

## **NASD AWARD**

### **NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

Name of Claimant

Dianne Cook

92-00801

Name of Respondents

Merrill Lynch, Pierce Fenner & Smith Inc. and  
Derwin L. Vandergriff

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### **REPRESENTATION**

Dianne Cook ("Claimant") was represented by James R. McKoon, Esq. and Michael Richards, Esq. of Heiskell, Donelson, Bearman, Adams, Williams, & Caldwell, Chattanooga, Tennessee.

Merrill Lynch, Pierce, Fenner and Smith ("Merrill Lynch") was represented by Donald W. Strickland, Esq. of Grant, Konvalinka & Harrison, P.C., Chattanooga, Tennessee.

Derwin L. Vandergriff did not appear at the hearing.

### **CASE INFORMATION**

Statement of Claim was filed on or about March 5, 1992. Amended Statement of Claim was filed on or about September 7, 1994. Submission Agreement of Claimant Dianne Cook was signed on March 3, 1992.

Statement of Answer filed by Respondent, Merrill Lynch, Pierce, Fenner & Smith on or about April 27, 1992. Respondent, Merrill Lynch, Pierce, Fenner & Smith's Statement of Answer to Claimant's Amended Statement of Claim was filed on or about September 14, 1994. Respondent, Merrill Lynch, Pierce, Fenner and Smith's Submission Agreement signed on: April 27, 1992 by John R. Cummings, First Vice President, Merrill Lynch, Pierce, Fenner & Smith.

Derwin L. Vandergriff did not file a responsive pleading.

### **HEARING INFORMATION**

A pre-hearing conference was held on January 18, 1994 for one (1) session with Arbitrators David

N. Burn, Esq. and Harvey W. McDonald, Esq. presiding. Pre-hearing conferences were conducted on February 21, 1994 for one (1) session and May 11, 1994 for one (1) session with David N. Burn, Esq. presiding.

The hearing was held on Wednesday, September 14, 1994 for two (2) sessions and Thursday, September 15, 1994 for two (2) sessions in Nashville, Tennessee for a total of sessions.

### **CASE SUMMARY**

Claimant, Dianne Cook, alleged that Respondent Derwin Lamarr Vandergriff ("Vandergriff") defrauded Claimant of \$345,000.00 by selling to her fraudulent bearer bonds and certificates of deposits. Furthermore, Claimant alleged that Respondent Merrill Lynch, through acts of negligence and misconduct failed to supervise his trading activities, and knew or should have known of Vandergriff's activities because of the numerous complaints and lawsuits filed by other individuals. Claimant specifically alleged that:

1. Claimant opened an account with Vandergriff while he was employed as a broker at Merrill Lynch; Claimant told Vandergriff that she wanted conservative investments which would provide income and liquidity. Claimant was extremely dependent upon Vandergriff for financial advice and relied on Vandergriff to counsel her on all financial matters and supervise her accounts;
2. In 1987, Vandergriff recommended certain "bearer bonds" supposedly issued by a Georgia County authority; subsequently, Vandergriff induced Claimant to invest \$305,000.00 in the purchase of these bonds. These purchases were made by checks payable to "Riverview Properties." It was undisclosed to Claimant that Riverview Properties was a Limited Partnership which was formed by Vandergriff and a partner for the purpose of real estate investment. Riverview Properties did not have bearer bonds among its assets. Claimant believes that no purchases of Riverview Property bonds were ever made; instead Vandergriff deposited Claimant's money into the accounts of Riverview Properties;
3. Because of her reliance on Vandergriff, Claimant followed him to Raymond James and Associates and then to Linsco Private Ledger. While at Raymond James, Vandergriff purported to sell to Claimant two separate Certificates of Deposit for \$20,000.00 each. No Certificates were ever purchased; instead these checks were endorsed and deposited by Vandergriff;
4. Vandergriff continuously concealed and perpetuated the fraud upon the Claimant by paying "interest" on the bearer bonds to Claimant; fabricating confirmations and other documents regarding the purchase of the bearer bonds; failing to provide any documentation showing Claimant's ownership of the bonds; and orally misrepresenting the existence and nature of her investments;

5. Claimant later discovered that numerous other investors had been defrauded by Vandergriff during his employment by Merrill Lynch and Raymond James, both of whom failed to supervise the highly irregular and fraudulent practices of their employee.

Based on the above allegations, Claimant asserted claims for Primary and Secondary Violations of Federal RICO laws (18 USC §1961 et seq.); breach of fiduciary duty; violation of §10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (15 U.S.C. §78j); violation of §12(2) of the Securities Act of 1933 (15 U.S.C. §771); violation of Section 20 of the Securities Exchange Act of 1934 (15 U.S.C. §78t); primary and secondary violations of common law fraud; violation of the Georgia Securities Act of 1973 (O.C.G.A. §10-5-1 et seq.; 1973 and Supp. 1990); violation of the Tennessee Securities Act of 1980 (Tenn. Code Ann. §48-2-121 et seq.); violation of the Georgia Fair Business Practices Act of 1975 (O.C.G.A. §10-1-393 et seq.); violation of the Tennessee Consumer Protection Act of 1977 (Tenn. Code Ann. §47-18-101 et seq.); common law conversion/defalcation; violation of NASD Rules of Fair Practice (Article III §18); common law breach of contract; and *respondeat superior* liability for all charges.

