

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants/Counter-Respondents

Kevin & Theresa Cooney

89-00988

Name of Respondents/Counter-Claimants

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Broadcast Capital Corporation  
First Affiliated Securities, Inc.  
J. Patrick Bohn

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89 - 00988  
(consolidated  
with 89-00999)

Name of Claimant/Counter-Respondent

David W. Cooney

Name of Respondents/Counter-Claimants

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Broadcast Capital Corporation  
First Affiliated Securities, Inc.  
J. Patrick Bohn

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REPRESENTATION

Claimants Kevin Cooney, Theresa Cooney, and David W. Cooney were represented by Karen H. Susman, Esq., Houston, Texas.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Broadcast Capital Corporation were represented by Kathy D. Patrick, Esq. of Gibbs & Ratliff, Houston, Texas.

Respondent J. Patrick Bohn was represented by Frank V. Ghiselli, Esq., Houston, Texas.

CASE INFORMATION

Statement of Claim of Kevin Cooney and Theresa Cooney filed: March 20, 1989.  
Claimants Kevin Cooney and Theresa Cooney's Submission Agreement signed on: January 3, 1989.

Statement of Answer of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. filed: June 20, 1989.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed by Michael J. Stewart on: May 24, 1989.

Statement of Answer and Crossclaim Against First Affiliated Securities, Inc. of Respondent Broadcast Capital Corporation filed: June 20, 1989.

Respondent Broadcast Capital Corporation's Submission Agreement signed by Edgar A. McIntosh, Jr. on: May 4, 1989

Statement of Answer and Counterclaim of Respondent First Affiliated Securities, Inc. filed: June 20, 1989.

Statement of Answer to Crossclaim Against First Affiliated Securities, Inc. of First Affiliated Securities, Inc. filed: September 1, 1989.

Statement of Answer of Respondent J. Patrick Bohn filed: June 20, 1989.

First Amended Statement of Answer filed by Respondent J. Patrick Bohn on or about: May 1, 1990

Second Amended Statement of Answer of Respondent J. Patrick Bohn filed on or about: January 11, 1991

Statement of Answer to Counterclaim Brought by Respondent First Affiliated Securities, Inc. of Kevin Cooney and Theresa Cooney filed: September 13, 1989.

Statement of Claim of David W. Cooney filed: April 3, 1989.

Claimant David W. Cooney's Submission Agreement signed on: March 21, 1989.

Statement of Answer filed by Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. on: June 2, 1989.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed by J. David Montague on: April 27, 1989.

Statement of Answer and Crossclaim Against First Affiliated Securities, Inc. of Respondent Broadcast Capital Corporation Filed: June 2, 1989.

Respondent Broadcast Capital Corporation's Submission Agreement signed by Edgar A. McIntosh, Jr. on: April 17, 1989.

Statement of Answer of Respondent First Affiliated Securities, Inc. Filed: June 2, 1989.

Respondent First Affiliated Securities, Inc.'s Submission Agreement signed on: April 17, 1989.

Statement of Answer to Crossclaim Against First affiliated Securities, Inc. filed by First Affiliated Securities, Inc. on: August 10, 1989.

Statement of Answer of Respondent J. Patrick Bohn filed: June 2, 1989.

First Amended Statement of Answer of Respondent J. Patrick Bohn filed on or about: July 9, 1990

Respondent J. Patrick Bohn's Submission Agreement signed on: May 5, 1989.

- Respondent J. Patrick Bohn's Motion for Consolidation filed on: May 18, 1990
- Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Motion for Consolidation filed on: May 29, 1990
- Respondent Broadcast Capital Corporation's Motion for Consolidation filed on: May 29, 1990
- Claimant's Response to Respondent's Motion to Consolidate filed on: December 21, 1990

The Arbitration panel determined that the Motion to Consolidate would be granted on May 9, 1991.

Claimants/Counter-Respondents Kevin & Theresa Cooney and David W. Cooney filed a First Amended, Consolidated Statement of Claim and Statement of Answer on: May 20, 1991

Respondents/Counter-Claimants Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Broadcast Capital Corporation filed an Amended Answer and Counterclaim on: June 5, 1991

Respondent/Counter-Claimant J. Patrick Bohn filed a Supplemental Counterclaim and Statement of Answer to the First Amended Statement of Claims on: June 7, 1991

#### HEARING INFORMATION

Hearing Dates/Sessions: June 18, 1991 for two (2) sessions  
June 19, 1991 for two (2) sessions  
July 15, 1991 for two (2) sessions  
July 16, 1991 for two (2) sessions

Hearing Location: Houston, Texas

#### CASE SUMMARY

Claimants/Counter-Respondents Kevin Cooney, Theresa Cooney and David Cooney ("Cooneys"), alleged that Respondent/Counter-Claimant J. Patrick Bohn ("Bohn"), while employed by or acting as an agent for the Respondents/Counter-Claimants Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Broadcast Capital Corporation ("Broadcast") and/or Respondent First Affiliated Securities, Inc. ("First Affiliated"), fraudulently induced the Cooneys into opening index option trading accounts by misrepresenting the risks inherent in the account and the speculative nature of option trading. The Cooneys further alleged the following:

