

**Award**  
**NASD Regulation, Inc.**

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In the Matter of the Arbitration Between:

Erika A.S. Dunn and Naomi A.S. Dunn, (Claimants) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., (Respondent)

Case Number: 99-02250

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimants, Erika A.S. Dunn and Naomi A.S. Dunn, hereinafter collectively referred to as "Claimants": Eric A. Klein, Esq., New York, NY.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., hereinafter referred to as "Respondent": Kevin T. Duffy, Esq., Assistant Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: May 14, 1999.

Claimants signed the Uniform Submission Agreements: May 13, 1999.

Statement of Answer filed by Respondent on or about: July 13, 1999.

Respondent signed the Uniform Submission Agreement: July 14, 1999.

**CASE SUMMARY**

Claimants asserted the following causes of action: unsuitability; excess trading; failure to "know" the customer; and gross negligence.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state claims upon which relief can be granted; Claimants are estopped from asserting the claims set forth in the Statement of Claim due to their own acts and conduct and the acts and conduct of their agents and those acting on their behalf; Claimants ratified, approved, accepted, acquiesced in, and confirmed in all respects the acts complained of in the Statement of Claim; Claimants failed to exercise due diligence and were reckless and negligent in the supervision of their financial affairs and the operation of the accounts at issue; and Claimants failed to mitigate their alleged damages.

### **RELIEF REQUESTED**

Claimants requested damages in the amount of \$500,000.00, which included compensatory and punitive damages, plus attorneys' fees.

Respondent requested that the Statement of Claim be dismissed in its entirety and that the costs of this proceeding be assessed against the Claimant.

### **OTHER ISSUES CONSIDERED AND 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.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are hereby denied in their entirety.
2. Upon confirmation of this Award by a court of competent jurisdiction, NASD Regulation, Inc. shall expunge all references to this arbitration from the permanent CRD records of Mr. Joseph DiMattina.
3. All other requests for relief are hereby denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:  
Initial claim filing fee = \$ 300.00

### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

April 4 & 5, 2000, adjournment by Respondent = \$WAIVED

### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel x \$1,125.00	= \$1,125.00
Pre-hearing conference: January 13, 2000 1 session	
Two (2) Hearing sessions x \$1,125.00	= \$2,250.00
Hearing Date: June 13, 2000 2 sessions	
Total Forum Fees	= \$3,375.00

1. The Panel has assessed \$1,687.50 of the forum fees against Claimant.
2. The Panel has assessed \$1,687.50 of the forum fees against Respondent.

### **Fee Summary**

1. Claimants be and hereby are jointly and severally liable for:	
Initial Filing Fee	= \$ 300.00
Forum Fees	= \$1,687.50
Total Fees	= \$1,987.50
Less payments	= \$1,425.00
Balance Due NASD Regulation, Inc.	= \$ 562.50

2. Respondent be and hereby is solely liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	<u>= \$1,687.50</u>
Total Fees	= \$6,287.50
<u>Less payments</u>	<u>= \$4,600.00</u>
Balance Due NASD Regulation, Inc.	= \$1,687.50


All balances are due and payable to NASD Regulation, Inc.

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
Donald Ferguson, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Robert Pincus, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Dennis C. Cronin  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

July 14, 2000  
Date of Service (For NASD office use only)

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Donald Ferguson  
Donald Ferguson, Esq.  
Public Arbitrator, Presiding Chair

7.1.00  
Signature Date

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Robert Pincus, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Dennis C. Cronin  
Industry Arbitrator

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Signature Date

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Donald Ferguson, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Robert Pincus, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Dennis C. Cronin  
Industry Arbitrator

7/7/00  
\_\_\_\_\_  
Signature Date

July 14, 2000  
Date of Service (For NASD office use only)