY

Claimant alleged that on or about April 4, 1994 Respondent became employed as a Financial Consultant Trainee with Claimant. Claimant alleged that as a condition of his employment with Claimant, Respondent voluntarily agreed to execute, and did execute, Claimant's Agreement to Repay Costs and Training ("Agreement"). Claimant alleged that the Agreement obligated Respondent to pay Claimant liquidated damages in the amount of \$38,000.00 in the event Respondent's employment terminated within two full years from the date Respondent was assigned a production number ("production date"). Claimant alleged that the Agreement further stipulated that the liquidated damages would be reduced by \$19,000.00 on the first anniversary of the production date. Claimant alleged that Respondent's production date was August 1, 1994 and Respondent voluntarily resigned his employment with Claimant on August 11, 1995

and commenced employment with a competitor of Claimant. Therefore, Claimant alleged that Respondent has the obligation, pursuant to the Agreement, to pay Claimant \$19,000.00.

Respondent denied that his participation in the training for a sales position was pursuant to the terms of the Agreement and denied that he voluntarily resigned employment with Claimant. Respondent maintained that while he executed the Agreement, the Agreement was silent on the issue of its subsequent oral modification. Respondent maintained that at the time of the termination of his employment with Claimant he was on probation for insufficient production. Respondent maintained that Claimant informed him that if he were fired for insufficient production Respondent would never find another job in the securities industry, therefore Claimant allowed Respondent to resign. Respondent maintained that Bob Herman, his supervisor at the time his employment terminated, informed Respondent that Claimant would waive any further training expenses due under the Agreement. Respondent maintained that as Claimant had done this with at least one other registered representative who resigned within the two year period, he accepted the modification of the Agreement and Claimant is now estopped from attempting to collect the damages. Therefore, Respondent maintained that based upon the oral modification of the Agreement by Herman, no additional funds are due to Claimant.

RELIEF REQUESTED

Claimant requested damages in the amount of \$19,000.00 and that the costs and disbursements of this proceeding be assessed to Respondent.

Respondent requested that the statement of claim be dismissed; that the costs and expenses of this arbitration, including reasonable attorney's fees, be assessed to Claimant; and that his attorney be allowed to inspect and to copy the contents of Respondent's personnel file maintained by Claimant, as well as any file maintained on him by the NASD no later than forty-five days prior to any hearing held on the merits of this case.

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.

The panel considered Claimant's Motion to Bar the Answer and Respondent's Response thereto, and denied the Motion.

AWARD

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

1. That the Statement of Claim is denied in its entirety.
2. That each party shall bear its own costs and expenses, including attorney's fees.
3. That any and all relief not specifically addressed herein is denied.

FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

2 sessions x \$600.00 = \$1,200.00

Forum Fees assessed against Claimant and Respondent in equal parts. Claimant is to receive credit for \$600.00 hearing session deposit previously submitted to the NASD Regulation, leaving no further assessment due from Claimant. Respondent has a net assessment due of \$600.00.

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

DATE

CONCURRING ARBITRATORS' SIGNATURES

4/18/97

Gerald B. Brenzel
Gerald B. Brenzel, Chairman
Industry Arbitrator

Mark E. Kessinger
Industry Arbitrator

Jerome A. Stricker
Industry Arbitrator

Date Decision Served by NASD Regulation:

April 28, 1997

FORUM FEES

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DATE

CONCURRING ARBITRATORS' SIGNATURES

Gerald B. Brenzel, Chairman
Industry Arbitrator

4/10/97

Mark E. Kessinger
Mark E. Kessinger
Industry Arbitrator

Jerome A. Stricker
Industry Arbitrator

Date Decision Served by NASD Regulation:

April 28, 1997

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CONCURRING ARBITRATORS' SIGNATURES

Gerald B. Brenzel, Chairman
Industry Arbitrator

Mark E. Kessinger
Industry Arbitrator

4/9/97


Jerome A. Stricker
Industry Arbitrator

Date Decision Served by NASD Regulation:

April 28, 1997