

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Carlton R. Pickens and Miriam
Pickens

91-04149

Name of Respondent(s)

Merrill Lynch, Pierce, Fenner & Smith, Inc.

REPRESENTATION

For Claimants: Carlton R. Pickens and Miriam Pickens were represented by Victor J. Gonzalez, Esq., located in Metairie, Louisiana.

For Respondent: Merrill Lynch, Pierce, Fenner & Smith, Inc. was represented by Todd A. Zuckerbrod, Esq. of Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed: December 31, 1991.

Claimants' Submission Agreement signed on: December 20, 1991.

Statement of Answer filed on: March 3, 1992.

Respondent's Submission Agreement signed on: March 2, 1992 by George A. Schieren, First Vice President, Assistant General Counsel of Merrill Lynch, Pierce, Fenner & Smith, Inc.

HEARING INFORMATION

Pre-Hearing Conference: May 19, 1992 for one (1) session.
Telephonically before Arbitrator
Daniel E. Bivins.

Hearing Date/Sessions: June 4, 1992 for two (2) sessions.

Hearing Location: New Orleans, Louisiana.

CASE SUMMARY

Claimants Carlton R. Pickens and Miriam Pickens ("Pickens") alleged that Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") improperly handled the Pickens' investment in shares of stock in Norex PLC by erroneously recording a 10% stock dividend instead of a reverse split and then engaged in unauthorized transactions in order to overcome the error in the account. In support thereof, the Pickens made the following allegations:

1. On June 13, 1988, the Pickens purchased 13,334 shares of Norex stock at \$0.285 per share for a net total of \$4,182.56, the stock was purchased through a foreign exchange and the monthly statements would indicate the price was "unavailable";
2. On May 15, 1990, Merrill Lynch recorded a 10% stock dividend for 1,333 shares of Norex to the Pickens' account, increasing the total shares to 14,667;
3. In September, 1990, Mr. Pickens requested and received a quoted market price on the Norex shares of \$2.53 per share. On September 18-19, 1990, the Pickens sold all 14,677 Norex shares, receiving \$35,025.48 which was reinvested into the Merrill Lynch Short Term Global Growth Fund;
4. In early December 1990, Pickens was notified that Merrill Lynch had made two errors in his account, stating that there had been no dividend declared in May, 1990, and, in fact, a reverse split of 1 for 10 had actually occurred in May; and
5. From December 5, 1990 until May 31, 1991, Merrill Lynch made numerous unauthorized transactions in the Pickens' account to overcome their errors, including reversing the purchase of the Merrill Lynch Short Term Global Growth Fund and reversing all dividends, interest and capital gains which had accrued to the account.

Respondent Merrill Lynch denied all allegations of improper, wrongful or actionable conduct, alleging that the Pickens received an erroneous windfall of approximately \$31,721.00 in connection with the sale of the Norex PLC shares, were unjustly enriched by the transaction, and were not legally or morally entitled to benefit from the error which Merrill Lynch corrected by selling shares of the Pickens' Merrill Lynch Short Term Global Growth Fund.

In addition, Merrill Lynch asserted the following affirmative defenses:

1. The Statement of Claim fails to state a claim for which relief can be granted;
2. The Pickens estopped from asserting their claims due to their own acts and conduct;

3. The Pickens, acting with full knowledge of the facts, ratified, approved, accepted, acquiesced in and confirmed in all respects the acts complained of in the Statement of Claim; and

4. The Pickens failed to mitigate their alleged damages, if any.

RELIEF REQUESTED

Claimants Carlton R. Pickens and Miriam Pickens requested entry of an award which would order Merrill Lynch to credit to the Pickens' account the 2,605 shares of the Merrill Lynch Short Term Global Growth Fund.

Respondent Merrill Lynch requested that the Arbitration Panel deny the Claimants' Statement of Claim in its entirety and assess the costs of these proceedings against them.

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.

AWARD

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

1. The Statement of Claim is hereby dismissed and denied in its entirety;
2. The arbitrators specifically find that: "Respondent produced evidence to the effect that Claimant received the benefit of a decline in price of the Norax stock between the date of sale of the erroneously credited stock and the date the short position was covered, in the amount of approximately \$4,000.00. Claimant also received dividend credits on re-invested amounts in the amount of approximately \$700.00;"
3. The Parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed:

One (1) pre-hearing conference session X \$300.00 = \$300.00
Two (2) hearing sessions X \$400.00 = \$800.00

Total forum fees = \$1,100.00

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$120.00 and the hearing session deposit of \$400.00 previously deposited by the Claimants, Carlton R. Pickens and Miriam Pickens. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$700.00

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

CONCURRING ARBITRATORS' SIGNATURES

Dated:

Daniel Eugene Bivens, III
Daniel Eugene Bivens, III
Public Arbitrator
Chairperson

July 18, 1992

Edward J. Gay, III, Esq.
Edward J. Gay, III, Esq.
Public Arbitrator

July 17, 1992

Robert R. Wolf
Robert R. Wolf
Industry Arbitrator

August 6, 1992

Date of Service on Parties: August 12, 1992