

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

William L. and Patricia V. Smallwood

89-00010

Name of Respondents

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

REPRESENTATION OF PARTIES

Claimants were represented by Stuart Bennett of Brega & Winters, P.C. of Denver, CO.

Respondents were represented by Elizabeth W. Sachs and Vic McWhorter of Paul, Hastings, Janofsky & Walker of Los Angeles, CA.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. ("NASD") on or about January 4, 1989, William L. and Patricia V. Smallwood ("Claimants") alleged that Henri B. Moreault ("Moreault"), Douglas Doyle ("Doyle") and/or John Carney ("Carney") each of whom was an account executive employed by A.G. Becker Paribas Incorporated ("Becker") in late 1980 and 1981 made material misrepresentations in connection with their purchase of Felmont Oil Corporation ("Felmont") stock. Claimants also alleged that Moreault, Doyle and/or Carney 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 Harold 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 retain Felmont stock;
- e) 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;
- f) Becker considered the need to offer its customers stock in a public or secondary offering; and

- g) The fiduciary standard for investment management is that the 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 March 9, 1989, Respondents denied the allegations of Claimants 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 mitigate.

RELIEF REQUESTED

Claimants requested an award of fraud damages in the amount of \$100,000.00; actual damages in the amount of \$66,221.30; exemplary damages in the amount of \$66,222.00; interest of not less than 8% per annum from the dates of purchase; costs and attorney's fees.

Respondents requested that the Statement of Claim be dismissed in its entirety and that costs, expenses and attorney's 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 denied Respondent's motion to exclude testimony of other customers after considering the arguments presented on behalf of the parties.

PROCEDURAL MATTERS

On Thursday, April 25, 1991, and Friday, April 26, 1991 in Denver, Colorado during a hearing lasting a total of five (5) sessions, including one pre-hearing conference, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimants William L. and Patricia V. Smallwood.

Respondent Merrill Lynch Pierce Fenner & Smith did not file with the NASD a properly executed submission to arbitration but are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing, are 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. However, since each party having answered the claim, appeared at the hearing and presented its defense, each 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 Money Markets, Inc. shall be and hereby is liable for and shall pay to the Claimants William L. and Patricia V. Smallwood the sum of Sixty Nine Thousand Eight Hundred Eighty Four Dollars (\$69,884.00);
2. Prejudgment interest at the rate of 9% per annum, simple interest is awarded on the above stated sum from and inclusive of the date the Claimants filed their cause of action in the U.S. District Court of Idaho to and inclusive of the date this award is paid in full;
3. Respondent Merrill Lynch Money Markets, Inc. shall be and hereby is liable for and shall pay to the Claimants William L. and Patricia V. Smallwood the sum of Eleven Thousand Six Hundred Thirty-Seven Dollars as reimbursement of costs incurred in this matter;
4. Each party shall bear its own attorneys fees incurred in this matter; and
5. 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 \$550.00 previously deposited with the NASD by the Claimants. Respondent Merrill Lynch Money Markets, Inc. shall pay to the NASD the sum of \$3,750.00 as forum fees. Respondent Merrill Lynch Money Markets, Inc. shall pay to the Claimants the \$200.00 non-refundable filing fee.

Dated:

May 20, 1991

s/ Edward F. O'Keefe
Edward O'Keefe, Esq.
Presiding Chair
Public Arbitrator

May 11, 1991

s/ John H. Barton
John H. Barton
Public Arbitrator

May 8, 1991

s/ Mark M. Maraia
Mark M. Maraia, Esq.
Industry Arbitrator