

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

William Simkins, Individually,
Josephine Simkins, Individually,
William Simkins, in his capacity
as Executor of the Estate of
Everett Simkins, Deceased.
Claimants,

v.

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Laurie J. Canaday,
Respondents.

Consolidated
Nos. 90-03517
91-03292

REPRESENTATION OF PARTIES

For Claimant: James M. Dezelar, Esq. of Robbins, Salomon & Patt, LTD., Chicago, Illinois.

For Respondents: Peter Cantwell, Esq., and Paul Scheurlein, Esq. of Cantwell & Cantwell, Chicago, Illinois. —

CASE INFORMATION

Statement of Claim for case number 90-03517 filed on or about: December 14, 1990.
Claimants' Submission Agreement for case number 90-03517 signed: December 11, 1990.
Statement of Answer of Respondent Laurie J. Canaday, for case number 90-03517, filed on or about: January 23, 1991.
Statement of Answer of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., for case number 90-03517, filed on or about: March 14, 1991.
Respondent Laurie Canaday's Submission Agreement for case number 90-03517 signed on: May 7, 1991.
Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement for case number 90-03517 signed on: March 13, 1991.

Statement of Claim for case number 91-03292 filed on or about: October 31, 1991.

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Claimant's Submission Agreement for case number 91-03292 signed on or about:
November 18, 1991.

The NASD does not have a record of Respondents having filed Submission Agreements
and a separate Answer to the Statement of Claim for case number 91-03292.

First Amended Statement of Claim for case numbers 90-03517 and 91-03292 filed on or
about: March 20, 1992.

Amended First Amended Statement of Claim for case numbers 90-03517 and 91-03292
filed on or about: April 2, 1992.

Statement of Claim for Consolidated Proceedings filed on or about: September 24, 1992.

Amended Consolidated Statement of Claim filed on or about: October 19, 1992.

Joint Answer to First Amended Consolidated Statement of Claim filed on or about:
March 11, 1993.

HEARING INFORMATION

Pre-hearing Conference dates: January 13, 1993. One (1) session.
January 21, 1993. One (1) session.

Hearing date: September 13, 1993. Two (2) sessions.
September 14, 1993. Two (2) sessions.
September 16, 1993. Two (2) sessions.
September 17, 1993. One (1) sessions.
November 22, 1993. Two (2) sessions.
November 23, 1993. Two (2) sessions.
November 24, 1993. Two (2) sessions.
January 27, 1994. Two (2) sessions.
January 28, 1994. Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimants, William Simkins, Individually, Josephine Simkins, Individually, and William Simkins, In his capacity as Executor of the Estate of Everett Simkins, Deceased ("Claimants") alleged that Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Laurie J. Canady ("Respondents"): Made unauthorized and unsuitable investments for

Claimants; breached their fiduciary duty to Claimants; made misrepresentations to the Claimants; acted with wilful and wanton, and reckless misconduct; violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; violated Section 17(a) of the Securities Act of 1933; violated Rule 10(b)-16 of the Exchange Act; and violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sections 1961-68 ("RICO"). Claimant further alleged that Respondent Merrill Lynch: Breached the contract with the Claimants; failed to supervise Respondent Laurie J. Canady; and violated Section 20(a) of the Exchange Act. The allegations arose out of transactions in CIF High Yield Series 15 and Series 58 corporate bonds, along with other securities more fully disclosed at the hearing.

Unless specifically admitted in their Answer, Respondents denied each and every allegation set forth by the Claimants. In addition, Respondents asserted the following affirmative defenses:

1. Claimant fails to state a claim upon which relief may be granted.
2. There is no private right of action permitted in the law under Section 17(a) of the Securities Act of 1933.
3. The claims asserted are time barred by the applicable statutes of limitation and the equitable doctrine of laches.
4. Claimants have, by their conduct, waived any and all claims alleged in their Statement of Claim.
5. Claimants are estopped by their conduct from asserting any and all claims alleged in the Statement of Claim.
6. Claimants are barred from any recovery because they directed, authorized, consented to, acquiesced in, and/or ratified the transactions in question in their cash Management and retirement accounts.
7. Claimants are barred from any recovery because they failed to exercise that degree of diligence required in the handling of their Cash Management and retirement accounts.
8. Claimants controlled the trading that occurred in the Cash Management and retirement accounts, and not the Respondents.
9. All transactions upon which the Claimants based their allegations against Respondents were properly conducted in accordance with the applicable rules and regulations.
10. Claimants' damages are solely the result of Claimants' conduct.
11. Claimants have failed to mitigate their damages.

