

N.A.S.D. AWARD

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Name of Claimant

Dana G. Frye

96-05112

Name of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.  
Tish Keppell  
George Baskerville, III

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REPRESENTATION

Claimant Dana G. Frye ("Claimant") was represented by Stephen W. Streep, Esq., Earlysville, VA.

Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch"), Tish Keppell ("Keppell") and George Baskerville ("Baskerville") were represented by Michael E. Olney, Esq., Merrill Lynch, Pierce Fenner & Smith, Inc., New York, NY.

CASE INFORMATION

The Statement of Claim was filed November 15, 1996.

The Amended Statement of Claim was filed February 25, 1998.

Claimant's Uniform Submission Agreement was signed February 3, 1997.

The Joint Statement of Answer of Respondents Merrill Lynch and Keppell (collectively "Respondents") was filed April 15, 1997.

Merrill Lynch's Uniform Submission Agreement was signed April 11, 1997.

Keppell's Uniform Submission Agreement was signed March 14, 1997.

Baskerville's Uniform Submission Agreement was signed March 14, 1997.

HEARING INFORMATION

Prehearing Dates/Sessions:    October 1, 1997/one session  
   January 29, 1998/two sessions

Hearing Dates/Sessions:       February 25, 1998/two sessions  
   February 26, 1998/two sessions  
   February 27, 1998/two sessions

Hearing Location:               Omni Hotel  
   Richmond, VA

### CASE SUMMARY

Claimant alleged that Respondents were guilty of negligence, breach of fiduciary duty, unsuitable trading and a failure to supervise. Claimant alleged that she deposited \$95,000.00 initially in her account from the sale of a home, followed by a transfer of 3,000 shares of U.S. Realty Partners valued at \$54,750.00 and 2300 shares of Exxon valued at \$210,450.00. Claimant further alleged that Respondents knew that the funds deposited in her account with Merrill Lynch were to build her new home and to provide income to live on. Claimant alleged that she trusted Respondents to work in Claimant's best interests because Respondents had been informed that she was a complete novice in managing her investment account. In fact, Claimant asserted that Keppell had been informed that Claimant lived on, and would continue to live solely on, the income from the Exxon stock and that she did not want to liquidate or even diversify her portfolio. Claimant alleged that regardless of knowing that Claimant lived on her Exxon stock, Keppell executed numerous Exxon stock sales, thus causing Claimant's portfolio to decrease in value.

Claimant alleged that Keppell invested \$95,000.00 of Claimant's assets in a front-end loaded, long term mutual fund, even though Keppell had been informed that Claimant would need those funds within six months to build her new home and that they should be kept liquid. Claimant also alleged that Keppell never mentioned the risks of using of a margin account when she recommended Claimant use her account to build her home, nor were the risk factors on different types of funds or securities generally explained to her. Claimant alleged that Keppell lacked the experience and knowledge to adequately manage Claimant's portfolio and that Baskerville and Merrill Lynch failed to properly supervise Keppell.

Respondents denied the allegations of wrong-doing as asserted in the Statement of Claim. Respondents maintained that Claimant is an experienced investor, having previously had an account with Wheat First and she indicated that her occupation was real estate investor. In addition, Respondents maintained that Claimant informed Respondents that her net worth was approximately one-half million dollars and that in addition to her liquid assets, she also owned several pieces of investment real estate and a home. Respondents maintained that Claimant purchased roughly equal positions in two equity mutual funds. Respondents asserted that Claimant sold her mutual funds shortly after the stock market crashed in October 1987, even though she had been informed that these were to be held for the long term.

Respondents maintained that Claimant, just two months after opening her account with Respondents, withdrew \$72,486.47 from the account. Respondents contended that Keppell, while explaining the a margin account to Claimant, informed Claimant that if she borrowed against the value of her account interest charges would accrue. Respondents further maintained that beginning in the spring of 1988, owing to her repeated overdrafts, Claimant liquidated her account's entire position in Exxon stock with the last sale taking place in April 1990.

Respondents raised the affirmative defenses of a failure to state a claim upon which relief can be granted; estoppel; waiver; ratification; assumption of risk; the claims are barred by the applicable statutes of limitation; Respondents acted in good faith and in a commercially reasonable manner and always were in accordance with all applicable rules and regulations; laches and a failure to mitigate.

### **RELIEF REQUESTED**

Claimant requested damages, amended at the hearing, of \$159,985.00, punitive damages of \$20,000.00, treble damages as well as the costs and expenses of this arbitration including attorney's fees.

Respondents requested that the Statement of Claim be denied in all respects, and at the hearing Respondents amended their relief request to include expungement of all references to this arbitration from the Central Registration Depository ("CRD") records of Keppell and Baskerville.

### **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 Respondents' Motion to Dismiss and Claimant's Response thereto submitted at the commencement of the hearing and denied it. Respondents reasserted their Motion to Dismiss at the end of Claimant's case in chief and again the panel denied it.

### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators 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; and
2. That the claims for punitive damages and treble damages are denied; and
3. That each party shall bear its own costs and expenses, including attorney's fees, with the exception of the Forum Fees as specified below; and
4. That all references to this arbitration shall be expunged from the CRD records of Respondents Keppell and Baskerville; and
5. That any and all relief not specifically addressed herein is denied.

### **OTHER COSTS**

Pursuant to Rule 10333, Respondent Merrill Lynch is assessed a member surcharge of \$350.00, which has been paid.

**FORUM FEES**

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

1 prehearing session (full panel) x \$750.00 =	\$ 750.00
2 prehearing sessions (single arbitrator) x \$300.00 =	\$ 600.00
6 Hearing sessions x \$750.00 =	<u>\$4,500.00</u>
<b>Total Forum Fees</b>	<b>\$5,850.00</b>

Forum Fees are assessed at \$2,925.00 to Claimant and \$2,925.00 to Respondents, jointly and severally.

Claimant shall receive credit for the \$750.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net Forum Fees assessment due from Claimant of \$2,175.00.

Respondents have a net Forum Fees assessment due of \$2,925.00.

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

DATE

3/31/98

CONCURRING ARBITRATORS' SIGNATURES

Stuart H. Dunn

Stuart H. Dunn, Presiding  
Public Arbitrator

William C. Barrett, III  
Public Arbitrator

Robert Sherman  
Industry Arbitrator

Date Decision Served by NASD Regulation:

April 8, 1998

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CONCURRING ARBITRATORS' SIGNATURES

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Stuart H. Dunn, Presiding  
Public Arbitrator

03-24-98

William C. Barrett III  
William C. Barrett, III  
Public Arbitrator

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Robert Sherman  
Industry Arbitrator

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Public Arbitrator

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3/23/98

Robert Sherman  
Robert Sherman  
Industry Arbitrator

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April 8, 1998