

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Wallace and Eugene Collins

91-02681

Name of Respondents

Merrill Lynch, Pierce Fenner & Smith Inc  
Cynthia Cargill Hayden  
Dean Investment Associates  
Dennis D. Dean  
C.H. Dean and Associates, Inc.  
Jonathan S. Ensley  
James L. Jenkinson

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REPRESENTATION

For Claimants: Cheryl P. Hunter, Esq. of Hammons & Hunter, Oklahoma City, Oklahoma.

For Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and Cynthia Cargill Hayden: William J. Crowe, Jr., Esq. of Merrill Lynch, Pierce Fenner & Smith, Inc., New York, New York.

For Respondents Dean Investment Associates, Dennis D. Dean, C. H. Dean and Associates, Inc., Jonathan S. Ensley, and James L. Jenkinson: James H. Stethem, Esq. of Dinsmore & Shohl, Dayton, Ohio.

CASE INFORMATION

Statement of Claim filed: August 29, 1991.

Claimant's Submission Agreement signed on: August 22, 1991.

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and Cynthia Cargill Hayden on: November 14, 1991.

Joint Statement of Answer filed by Respondents, Dean Investment Associates, Dennis D. Dean, C. H. Dean and Associates, Inc., Jonathan S. Ensley, and James L. Jenkinson on: November 15, 1991.

Respondent Merrill Lynch, Pierce Fenner & Smith, Inc.'s Submission Agreement signed on: November 13, 1991. Respondent Cynthia Cargill Hayden's Submission Agreement signed on: November 11, 1991. Respondents Dean Investment Associates, Dennis D. Dean, C. H. Dean and Associates, Inc., and Jonathan S. Enaley's Submission Agreements signed on: November 14, 1991. Respondent James L. Jenkinson's Submission Agreement signed on: November 25, 1991.

#### HEARING INFORMATION

Hearing Dates/Sessions: February 26, 1992 for two (2) sessions.  
February 27, 1992 for two (2) sessions.  
February 28, 1992 for two (2) sessions.

Hearing Location: Oklahoma City, Oklahoma.

#### CASE SUMMARY

Claimants alleged that they held a portfolio with Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch") which consisted mainly of blue chip stocks and that Respondent Cynthia Hayden ("Hayden") of Merrill Lynch convinced Claimants to participate in the Merrill Lynch Consults Service ("Service"). Respondent Dean Investments Associates ("Dean") a division of Respondent C.H. Dean & Associates, Inc. would be the investment manager under the Service. Claimants further alleged that they chose to participate in the Service but were convinced by Hayden that their complete, current portfolio should be included in order to effectuate Claimant's goals. Claimants alleged that they were unaware that Merrill Lynch would sell Claimant's entire portfolio after participating in the Service, and that it would result in a huge capital gain and cause a large tax liability for the Claimants.

Respondents Merrill Lynch and Hayden denied any instance of wrongdoing or liability to Claimants. Merrill Lynch and Hayden further alleged that "Dean representatives informed Claimants of the possibility of taking tax losses from selling other securities and requested claimants' written advise as to which securities would establish tax losses as soon as possible and they would try to accommodate them if possible." Merrill Lynch and Hayden also alleged that "Hayden received a phone call from Mrs. Collins who advised that after meeting with her accountant some selling should be done in the account in an attempt to create tax losses in the sum of \$50,000."

Respondents Dean Investment Associates, C.H. Dean & Associates, Inc., Dennis D. Dean, Jonathan Enaley, and James Jenkinson (collectively "Respondents") deny any instance of wrongdoing or liability to Claimants. Respondents alleged that Hayden notified Respondent C.H. Dean & Associates to create tax losses, if possible, up to \$50,000. Respondents further alleged that Dean liquidated certain securities to accommodate the request of claimants.

#### RELIEF REQUESTED

Claimants requested \$70,420.00 in tax liability for 1990 along with lost earnings thereon, additional fees to Claimant's CPA related to the reporting of the actions taken with regard to Claimant's portfolio in the amount of \$300.00, attorney's fees incurred in consulting lawyers with regard to this matter, a diminution in the value of Claimant's portfolio which could be resolved by rescission of the trades of the original portfolio, \$11,955.00 in tax liability for 1989 with lost earnings thereon and diminution in the portfolio due to sales required to pay tax liabilities, brokerage fees charged in transactions which were contrary to the Respondents responsibilities in the amount of \$6253.72, loss interest on monies expended due to Respondent's actions, expert fees to be incurred in the prosecution of this matter, filing and hearing session fees in an amount of no less than \$1,250.00, and punitive damages in an amount of not less than \$750,000.00

Respondents Merrill Lynch and Hayden, Dean Investment Associates, C.H. & Associates, Inc., Dennis D. Dean, Jonathan Enaley, and James Jenkinson requested that the claim be dismissed and that costs be assessed against Claimants in favor of Respondents and that Claimants be barred from recovering punitive damages.

#### OTHER ISSUES CONSIDERED & DECIDED

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 originals remain on file with the NASD.

At the conclusion of the Claimant's case in chief, all of the Respondents Motioned to Dismiss the Claimant's claims. The panel voted unanimously to sustain the Motion to Dismiss of Dean Investments Associates, C.H. Dean & Associates, Inc., Dennis D. Dean, Jonathan S. Enaley, and James L. Jenkinson. Those Respondents were then excused. The Motion to Dismiss of the Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and Cynthia Cargill Hayden was sustained as to the fraud count, but otherwise overruled. Thereafter, the Respondents Merrill Lynch and Hayden presented their case in chief.

#### AWARD

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

1. The Claim against Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and Cynthia Cargill Hayden is denied in its entirety;
2. Each party shall bear their own costs and expenses, including attorney's fees, other than those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

6 sessions X \$1000 = \$6000 minus hearing session deposit of \$1000 = net \$5000. due.

Forum fees Assessed Against: Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. and Claimants Wallace and Eugene Collins, jointly and severally.

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

By The Arbitration Panel:

Dated:

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Dennis Roussar, Esq., Chairperson  
Public Arbitrator

*John Olrey, Sr.*  
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John Olrey, Sr.  
Public Arbitrator

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Edward O'Rourke  
Industry Arbitrator

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By The Arbitration Panel:

Dated:

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Dennis Bousaur, Esq., Chairperson  
Public Arbitrator

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John Ulrey, Sr.  
Public Arbitrator

  
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Edward O'Rourke  
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By The Arbitration Panel:

Dated:

Dennis S. Boyeur  
Dennis Boyeur, Esq., Chairperson  
Public Arbitrator

April 16, 1992

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John Ulrey, Sr.  
Public Arbitrator

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Edward O'Rourke  
Industry Arbitrator