

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

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In the Matter of the Arbitration Between

Name of Claimant

Stephen K. Vandervliet

96-03249

Name of Respondent

Merrill Lynch Pierce Fenner & Smith Inc

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CASE SUMMARY

In a case filed with the National Association of Securities Dealers Regulation, Inc. on July 29, 1996, claimant Stephen Vandervliet ("claimant"), who appeared Pro Se, alleged that respondent Merrill Lynch Pierce, Fenner & Smith ("Merrill Lynch") cut short his reward on a stock he short sold. Claimant further alleged that on May 22, 1996, he read a broker analysis which stated that Optical Cable Corporation ("OCC") terribly overvalued and estimated the stock's true value of not more that \$7 or \$8. Claimant also alleged that he was an active and experienced trader. Claimant asserted that the next morning he called his local Merrill Lynch broker and ordered a short sale of 100 shares of OCC at any price over \$100.00. Claimant further asserted that this order was filled and the next day his broker called with a worried tone and said the stock had shot up to the \$120's. Claimant also asserted rather than close his position, he chose to "average up" to hopefully reduce his risk. On May 24, 1996 this second trade of 100 shares of OCC was executed at \$126.

Claimant contended that six days later, the broker called him and said that he had made a mistake, and described that if the stock had gone up, he would have had to pay for the loss. Claimant further contended that the broker told him that Merrill Lynch had closed the position to limit their exposure. Claimant also contended that he had not placed a limit order to close the trade either up or down. Claimant alleged that he was amazed that a reputable full commission brokerage house could try and get away with this type of action.

Respondent Merrill Lynch through its representative and in-house counsel Christopher D. Cavioti maintained that on three occasions claimant short sold OCC. Respondent further maintained that pursuant to New York Stock Exchange, Inc. ("NYSE") Rule 440C, if a stock in question is unavailable or difficult to obtain, brokerage firms are not permitted to execute the requested short sale order. Respondent also maintained that most, if not all, brokerage firms required approval from their Stock Loan Departments ("SLD"), before they authorize and execute a short sale order. Respondent contended that the SLD reviews the availability of the security in question. Respondent further contended that in order to facilitate and expedite this review, it maintains a "Hard to Borrow list". Respondent also contended that the "Hard to borrow" list is a compilation of securities that are either difficult or impractical to obtain.

Respondent maintained that Mr. Blissit, Financial Consultant, executed both of claimant's short sale orders, prior to obtaining authorization from it's SLD. Respondent further maintained that on May 28, 1996, the SLD informed Mr. Blissit that claimant's short sales had to be covered because Merrill Lynch did not have the stock to loan to claimant. Respondent also maintained that OCC was on it's "Hard to Borrow" list, and as such was ineligible for a short sale. Respondent maintained that if claimant's short sale orders had gone through the proper procedure, they never would have been executed, pursuant to NYSE Rule 440C. On May 29, 1996 Respondent bought 200 OCC shares at \$65 per share for Claimant's account, for a net amount of \$13,141.35. Claimant realized a profit of \$9,238.95 on these transactions and did not incur any loss.

#### **RELIEF REQUESTED**

Claimant Stephen Vandervliet requested \$10,000 amended to \$4,341.35 for the unrealized profit he would have been able to close the trade at.

Respondent Merrill Lynch requested that the claims of claimant be dismissed in their entirety, with costs being assessed against claimant.

#### **AWARD**

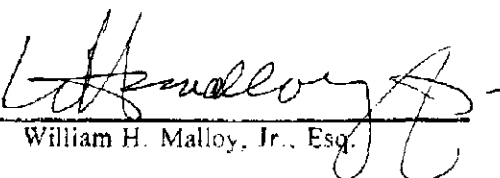
Pursuant to Rule 10302 of the Code of Arbitration Procedure, a single Public Arbitrator, William H. Malloy, Jr., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by claimant Stephen Vandervliet on July 22, 1996 and by respondent Merrill Lynch on September 12, 1996 as required pursuant to Rules 10301 and 10302 of the Code of Arbitration Procedure.

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

1. The claims of claimant Stephen Vandervliet against respondent Merrill Lynch are dismissed in their entirety.
2. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers Regulation, Inc. by claimant shall be retained by NASD Regulation, Inc.
3. All other relief requests are denied.

#### **AFFIRMATION**

I, William H. Malloy, Jr., Esq., do hereby affirm upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.

  
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William H. Malloy, Jr., Esq.

Date of Decision: April 8, 1997