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N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Kim S. Bondi

96-O 1667

Name of Respondents

*Merrill Lynch Pierce Fenner & Smith Inc.
Wayne Botz

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Securities Dealers, Inc.

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CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on April 17, 1996, Claimant Kim S. Bondi ("Claimant"), who appeared through her representative and counsel Mitchell L. Perlstein, alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") and Respondent Wayne Botz ("Botz") gave her unsuitable investment advice and made unauthorized purchases in her account. Claimant further alleged that Botz, her Account Executive at Merrill Lynch, encouraged her to follow an aggressive investment strategy by investing in a portfolio that consisted of five selected companies in the Dow Jones Industrial Average (the "Dow Strategy"). Claimant contended that she repeatedly declined Botz's proposal to invest in the Dow Strategy. Claimant further contended that on September 20, 1995, Botz made an unauthorized purchase of several equities for Claimant's account. Claimant asserted that these unauthorized purchases were not made in accordance with the Dow Strategy but were purchased as part of the Merrill Lynch Equity Screen and the Momentum Growth Model. Claimant further asserted that these securities were not discussed with her before they were purchased and that they suffered a decline in value. Claimant alleged that in response to her instructions to sell the securities, Botz told her not to "take the loss" by selling the positions. Claimant further alleged that Merrill Lynch failed to reasonably supervise Botz in connection with his dealings with her and thereby breached its contractual and legal duties. Claimant contended that due to the wrongdoing of the Respondents, she has suffered damages for which the Respondents should be held liable.

Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. and Respondent Wayne Botz, who appeared through their representative and in-house counsel, Christopher D. Cavuoti, Esq., maintained in their Answer that Claimant's account was serviced at all times in a lawful, competent, and professional manner. Respondents further maintained that Claimant opened a Merrill Lynch IRA account through Ed Hall, a representative at Merrill Lynch, on or about March 7, 1994. Respondents contended that Botz was assigned Claimant's account in January 1995 immediately upon the resignation of Hall. Respondents further contended that Botz recommended three investment strategies to Claimant during the period of January 1995 to September 1995; 1) a laddered portfolio of bonds, 2) the Dow Strategy, 3) the Momentum Growth strategy. Respondent maintained that Claimant declined to invest in the laddered

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portfolio of bonds and the Dow Strategy, but did agree to invest in the Momentum Growth strategy, Respondents further maintained that Claimant's decision to invest in the Momentum Growth strategy was made after careful review of information provided by Botz, and also maintained that the investment strategy was in accordance with Claimant's investment objective of total return and aggressive risk tolerance. Respondents asserted that Claimant originally agreed to make a two year commitment in the Momentum Growth strategy, but that she decided to sell in a reaction to a market decline in the stocks. Respondent further alleged that at no time prior to Claimant's Statement of Claim did Claimant raise the issue of unauthorized trades. Respondents further asserted that they committed no wrongdoing and requested that the Claims against them be dismissed.

In a Reply to the Respondent's Answer, Claimant alleged that at no time did she advise Merrill Lynch that she had an aggressive risk tolerance and that Hall never advised her that he marked her risk tolerance as "aggressive" on any internal Merrill Lynch document. Claimant further alleged that Botz recommended only two investment strategies; 1) a ladder portfolio of bonds and 2) the Dow Strategy. Claimant contended that upon reviewing the confirmation shown as Claimant's exhibit F1-F10, she immediately contacted Botz and told him that this was not what she had agreed to. Respondent further contended that Botz advised her not to sell at that time because she would suffer approximately a \$2,000.00 loss.

Claimant asserted that it was on Botz's insistence that she held the securities positions and that Botz did not provide her with information on the Momentum Growth strategy before the trades were effected on her account.

In a Response to the Claimant's Reply, Respondents maintained that the information on the Claimant's new account form stating her "aggressive" risk tolerance was obtained through discussions Hall had with Claimant. Respondents further maintained that Botz explained to Claimant the risks involved in investing in the Momentum Growth strategy, and that Claimant authorized Botz to implement the strategy.

RELIEF REQUESTED

Claimant Kim S. Bondi requested \$10,000.00 in actual damages. Claimant requested reimbursement of all commissions charged her, plus interest at the rate of 12% per annum. Claimant requested reimbursement of the costs and fees associated with the filing of this action, including but not limited to attorney's fees.

Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. and Respondent Wayne Botz requested that the claims of the Claimant be dismissed.

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AWARD

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Leo Howard Kerns, Esq., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant Kim S. Bondi on March 29, 1996, and by the Respondent Merrill Lynch, Pierce, Fenner, & Smith Inc. on June 3, 1996, and by the Respondent Wayne Botz on May 21, 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 Claimant Kim S. Bondi against Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. and Respondent Wayne Botz are dismissed in their entirety.**

2. **All other requests for relief are denied.**

3. **The parties shall bear their respective costs.**

4. **The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Kim S. Bondi, shall be retained by the NASD, Inc.**

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AFFIRMATION

STATE OF

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COUNTY OF

I, LEO H. KERNS 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.

Leo H. Kerns
Signature of Arbitrator

DATE OF DECISION:

July 23, 1996