1. The Respondents placed the Claimants' money in "naked" put and call options that were totally unsuitable for their conservative financial goals;
2. Bohn, while exercising control over the accounts, "churned" the accounts by engaging in trading which was excessive with unlawful

- turn-over ratios, causing excessive commissions in comparison to the amount invested and Claimants' investment objectives;

3. Bohn and Merrill Lynch's investing in "naked" puts and calls was negligent because of the Cooneys' financial objectives and situation in life;

4. Respondents breached their fiduciary duty to protect the Cooneys' financial interests and to disclose any conflict of interest on their part by incurring excessive commissions related to the investment;

5. Merrill Lynch failed to diligently supervise the actions of Bohn;

6. Merrill Lynch breached the contract with the Cooneys to provide sound investment advice tailored to meet the Claimants' financial needs and goals by employing a broker-dealer who negligently invested in naked options put and calls, who told the Claimants the investment was safe and sound and who violated the Securities and Exchange Commission Act of 1934; and

7. Merrill Lynch and Bohn violated the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. Sec. 1961-68 by engaging in a pattern of racketeering activity, as evidenced by numerous acts of mail, wire and securities fraud in the conduct of its commercial enterprise.

Merrill Lynch and Broadcast's liability was alleged pursuant to the theory of Respondeat Superior. In addition, it was alleged that because the Cooneys believed that Merrill Lynch and Broadcast stood behind and were the same as First and Bohn, they were entitled to "pierce the corporate veil" and hold Merrill Lynch responsible for all damages.

Respondents/Counter-Claimants Merrill Lynch and Broadcast denied the material allegations of the Statement of Claim, alleging that:

1. Merrill Lynch has had no business relationship with the Cooneys since June of 1987, when the Cooneys closed their accounts to follow Bohn to First Affiliated;

2. The Cooneys' accounts were in a profitable position when they left Merrill Lynch and the positions which caused the losses were purchased through the new accounts at First Affiliated;

3. Broadcast served only as a clearing broker for First Affiliated, gave the Cooneys no investment advice, did not solicit transactions from them and did not act as their agent;

4. The Cooneys were sophisticated investors, who initiated all trades in their non-discretionary accounts, and were provided with all forms explaining the risks of option trading which they signed; and

5. Merrill Lynch regularly supervised the Cooney accounts until the accounts were closed in June of 1987, and in 1986 conducted full activity reviews of the trading activity in the accounts.

Merrill Lynch and Broadcast asserted a Counterclaim for the filing of a frivolous lawsuit, alleging that the Cooneys knew when the action was filed that Merrill Lynch and Broadcast could not be held responsible for the losses because: 1) the trades which created the loss were made at First Affiliated long after the Cooneys left Merrill Lynch with their accounts in a profitable position; 2) the Cooneys never had any contact with Broadcast and signed contracts agreeing that Broadcast would not be responsible for the acts or omissions of First Affiliated; and 3) there was no common ownership between Merrill Lynch and First Affiliated or Broadcast and First Affiliated.

By letter dated and received by the NASD on June 13, 1991, Claimants dismissed any claims made against Broadcast Capital Corporation as a respondent in these cases.

Respondent/Counter-Claimant Bohn denied the material allegations of the Statement of Claim, alleging that;

1. The Cooneys were sophisticated investors, whose financial status and objectives were suitable for trading in options;
2. The cause of the Cooneys' losses was the stock market crash of October 19, 1987;
3. The claims are barred by the doctrines of ratification, waiver and estoppel;
4. The Cooneys assumed the risks incidental to the transactions complained of, and were fully aware of the risks involved in option trading;
5. The trading in the Cooneys' accounts were not excessive in light of their investment objectives of speculation and aggressive trading;

Bohn further adopted, in their entirety, the Statements of Answer of Respondents Merrill Lynch and Broadcast.

In addition, Bohn asserted a counterclaim for the balance due on a promissory note signed and delivered by Kevin and Theresa Cooney, upon which payment has been demanded, but refused. Furthermore, Bohn asserted a counterclaim against the Cooneys for filing a frivolous action.

Respondent First Affiliated Securities, Inc. denied the material allegations of the Statement of Claim and asserted a counterclaim as the original holder of the promissory note held by Respondent Bohn. On March 29, 1990, First Affiliated, now known as ARIM Production Corp., filed a Voluntary Petition Under Chapter 7 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Central District of California. Pursuant to the notice, all claims asserted by the Claimants against First Affiliated were stayed.

### OTHER ISSUES

On July 25, 1991, prior to the panel rendering an award, the Claimants filed a motion to reopen the hearing pursuant to Section 40 of the Code of Arbitration Procedure. The motion and all responses were forwarded to the panel for determination. Upon review, the panel determined that the motion would be denied.

