



N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Arbitration

National Association of
Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, N.Y. 10004
FAX (212) 858-4389

In the Matter of the Arbitration Between

Name of Claimants

Sedi Hashemy and Mohammad Hashemi

Modified
91-02465 Award

Name of Respondent

Merrill Lynch Pierce Fenner & Smith Inc

REPRESENTATION

For Claimant: Mike Paulk, Esq.

For Respondent: Paul Stivers, Esq. and Laura H. Robison, Esq. of the law
firm of Rogers & Hardin.

CASE INFORMATION

Statement of Claim filed: August 7, 1991.

Claimant's Reply to Respondent's Motion to Dismiss filed.

Claimant's Submission Agreement signed on: August 6, 1991.

Claimant's Motions filed requesting:

1. That a determination of the time defenses Respondent has raised be made well in advance of any hearing on the merits of the case,
2. That the merits of the case, apart from the time defenses raised by Respondent, not be heard and determined at the May 6 and 7 1992 hearing,
3. That Respondent be barred at any hearing from presenting facts and defenses not included in its answer, made pursuant to Section 25(b)(2) of the NASD Code,
4. That the arbitrators give a written opinion should they rule against Claimants on the time defenses Respondent has raised.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Preliminary Answer and Motion to Dismiss Claimants' Statement of Claim filed on: December 30, 1991.

Motion for Preliminary Consideration of Motion to Dismiss filed on: December 30, 1991.

Motion to Dismiss filed.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed on: January 20, 1992.

HEARING INFORMATION

Hearing Date/Sessions: May 6, 1992, 1 session.

Hearing Location: Offices of the NASD located in Atlanta, GA.

CASE SUMMARY

Claimants alleged that they have a dispute with the Respondent arising out of the opening of their account with Merrill Lynch, Pierce, Fenner & Smith, Inc. in 1979 and they undertook to resolve the dispute by filing a lawsuit in Federal District Court in Atlanta, Georgia and by an order entered on the docket August 7, 1985 the court granted Respondent's Motion to Compel Arbitration. Claimants further alleged Respondent violated Rule 10b-5 in that throughout the time their account was with Merrill Lynch, Pierce, Fenner & Smith, Inc. the account executive Earl H. Finney made numerous misrepresentations of fact and omissions and Claimants further alleged although they believed they were loaning their money to a bank-like company, numerous securities were purchased and sold for their account in connection with Earl H. Finney's misrepresentations and omissions and Earl H. Finney managed the account to benefit himself through commissions in complete disregard of the Claimants' objectives and understandings. Claimants further alleged initially their money was invested in suitable investments but later their money was put into a mutual stock fund, used for stock trading, used to speculate with stock warrants and stock calls, none of which were suitable for Claimants and Respondent's actions constitute common law fraud. Claimants further alleged Respondent acted recklessly and Earl H. Finney's management of the account violated a number of the NASD Rules of Fair Practice and the incongruities in Claimants' account escaped managements' supervision and on the occasion where it seemed a thorough investigation of the account was due, on June 11, 1981, management signed on as an active participant in Mr. Finney's wrongful conduct and in January 1982 after Claimants complained to management, Respondent ignored their disaffirmance of the trades and left the equity securities in their account thereafter periodically soliciting the Claimants' order to sell them, only relenting some sixteen months later and selling them themselves. Claimants further alleged Earl H. Finney and Merrill Lynch, Pierce, Fenner & Smith Inc., were aware of Claimants peculiar susceptibility to emotional distress and their fraud is outrageous conduct causing severe emotional distress to Claimants.

Respondent maintained that the Claimants' claims are time barred; their claims are meritless; Claimants failed to state a cause of action against Respondent; Claimants approved all trades in their account; ratified the trades by failing to object to the transactions within a reasonable period after receiving notification of them and are, therefore, estopped from complaining about the trades; Claimants have not alleged sufficient facts to support a claim for fraud under either the federal securities laws or Georgia common law; Claimants have suffered no damages in their account and Claimants made a profit in their account and Claimants' calculation of damages ignores Claimants' own obligations to mitigate their damages and Claimants' complaint is frivolous.

