

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Mary Ellen Burns Family Trust

96-01840

Name of Respondent

Merrill, Lynch, Pierce, Fenner & Smith, Inc.
Charles C. Hanner
Tosh McIntosh

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. ("NASD") on April 26, 1996, the Mary Ellen Burns Family Trust ("Claimant"), through its trustee Mary Ellen Burns, who appeared Pro Se, alleged that she participated in a Utility Plan ("Plan") offered to her by Respondent Charles C. Hanner ("Hanner"), who, at the time of the transactions that gave rise to this claim, was a broker at Respondent Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Claimant further alleged that in connection with this Plan, Hanner sold her 100 shares of Telefonos Mexican stock for \$7,059.85. Claimant asserted that prior to this purchase, there was no mention or discussion of the aforementioned Plan containing utilities located outside the United States and that for her, a 77 year old investor who has no experience in the stock market and is concerned with safety and preservation of capital, investing in stock issued by a country such as Mexico was unsuitable. Claimant contended that when Hanner sold her shares of Telefonos Mexican, the proceeds of this sale were \$3,156.85; therefore, she lost \$3,903.00 of her initial investment. Claimant further contended that subsequent to the sale of these shares, she had discussions with Respondent Tosh McIntosh ("McIntosh"), Branch Manager at Merrill Lynch's La Mesa, California office, about the monetary loss she incurred from her investment in Telefonos Mexican. Claimant alleged that during her discussions with McIntosh, it was his contention that this stock was appropriate and that she "should have accepted the stocks in Mr. Hanner's Utility Plan non selectively." As a result of the above, Claimant contended that she has suffered damages for which Respondents should be held liable.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., Charles C. Hanner and Alan P. ("Tosh") McIntosh, through their representative and in-house counsel, Christopher D. Cavuoti, Esq., maintained that when Claimant opened her Capital Management Account ("CMA") in Merrill Lynch's La Mesa, California branch with Hanner, a Financial Consultant, she indicated to him that she was an experienced investor and maintained an account at Kidder Peabody. Respondents further maintained that Hanner and Claimant discussed the possibility of adding utility stocks to her CMA portfolio, which consisted various of investment vehicles that Claimant selected herself. Hanner contended that Claimant elected to invest \$50,000.00 in a variety of utility stocks, after agreeing that such an investment would add diversity to her portfolio and stay consistent with her investment objectives. Hanner also contended that during their many discussions, Claimant did not express concerns with the suitability of any of her securities. McIntosh alleged that when Claimant met with him, she said that she had suffered \$9,000.00 in damages due to Hanner's mishandling of her account and she expected to be reimbursed. McIntosh further alleged that he, in turn, told Claimant that since he had no prior knowledge of Claimant's concerns, he would gather information and meet with her after he had an opportunity to review this matter closely. McIntosh asserted that during his next meeting with Claimant, he pointed out to her that there had been gains and losses in her account; one of those losses, which was approximately \$3,900.00, resulted from her investment in Telefonos de Mexico. McIntosh further asserted that he informed Claimant that there was nothing in her account records which substantiated her claim that she suffered a loss of \$9,000.00. McIntosh contended that Claimant maintained that she suffered larger losses and stated that she needed to review her notes and files, to which McIntosh agreed and invited her to contact him when she was ready for them to review this matter. McIntosh also contended that until Claimant filed for arbitration, he did not hear anything further regarding this matter. As a result of the above, Respondent contended that McIntosh should be removed as a party to this action and Claimant should not be entitled to any damages.

In Claimant's rebuttal to Respondents' Answer, she asserted that her CMA, which was opened at Merrill Lynch's Dayton, Ohio branch, contained securities which had been selected for her by another broker at Merrill Lynch and a broker at Kidder Peabody. Claimant contended that Hanner, with whom she did not have many conversations, approached her about the Plan and said it was a conservative investment which was appropriate for her. Claimant further contended that Hanner knew that Telefonos de Mexico stock was a speculative risk and should not have been sold to an investor of her age who is primarily interested in the preservation of capital. Claimant asserted that she does not how McIntosh arrived at the \$9,000.00 damage amount mentioned in Respondents' Answer because during their meetings, she was only specific as to the dollar amount lost in connection with her Mexican stock investment. Claimant further asserted that during these meetings, she requested reimbursement for her loss of \$3,903.00; however, McIntosh refused her request.

OTHER ISSUES CONSIDERED & DECIDED

The arbitrator reviewed and considered Respondent Alan P. McIntosh's Motion to Dismiss as a party from this action. The Motion is granted.

RELIEF REQUESTED

Claimant Mary Ellen Burns Trust requested \$3,903.00 in actual damages.

Respondents Merrill Lynch, Pierce Fenner & Smith, Charles C. Hammer and Tosh McIntosh requested that Claimant's claims for damages be denied in all respects.

AWARD

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Diana G. Davis, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant Mary Ellen Burns Trust on May 13, 1996; Respondent Merrill Lynch, Pierce Fenner & Smith on July 2, 1996; Respondent Charles C. Hanner on July 1, 1996; and Respondent Tosh McIntosh in June 28, 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 Mary Ellen Burns Family Trust against Respondents Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Charles C. Hanner are dismissed in their entirety.
2. The parties shall bear their respective costs.
3. The \$125.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant shall be retained by the NASD, Inc.

AFFIRMATION

I, DIANA G. DAVIS, ESQ., 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.



Signature of Arbitrator

Date of Decision: August 30, 1996