

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Donna R. Kelsey

88-03727

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Merrill Lynch Money Markets, Inc.
Merrill Lynch and Co.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. ("NASD") on or about December 12, 1988, Donna R. Kelsey ("Claimant") alleged that Henri B. Moreault ("Moreault") an account executive employed by A. G. Becker Paribas Incorporated ("Becker") in late 1980 and 1981 made material misrepresentations in connection with her purchase of Felmont Oil Corporation; unauthorized transactions and failed to execute an order to sell the Felmont Oil Corporation Stock. Claimant further alleged that Moreault knew or should have known that Claimants purchase of Felmont Oil Corporation and Purex Industries, Inc., on margin was unsuitable for her. Claimant finally alleged that Moreault failed to disclose the following material facts:

- a) Becker recommended the sale of oil stocks in December 1980;
- b) Felmont stock was overvalued in relation to its assets and reserves;
- c) The John Herold Report valued Felmont's reserves at not more than \$20.00 per share;
- d) Moreault did not have a reasonable basis for recommending that Claimant purchase and then retain Felmont stock;
- e) Claimant's purchases of Felmont on margin were wholly unsuitable for her investment goals and financial needs;
- f) Claimant might not be able to liquidate her positions in Felmont due to the thinness of the market caused by Moreault's purchase of Felmont stock;
- g) Becker considered the need to offer its customers stock in a public or secondary offering; and

- h) the fiduciary standard for investment management is that a portfolio be diversified as to individual companies and industries.

Merrill Lynch Pierce Fenner & Smith; Merrill Lynch Money Markets, Inc.; and Merrill Lynch & Co. ("Respondents") are named as Respondents as a result of the purchase of Becker and their status as successors in interest to Becker.

In their Answer filed with the NASD on or about January 31, 1989, Respondents denied the allegations of Claimant and asserted the following affirmative defenses; the claim failed to state a claim upon which relief can be granted; ratification; estoppel; doctrine of waiver; assumption of the risk; and failure to negotiate.

RELIEF REQUESTED

Claimant requested an award of fraud damages in the amount of \$129,000.00; actual damages in the amount of \$43,854.00; exemplary damages not less than \$43,854; interest of not less than 8% per annum from the dates of purchase; costs and attorneys' fees.

Respondents requested that the Statement of Claim be dismissed in its entirety and that costs, expenses and attorneys' fees be awarded.

OTHER ISSUES

After considering the arguments presented on behalf of the parties, the panel determined that the doctrine of collateral estoppel did not apply to this proceeding. The panel also granted Respondents' motion to exclude testimony of other customers after considering the arguments presented on behalf of the parties. Claimants were not precluded from presenting the prior testimony of other witnesses. The panel ruled that Claimant's counsel would be allowed to present transcripts of other witness' testimony but would not allow Claimant's counsel to read that testimony into the record. The prior testimony was admitted into the record in documentary form for the panel's review.

PROCEDURAL MATTERS

On Monday, March 18, 1991 and Tuesday, March 19, 1990 in Denver, Colorado during a hearing lasting a total of four (4) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on November 25, 1988 by Claimant Donna R. Kelsey.

Respondent Merrill Lynch Pierce Fenner & Smith, Inc. did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure and having answered the claim, appeared at the hearing, and presented its defense is bound by the determination of the arbitration panel on all issues submitted.

Respondents Merrill Lynch Money Markets, Inc. and Merrill Lynch and Co. did not file with the NASD a properly executed submission to arbitration, having

answered the claim, appeared at the hearing and presented their defense is bound by the determination of the arbitration panel on all issues submitted.

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 original(s) remain on file with the NASD.

AWARD

The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Merrill Lynch Pierce Fenner & Smith, Inc., shall be and hereby is liable for and shall pay to Claimant Donna R. Kelsey the sum of One Hundred Twenty Seven Thousand Nine Hundred Forty Eight Dollars and Twenty One Cents (\$127,948.21);
2. The claims against Merrill Lynch Money Markets, Inc. and Merrill Lynch & Co. shall be and hereby are dismissed;
3. No interest is awarded on the above stated sum;
4. No punitive damages are awarded herein;
5. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter; and
6. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall refund the hearing session deposit in the amount of \$ 750.00 previously deposited with the NASD by the Claimant. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. shall pay to the NASD the sum of \$3,000.00 as forum fees.

Dated:

4/10/91

/S/ Susan Thevenet, Esq.
Susan Thevenet, Esq.
Presiding Chair

4/15/91

/S/ Holly Stein, Esq.
Holly Stein, Esq.

4/12/91

/S/ Roger Felthoven
Roger Felthoven
Industry Arbitrator