Respondents asserted a Motion to Dismiss alleging the Statement of Claim is wholly time barred as Claimants first opened the account in October 1979 and made the last trade upon which they base their claims in October 1981 and Claimants failed to initiate the proceeding until more than six years after a U.S. District Court judge signed an Order directing Claimants to proceed to arbitration, more than nine years after Claimants first raised their allegations with Merrill Lynch, Pierce, Fenner & Smith, Inc. management, almost ten years after the trading in their account ceased; almost twelve years after they first opened their account; thus, Claimants are barred by law and equity from raising this matter and to allow Claimants to proceed would unduly prejudice Respondent and Claimants' claims are barred by the NASD Code of Arbitration, the applicable Statutes of Limitations, equitable principles and under the doctrine of laches.

In response to the Motion to Dismiss, Claimants maintained their claims are not time-barred under the Code of Arbitration Procedure as it states that the time limitations shall not apply to any case which is directed to arbitration by a court of competent jurisdiction; therefore, the six year time limitation was tolled and continues for such period as the court shall retain jurisdiction upon the matter submitted. Claimants further maintained the Respondents wrongful conduct occurred over a period of years, beginning with the opening of the account on October 16, 1979 and continuing up through Claimants commencing suit some three years two and a half months later on December 29, 1982 and conduct which Claimants contend constitutes common law fraud occurred within four years prior to filing suit and conduct which Claimants contend constitutes violations of 10b-5 occurred within three years prior to filing suit and conduct which constitutes intentional infliction of emotional distress occurred within two years of filing suit and Claimants further maintained their lawsuit was timely commenced and remains pending; consequently, their claims are not barred by statutes of limitations and Claimants' claims are not barred by laches as there was no unreasonable delay and Claimants' claim was filed on August 6, 1991 within six years after the order compelling arbitration become effective on August 7, 1985 and Claimants have not made a request for equitable relief so the doctrine of laches is not relevant.

RELIEF REQUESTED

Claimants requested the sum of \$99,739.00 through July 31, 1991 and such interest thereafter as is found appropriate for actual damages to the account; for emotional distress each Claimant requested \$200,000.00; to punish and deter Merrill Lynch, Pierce, Fenner & Smith, Inc. from such wrongful conduct Claimants requested the sum of \$1,500,000.00 plus all of Claimants costs, expenses and disbursements including reasonable attorneys' fees and for such other relief the arbitration panel deems just and proper. Claimants further requested a denial of Respondent's Motion to Dismiss.

Respondent requested dismissal of Claimants' claim with prejudice and that it be awarded its attorneys' fees in defending the action.

AWARD

The arbitration panel has read and considered the pleadings, motions and responses filed by the parties, the arguments of counsel, and the documentary evidence and testimony presented at the hearing conducted on May 6, 1992. After careful deliberation, the panel has concluded that all claims asserted by the Claimants are barred by the applicable statutes of limitation, those being:

- (a) Rule 10b-5 15 USC Sections 77m,
78i(e), 78r(c) (1 and 3 yrs)
- (b) Common law fraud O.C.G.A. Section 9-3-31 (4 yrs)
- (c) Recklessness O.C.G.A. Section 9-3-31 (4 yrs)
- (d) Intentional infliction of
emotional distress . . . O.C.G.A. Section 9-3-33 (2 yrs)

The panel has found insufficient evidence to support the Claimants' argument that the limitation periods were tolled under O.C.G.A. Section 9-3-30 et seq. or the rules of the N.A.S.D. so as to bring their claims within the limitation period.

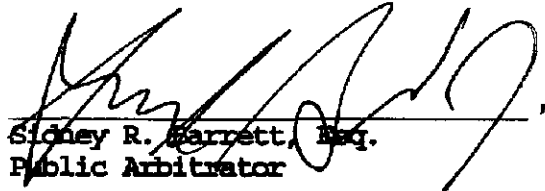
The Claimants' claims are therefore dismissed with prejudice.

Each party shall bear their respective costs including attorneys' fees.

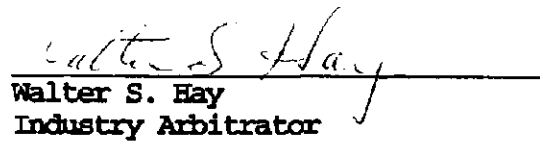
FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the NASD shall retain the \$250.00 claim filing fee and the \$1,000.00 hearing session deposit previously deposited by the Claimants.

ARBITRATOR SIGNATURES


Sidney R. Garrett, Esq.
Public Arbitrator


T. Brooks Pearson, Esq.
Public Arbitrator


Walter S. Hay
Industry Arbitrator

Date of Decision: July 23, 1992