RELIEF REQUESTED

Claimants requested the following award against the Respondents:

Claimants requested an award against Merrill Lynch, Pierce, Fenner & Smith, Inc. as follows: Rescission of the agreements; compensatory damages in excess of \$200,000.00; costs; attorneys' fees; pre-judgement interest; and punitive damages in the amount of \$2,000,000.00.

Claimants requested an award against Respondents Laurie J. Canaday and Merrill Lynch, Pierce, Fenner & Smith, Inc. as follows: Compensatory damages in excess of \$200,000.00; costs; attorneys' fees; pre-judgement interest; punitive damages in the amount of \$2,000,000.00; and compensatory damages in a sum in excess of \$200,000.00 trebled.

Respondents requested that the arbitration panel deny the relief requested in the Statement of Claim in all respects.

OTHER ISSUES CONSIDERED & DECIDED

On March 13, 1991, Claimants, in case number 90-03517, filed a Motion to Preclude Respondents from filing an Answer. The motion was moot, due to the fact that Respondents had requested, and were granted, an extension to file their Answers until March 14, 1993.

On March 16, 1992, the parties made a joint Motion to Consolidate case numbers 90-03517 and 91-03292 into one action. After review of the motion, the arbitrators granted the consolidation of the two cases.

On March 20, 1992, Claimants' filed a Request that the panel allow them to file a "First Amended Statement of Claim for case numbers 90-03517 and 91-03292. The panel granted the request.

On October 19, 1992, Claimants' filed a Motion for Leave to Amend Consolidated Statement of Claim. After review of the Motion and the Response, and deliberation, the panel granted the motion in their Order relating to the January 21, 1993 pre-hearing conference infra.

On December 23, 1992, Respondents made a Motion to Dismiss Claimants' Claims pursuant to Section 15 of the NASD Code of Arbitration Procedure (the "Code"),

Request to Postpone the January 1993 hearing dates and to waive the postponement fee. After consideration of the Motions and responses, and deliberation, the panel granted the postponement request, and scheduled a pre-hearing conference for January 21, 1993 to consider the substantive motions. After hearing arguments from the parties on January 21, 1993, the arbitrators ruled as follows:

1. The Amended Consolidated Complaint is accepted as filed. Respondents shall file their Answer within 10 business days.
2. Respondents' Motion to Waive/Return the postponement fee or apply it to any forum fees assessed in this matter is deferred until the award is issued on the merits of this matter.
3. Respondents' Motion to Dismiss the punitive damages claim is taken under advisement.
4. As to Respondents' Motion to Dismiss certain claims as time-barred pursuant to Section 15 of the Code, the panel adopts the position taken by both counsel at the pre-hearing conference.

On August 24, 1993, Claimants' made a Motion to Supplement their First Amended Consolidated Statement of Claim to add Count XIII, a count for punitive damages. After reviewing the Motion and Response, the panel denied Claimants' Motion to Supplement.

At the first day of hearing in this matter, Respondents filed various Motions to dismiss certain counts of the Claimants' First Amended Consolidated Statement of Claim. After Respondent raised the motions as to Counts IX, XI, and XII of the First Amended Consolidated Statement of Claim, Claimants' First Amended Statement of Claim, Claimants' withdrew those claims from this arbitration. After consideration of arguments, and the Motions, the panel denied the remaining Motions to Dismiss, with leave to refile at the close of Claimants' case. Respondents reraised their Motions to Dismiss at the close of Claimants' case. After review of the motions and the Response, hearing argument from the parties, and deliberation, the panel denied the motions.