Respondent Merrill Lynch denied owing any sums to Claimant, alleging that:

1. Merrill Lynch did not have any knowledge of the alleged activities by Vandergriff; if Vandergriff did engage in these activities, he acted outside the course and scope of his employment with Merrill Lynch;
2. The alleged acts and losses did not result from the failure by Merrill Lynch to exercise proper control over Vandergriff;
3. Claimant knew that she was not trading in the bonds through Merrill Lynch; account statements issued by Merrill Lynch to Claimant showed that no purchases of bearer bonds were made through Merrill Lynch; furthermore, by writing checks payable to an entity known as "Riverview Properties," Claimant contributed to the cause of her losses;
4. Merrill Lynch did not have any knowledge concerning Claimant's or Vandergriff's activities after Vandergriff left the employ of Merrill Lynch and Claimant's accounts were transferred from Merrill Lynch;
5. The National Association of Securities Dealers, Inc. concluded an investigation and determined that "no action was warranted against Merrill Lynch."

Merrill Lynch asserted the following affirmative defenses:

1. The agreements between Claimant and Merrill Lynch specifically provide that disputes are to be governed by New York law; therefore, Cook cannot maintain any of her legal theories that are inconsistent with the governing law provisions;

2. Claimant's claims are barred by the applicable statutes of limitation;
3. Claimant may not, as a matter of law, recover punitive damages from Merrill Lynch;
4. Merrill Lynch did not violate the Racketeer Influenced And Corrupt Organizations Act and is not liable under the doctrine of *respondeat superior* for Vandergriff's alleged acts;
5. Merrill Lynch did not breach any fiduciary duty owed to Claimant;
6. Merrill Lynch did not violate any provisions of the Exchange Act and is not liable under the doctrine of *respondeat superior* for Vandergriff's alleged acts;
7. Merrill Lynch did not intend to deceive or defraud Claimant and did not act with scienter or in a reckless or negligent manner. Further, Merrill Lynch acted in good faith and did not directly or indirectly induce the alleged acts constituting the alleged violations or alleged causes of action;
8. Claimant was negligent by failing to conduct herself in the manner of a reasonably prudent investor, thereby contributing to cause her alleged losses. Further, Claimant failed to take reasonable steps to limit her alleged losses and protect herself for alleged losses, thereby failing to mitigate her alleged damages;
9. Claimant approved, authorized, ratified and/or acquiesced in the alleged acts, omissions and misrepresentations which form the basis of her complaint and has waived and/or is estopped from recovery in this case.

#### **RELIEF REQUESTED**

Claimant requested entry of an award against Respondents, jointly and severally, in the amounts as follows: \$345,000.00 for her actual damages, plus a fair return of this original investment, less the amount paid to Claimant as "interest"; damages for mental and emotional distress; punitive damages in the amount of \$1,035,000.00; reasonable attorney's fees, costs, and expenses; and such other relief as the arbitrators may deem appropriate.

Respondent requested that a determination be made that Claimant is entitled to no relief with respect to Merrill Lynch.

#### **OTHER ISSUES CONSIDERED & DECIDED**

Upon the stipulation and agreement between Claimant and Raymond James and Associates, Inc., a Respondent herein, and for good cause shown, on May 10, 1994, the Panel entered an Order dismissing Raymond James and Associates, Inc. from the proceedings of this Arbitration.

Upon review of the file and the representations made by/on behalf of the Claimant, the panel has determined that Respondent Derwin Vandergriff has been properly served with the Statement of Claim pursuant to §13 and §25 of the NASD Code of Arbitration Procedure (the "Code"). The panel also determined that Respondent Derwin Vandergriff had received due notice of the hearing as required under §26 of the Code and that arbitration of the matter would proceed pursuant to §29 of the Code.

Respondent Derwin Vandergriff did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to §12 of the NASD Code of Arbitration Procedure (the "Code") and is bound by the determination of the arbitration panel on all issues submitted.

At the conclusion of Claimant's case-in-chief, Respondent Merrill Lynch, Pierce, Fenner & Smith asserted a Motion to Dismiss Merrill Lynch, Pierce, Fenner & Smith based upon the Statute of Limitations and other reasons. After considering the oral argument and written submissions of the parties, the Panel denied the Motion.

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 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. Respondent Derwin Vandergriff engaged in fraudulent activity and shall be and hereby is liable for and shall pay to Dianne Cook the sum of Three hundred forty five thousand dollars (\$345,000) which sum shall be trebled pursuant to Federal RICO laws (18 USC §1961 et seq.) for a total amount of **One million thirty five thousand dollars (\$1,035,000.00)**.
2. Pursuant to Federal RICO laws (18 USC §1961 et seq.) Respondent Derwin Vandergriff shall be and hereby is liable for and shall pay to Dianne Cook costs and attorney's fees incurred in this action. Claimant is ordered to submit an affidavit of fees and costs to Mr. Vandergriff.
3. Respondent Merrill Lynch, Pierce, Fenner & Smith shall be and hereby is liable for and shall pay to Dianne Cook the sum of **One hundred sixty seven thousand dollars (\$167,000.00)**. No attorney's fees or costs are awarded.

4. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter not specifically enumerated herein.
5. All other claims asserted by the parties are denied and dismissed with prejudice.

#### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each prehearing conference, if any. There were two (2) sessions x \$300 and five (5) sessions x \$1,000 = \$5,600 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD by the Claimant. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. shall be and hereby is liable for and shall pay to the NASD the sum of \$4,600 as the balance due for forum fees.

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

Dated:

/s/ David N. Burn, Esq.

October 24, 1994

David N. Burn, Esq.

Public Arbitrator, Presiding Chair

/s/ Lee Cowen

October 28, 1994

Lee Cowen

Public Arbitrator

/s/ Harvey W. McDonald, Esq.

November 15, 1994

Harvey W. McDonald, Esq.

Industry Arbitrator