

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Kathleen Lo Re,

Claimant,

and

Case Number: 96-04866

Merrill Lynch, Pierce, Fenner & Smith, Inc.,  
Henry Otten,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimant Kathleen Lo Re ("Claimant") was represented by Mark E. Sanders, Esq. and Mary Beth Peranteau, Esq. of Halling & Cayo, S.C. located in Milwaukee, Wisconsin.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Henry Otten ("Otten") (collectively referred to as "Respondents") were represented by Marianne Bretton-Granatoor, Esq. of Merrill Lynch, Pierce, Fenner & Smith, Inc. located in New York, New York.

### **CASE INFORMATION**

The Statement of Claim was filed on or about October 31, 1996.

Claimant's Submission Agreement was signed on September 10, 1996.

Respondents' Joint Statement of Answer was filed on or about December 19, 1996.

Respondent Merrill Lynch's Submission Agreement was signed on December 12, 1996.

Respondent Otten's Submission Agreement was signed on May 20, 1997.

Claimant's Post-Hearing Brief was filed on or about December 3, 1997.

Respondents' Post-Hearing Brief was filed on or about December 30, 1997.

Claimant's Post-Hearing Reply Brief was filed on or about January 12, 1998.

### **HEARING INFORMATION**

The hearing in this matter was held on November 10, 1997 for two (2) sessions, November 12, 1997 for three (3) sessions, and November 13, 1997 for three (3) sessions. The hearing location was Milwaukee, Wisconsin.

### **CASE SUMMARY**

In the Statement of Claim, Claimant alleged that Respondents sold her stock in Diana Corporation on January 5, 1996 without authorization and contrary to her wishes. Claimant contended that, although she never executed a power of attorney for someone else to authorize transactions in her account, Respondents executed the sale upon the assumed authorization of Claimant's husband. Claimant asserted that Respondents never verified, either verbally or in writing, that Claimant wished to have her stock sold out of her account. Claimant maintained that Respondents' actions were contrary to Wisconsin law which requires a signed power of attorney before any transactions can be executed upon the authorization of a third party. Claimant alleged that Respondents have consistently refused to rectify the error, causing Claimant to seek her remedy in arbitration. Claimant also contended that Respondents failed to execute Claimant's December 29, 1995 order to sell Diana Corporation stock. Claimant asserted claims against Respondents including: violation of the Wisconsin Securities Law; Negligence; Breach of Contract; and Breach of Agency.

Respondents denied all liability to Claimant in the Joint Statement of Answer. Respondents alleged that Claimant explicitly authorized the sale of her Diana Corporation shares on January 5, 1996. Respondents further contended that Claimant netted a profit from the sale of the Diana Corporation stock. Respondents asserted that Claimant made no contemporaneous complaint regarding the sale of the shares, and that her conduct after the sale depicts her as ratifying the sale. Respondents maintained that she never called Respondents after the sale to complain and request that the trade be canceled, nor did she write a letter of complaint. Respondents alleged that Claimant's current contentions are directly at odds with prior positions she had taken with respect to the transaction at issue, and are contemplated only to wring the greatest profit possible from the sale at the expense of Respondents.

### **RELIEF REQUESTED**

Claimant requested an award of the following: damages of \$299,100, plus commissions and all margin interest that has been charged to her, plus interest since the date of the loss, plus her costs and disbursements; reasonable attorney fees; and for such other and further relief as the panel deems just and appropriate under all the circumstances.

In the Statement of Answer, Respondents requested: that the Statement of Claim be dismissed in its entirety; that Respondent Otten's record with respect to this matter be expunged in its entirety; and that Respondents be awarded costs and attorney fees incurred in connection with this proceeding.

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

The parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing, as well as the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- (1) That Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Henry Otten are jointly and severally liable for and shall pay to Claimant Kathleen Lo Re damages in the amount of Fifteen Thousand Five Hundred Fifty Dollars and No Cents (\$15,550.00);
- (2) That other than forum fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- (3) That any relief not specifically enumerated is hereby denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 per pre-hearing session, if any. There were eight (8) hearing session x \$750 = \$6,000 in forum fees. Total forum fees = \$6,000. Pursuant to §10332(b) of the NASD Code of Arbitration Procedure ("Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall refund the hearing session deposit in the amount of \$ 750 previously deposited with NASD Regulation, Inc. by the Claimant.

Pursuant to §10332(c) of the Code, Respondents are hereby jointly and severally liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution all forum fees incurred in this action in the amount of \$6,000.

**Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Concurring Arbitrators' Signatures

\s\ Stanley H. Michelsetter, II, Esq.  
Stanley H. Michelsetter, II, Esq.  
Chairperson  
Public Arbitrator

February 19, 1998  
Dated:

\s\ Stuart S. Mukamal, Esq.  
Stuart S. Mukamal, Esq.  
Panelist  
Public Arbitrator

February 19, 1998  
Dated:

\s\ Todd D. Thompson  
Todd D. Thompson  
Panelist  
Industry Arbitrator

February 24, 1998  
Dated:

For NASD Regulation use only:  
Date award served on the parties: February 24, 1998