

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Jeff Bailey

92-02688

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.;
Marc Peacock

REPRESENTATION

For Claimant: Jeff Bailey was represented by Raymond H. Stauffacher, Jr., Esq. and Steve Ellinger, Esq. of Houston, Texas.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. was represented by Michael D. Napoli, Esq. of Gibbs & Ratliff, L.L.P., located in Houston, Texas.

Marc Peacock did not answer or appear at hearing.

CASE INFORMATION

Statement of Claim filed: August 11, 1992.

Claimant's Submission Agreement signed on: July 15, 1992.

Statement of Answer filed by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on: October 15, 1992.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed on: September 30, 1992 by Michael J. Stewart, First Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc.

HEARING INFORMATION

Pre-Hearing Conference:

None Held.

Hearing Date/Sessions:

April 23, 1993 for One (1) session.

Hearing Location:

Houston, Texas.

CASE SUMMARY

Claimant Jeff Bailey ("Bailey") alleged that Respondent Marc Peacock ("Peacock"), while employed by or acting as an agent for Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), received funds from Bailey for an investment in a company called Rhine-Co. Investments which has disappeared. Bailey specifically alleged that on or about April 1, 1989, Bailey deposited \$30,000.00 for investment purposes with Merrill Lynch through Peacock and received a receipt from Peacock. Bailey then made repeated demands on Peacock and Merrill Lynch for statements, accounting or other information, but has received no information about the investment from the Respondents.

Respondent Merrill Lynch denied the material allegations of the Statement of Claim, alleging that:

1. Bailey opened his account at Merrill Lynch on March 9, 1989 with Peacock, who was Bailey's childhood friend;
2. Bailey complained that his return was not high enough. Therefore, Baily and Peacock discussed an investment in Rhine-Co. Investments, a company owned by another childhood friend, Kevin Heil, during social occasions;
3. Bailey decided to invest, and on April 1, 1989 gave Peacock a check for \$30,000.00 to be invested with Rhine-Co. The funds were never deposited with Merrill Lynch. The receipt stated that the \$30,000.00 was being provided "To Rhine-Co. Investments," and that the money was received from Jeff Bailey by: "Rhine-Co. Investments Marc Peacock/Kevin Heil";
4. The words Merrill Lynch, Pierce, Fenner & Smith, Inc. do not appear anywhere on the receipt. Bailey was advised repeatedly that this was not a Merrill Lynch investment, but decided to because he felt the returns Merrill Lynch offered were not high enough;
5. Bailey received regular monthly account statements on his account for over one year which did not reflect a deposit to Rhine-Co. Investment, yet he did not complain, never contacted anyone about his investment or inquired about the failure to credit his investment properly.

RELIEF REQUESTED

Claimant Bailey requested entry of an award against Respondents for the sum of \$30,000.00 in actual damages; interest from April 1, 1989 until paid in full; exemplary damages in the amount of \$87,000.00 pursuant to the applicable provisions of the Texas Deceptive Trade Practices Act;

and attorneys' fees.

Respondent Merrill Lynch requested that the arbitration panel enter an award that Claimant take nothing by his action.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Marc Peacock did not file an executed submission agreement and a Statement of Answer, nor did he appear at hearing. The panel determined that as Respondent Peacock was an associated person of a NASD member firm at the time the incidents complained of arose, that Respondent Marc Peacock was required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure. Upon review of the evidence presented at hearing and the NASD correspondence, the Panel has determined that Respondent Peacock was properly served with the Statement of Claim and Notice of Hearing as required by the NASD Code of Arbitration Procedure. Pursuant to Section 29 of the NASD Code of Arbitration Procedure, the panel determined that the hearing would proceed and an award entered as if Respondent Peacock had entered an appearance.

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 pleading, 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 Marc Peacock is liable for and shall pay to Claimant Jeff Bailey the sum of \$20,000.00;
2. In addition, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to Claimant Jeff Bailey the sum of \$10,000.00;
3. Furthermore, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to Claimant Jeff Bailey the sum of \$7,600.00 as attorneys' fees. In determining to award attorneys' fees, the panel considered the arguments presented by the parties and determined that authority existed for an award of attorneys' fees to the Claimant, Jeff Bailey;
4. The claims for damages pursuant to the Texas Deceptive Trade Practices Act and for exemplary damages are hereby dismissed and denied in their entirety;

5. All other costs of arbitration shall be borne by the party incurring the cost, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed: One (1) hearing session x \$750.00 per hearing session = \$750.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and refund the \$750.00 hearing session deposit previously deposited by the Claimant, Jeff Bailey. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$750.00.

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

Concurring Arbitrators' Signatures

Name

Date

Judith A. Swinney, Esq.
Judith A. Swinney, Esq.
Public Arbitrator
Chairperson

October 12, 1993

Wayne J. Baxmann
Wayne J. Baxmann
Public Arbitrator

October 1, 1993

John M. Greer
John M. Greer
Industry Arbitrator

October 8, 1993

For NASD Use Only

Date of Service on Parties: 10-12-93