Respondents did not file with the NASD properly executed submissions to arbitration but are required to submit to arbitration pursuant to Section 12 of the Code and having answered the claim, appeared and testified at the hearing and therefore are bound by the determination of the panel on all issues submitted.

The parties have agreed that the Award in this matter may be executed by 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

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

1. Claimants, William Simkins', Individually, Josephine Simkins', Individually, and William Simkins', In his Capacity as Executor of the Estate of Everett Simkins, Deceased, ("Claimants") claims as to Counts IX, XI and XII are denied and dismissed with prejudice.

2. Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Laurie J. Canaday are jointly and severally liable for, and shall pay to Claimants the sum of \$262,249.00 as satisfaction of all of their claims for compensatory damages herein, and the sum of \$56,340.00 as satisfaction for all of their claims for interest made herein.

3. Claimants' claims for punitive damages and attorneys' fees are hereby denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully below.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Laurie J. Canaday are jointly and severally liable for, and shall pay to the Claimants the sum of \$32,068.00 as satisfaction for Claimants' claims for costs made herein.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Laurie J. Canaday are jointly and severally liable for, and shall pay to the Claimants the sum of \$1,770.00 as reimbursement of their filing fee and hearing session deposit costs incurred in filing case nos. 90-03517 and 91-03292 with the NASD.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

2 pre-hearing conference sessions x \$300.00 =	\$ 600.00
17 hearing sessions x \$1,000.00 =	<u>17,000.00</u>
Total Forum Fees to be assessed	\$17,600.00
Less:	

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Deposit paid for 90-03517	1,000.00
Deposit paid for 91-03292	400.00
Respondents' Postponement fee	<u>1,000.00</u>
Balance of Forum Fees to be assessed	<u>\$15,200.00</u>

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee for case no. 90-03517 in the amount of \$250.00, and shall retain the nonrefundable filing fee in the amount of \$120.00 for case no. 91-03292, and shall **RETAIN** the hearing session deposits in the amount of \$1,000.00 and \$400.00, respectively, previously paid to the NASD by the Claimants.

Pursuant to Sections 30(b) and 43(c) the NASD shall retain the postponement fee in the amount of \$1,000.00 previously paid to the NASD by the Respondents. The retained forum fee shall be applied towards the additional forum fees assessed against the Respondents.

Additional Forum Fees in the amount of \$15,200.00 are assessed jointly and severally against the Respondents.

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

CONCURRING ARBITRATORS

Dated: _____ Name: _____

February 7, 1994

February 4, 1994

February 11, 1994

Date of Service by the NASD: February 15, 1994

N.A.S.D. DISCIPLINARY REFERRAL

NATIONAL ASSOCIATION OF SECURITIES DEALERS

William Simkins, Individually,
Josephine Simkins, Individually,
William Simkins, in his capacity
as Executor of the Estate of
Everett Simkins, Deceased,
Claimants,

v.

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Laurie J. Canaday,
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Hearings were held in Chicago, Illinois, on September 13, 14, 16, and 17, 1993, November 22, 23, and 24, 1993, and January 27, and 28, 1994. At the hearing of this matter, certain evidence and testimony were taken by the undersigned panel that lead them to believe that Respondent Laurie J. Canady had made unauthorized transactions and unsuitable investments in Claimants' accounts, and that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. had failed to supervise Respondent Laurie J. Canady. Therefore, the arbitrators are requesting that this matter be submitted for disciplinary review.

CONCURRING ARBITRATORS

Dated:

Name:

February 7, 1994

James D. Martin/s/
James D. Martin
Presiding Chair
Public Arbitrator

February 4, 1994

Lynn P. Cohn/s/
Lynn P. Cohn
Public Arbitrator

February 11, 1994

Thomas J. Cavanagh/s/
Thomas J. Cavanagh
Industry Arbitrator

Date of Service by the NASD:

February 15, 1994

(1)