### RELIEF REQUESTED

Claimants requested entry of an award against Respondents Merrill Lynch and Bohn in the amount of \$272,771.00 for Kevin and Theresa Cooney, and in the amount of \$176,943.00 for David Cooney. In addition, the Cooneys requested punitive damages of at least three times actual damages, treble damages pursuant to the RICO claim, a declaration that the note and alleged debt to Bohn be declared null and void, reasonable lawful attorneys' fees and costs, and all general and equitable relief deemed warranted. Furthermore, Claimants requested that all counterclaims asserted against them be dismissed and denied in their entirety.

Respondent Merrill Lynch requested that the Claims be dismissed and denied in their entirety. Respondents Merrill Lynch and Broadcort further requested entry of an award against Claimants for attorneys' fees and costs to compensate them for the expenses incurred in defending the arbitration.

Respondent J. Patrick Bohn requested that the Claims be dismissed and denied in their entirety. Bohn further requested the entry of an award against Claimants Kevin and Theresa Cooney for the sum of \$36,000.00, plus accrued interest from December 1, 1988 at the rate of 10% per annum, plus attorneys' fees in accordance with the terms of the promissory note. Bohn also requested entry of an award against Claimants for attorneys' fees and costs to compensate him for the expenses incurred in defending this arbitration.

### AWARD

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

1. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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;
2. The Claims filed by Claimants Kevin Cooney, Theresa Cooney and David Cooney against Respondents Merrill Lynch, Pierce, Fenner &

Smith, Inc. and J. Patrick Bohn are hereby dismissed and denied in their entirety;

3. Claimants/Counter-Respondents Kevin Cooney and Theresa Cooney are jointly and severally liable for and shall pay to Respondent/Counter-Claimant J. Patrick Bohn the sum of \$36,000.00 plus interest at the rate of 10% per annum from December 1, 1988 until the award is paid. In addition, Claimants/Counter-Respondents Kevin Cooney and Theresa Cooney are jointly and severally liable for and shall pay to Respondent/Counter-Claimant J. Patrick Bohn the sum of \$7,000.00 as attorneys' fees. In making this award of attorneys' fees, the arbitrators reviewed the terms of the promissory note and Texas law and determined that the authority existed for an award of attorneys' fees to Respondent/Counter-Claimant J. Patrick Bohn;

4. Claimants/Counter-Respondents Kevin Cooney and David Cooney are jointly and severally liable for and shall pay to Respondent Counter-Claimant J. Patrick Bohn the sum of \$10,718.75 as reasonable attorneys' fees and expenses. In determining to award attorneys' fees to Respondent/Counter-Claimant, the panel considered the authorities and arguments set forth by the parties and the post-hearing memorandum provided, in addition to the Texas Deceptive Trade Practices Act, Rule 11 of the Federal Rules of Civil Procedure, Rule 13 of the Texas Rules of Civil Procedure and equity, and determined that authority existed for an award of attorneys' fees to Respondent/Counter-Claimant J. Patrick Bohn;

5. In addition, Claimants/Counter-Respondents Kevin Cooney and David Cooney are jointly and severally liable for and shall pay to Respondent/Counter-Claimant Merrill Lynch, Pierce, Fenner and Smith, Inc. the sum of \$47,047.74 as reasonable attorneys' fees and expenses. In determining to award attorneys' fees to Respondent/Counter-Claimant, the panel considered the authorities and arguments set forth by the parties and the post-hearing memorandum provided, in addition to the Texas Deceptive Trade Practices Act, Rule 11 of the Federal Rules of Civil Procedure, Rule 13 of the Texas Rules of Civil Procedure and equity, and determined that authority existed for an award of attorneys' fees to Respondent/Counter-Claimant Merrill Lynch, Pierce, Fenner and Smith, Inc.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and the hearing session deposit of \$550.00 previously deposited by the Claimants Kevin and Theresa Cooney. Claimants Kevin and Theresa Cooney are liable for and shall pay to the NASD additional forum fees in the sum of \$450.00. In addition, the NASD shall retain the claim filing

fee of \$200.00 and the hearing session deposit of \$550.00 previously deposited by the Claimant David Cooney. Claimant David Cooney is liable for and shall pay to the NASD additional forum fees in the sum of \$450.00. Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$2,000.00. Respondent J. Patrick Bohn is liable for and shall pay to the NASD forum fees in the sum of \$2,000.00.

Fees are payable to the National Association of Securities Dealers, Inc.

BY THE ARBITRATION PANEL

DATED:

Michael E. McGown  
Michael E. McGown, Esq.  
Chairperson  
Public Arbitrator

September 18, 1991

Cynthia J. Thomson  
Cynthia J. Thomson, Esq.  
Public Arbitrator

September 17, 1991

Franklin Anthony Arnold  
Franklin Anthony Arnold, Esq.  
Industry Arbitrator

September 18, 1991

Date Served:

10-8-91