

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Catherine Smith

Name of Respondent(s)

89-01799

Merrill Lynch, Pierce Fenner & Smith Inc
Gene Valentino

Name of Third Party Respondent

Nick Valentino

CASE SUMMARY

In a Statement of Claim filed with the NASD on June 23, 1989, Claimant Catherine M. Smith alleged that Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gene Valentino represented a real estate investment trust to her as a Merrill Lynch program when, in fact, it was not and that this misrepresentation fraudulently induced her to invest in this trust. According to the Statement of Claim, Claimant executed a check to Florida Eastern Development Company for the purchase of 10 units of GIN Series II under the guidance of Respondent Gene Valentino and executed blank subscription documents into which false information was later placed. These actions were taken due to Claimant's trust in the Respondents and her reliance upon Respondent Gene Valentino's representation that it was a Merrill Lynch program. It is further alleged that the investment was not through Respondents Merrill Lynch and Gene Valentino, but through Third-Party Respondent Nick Valentino of the brokerage firm of Fitzgerald, DeArman & Roberts, who is Gene Valentino's brother. Claimant stated that she would not have entered into the investment if she had known it was not a Merrill Lynch program; her investment is now worthless; Respondent Gene Valentino's actions constitute fraud, misrepresentation and gross breach of fiduciary duty; and, that Respondent Merrill Lynch is responsible for the acts of its employee.

In a Statement of Answer filed with the NASD on September 18, 1989, Respondent Merrill Lynch Pierce Fenner and Smith, Inc. denied responsibility for the actions of Respondent Gene Valentino and the consequences resulting therefrom, stating that no client referrals were made to Nick Valentino by Gene Valentino while Gene was employed by Merrill Lynch. Respondent Merrill Lynch filed a Cross-Claim and Third Party Claim alleging that if Claimant's allegations involving the actions by Nick and Gene Valentino are true, these

actions occurred without the knowledge, consent, authority, or ratification of Merrill Lynch, were beyond the scope of Gene Valentino's authority and were in direct contradiction and violation of Merrill Lynch's policies and procedures. Therefore, Merrill Lynch asserted claims against Gene Valentino and/or Nick Valentino for any amount Claimant is awarded from Merrill Lynch.

In a Statement of Answer filed with NASD on September 18, 1989, Respondent Gene Valentino denied the material allegations of the Statement of Claim, alleging that neither he or Merrill Lynch were involved in, profited from, or recommended the investment complained of by Claimant.

In a Statement of Answer filed with the NASD, Third-Party Respondent Nick Valentino denied the Claimant's allegations, stating that Claimant voluntarily entered into the investment and that at no time did Respondents Gene Valentino and Merrill Lynch become involved in the dealings involving the investment.

RELIEF REQUESTED

Claimant Catherine M. Smith requested entry of an award against Respondents Merrill Lynch, Pierce, Fenner & Smith and Gene Valentino for \$100,000.00, unspecified punitive damages, statutory interest, plus reasonable costs and attorneys' fees.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested entry of an award denying the Claimant's Statement of Claim, or in the event an award is entered in favor of Claimant, that such award be entered solely against Respondent Gene Valentino and/or Third Party Respondent Nick Valentino.

Respondent Gene Valentino requested that the Statement of Claim be denied, that Claimant take nothing, that he be awarded attorneys' fees and costs, and for such further relief as the Arbitrators may deem fit and proper.

Third Party Respondent Nick Valentino requested that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. take nothing on their Third Party Claim against him and for such other and further relief as the arbitrator's deem fit and proper.

HEARD

On June 28, 1990 and July 31, 1990, in Oklahoma City, Oklahoma, during a hearing lasting a total of four sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on June 16, 1989 by Claimant Catherine M. Smith, on September 13, 1989 by Quinton Ellis on behalf of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., on September 14, 1989 by Respondent Gene Valentino, and on June 28, 1990 by Third Party Respondent Nick Valentino.

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

1. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. and Respondent Gene Valentino are jointly and severally liable for and shall pay to Claimant Catherine M. Smith the sum of \$54,074.99 plus interest at the rate of 10% per annum from September 23, 1986 until said amount is paid and attorneys' fees in the amount of \$12,500.00;
2. Respondent Gene Valentino is liable for and shall pay to Claimant Catherine M. Smith as additional damages the sum of \$28,425.01, plus interest at the rate of 10% per annum from September 23, 1986 until said amount is paid;
3. Respondents Gene Valentino and Third-Party Respondent Nick Valentino are jointly and severally liable for and shall pay to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. for the amount paid to Claimant by Merrill Lynch in satisfaction of the judgement set forth in paragraph 1 above;
4. In awarding attorneys' fees, the arbitration panel considered the federal and state authorities cited and the arguments set forth by the parties in their post-hearing briefs and determined that authority existed for an award of attorneys' fees in favor of Claimant Catherine M. Smith and Respondent Merrill Lynch Pierce Fenner & Smith, Inc.; and
5. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain as forum fees, the \$750.00 filing fee previously deposited with the NASD by the Claimant Catherine M. Smith. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to the Claimant Catherine M. Smith the sum of \$750.00 as reimbursement of the filing fee previously deposited with the NASD by the Claimant Catherine M. Smith. In addition, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to the NASD additional forum fees of \$2,250.00.

By the Panel

Dated: Jan 17, 1991

/s/ Roy J. Davis
Roy J. Davis, Esq.

Dated: Jan 17, 1991

/s/ James C. Gibbens
James C. Gibbens, Esq.

Dated: Jan 17, 1991

/s/ Mel James
Mel James