

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between**

**Name of Claimants**

Edward and Rita Foon

92-02799

**Name of Respondents**

Merrill Lynch, Pierce Fenner & Smith, Inc.;  
Sidney Kogan

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**REPRESENTATION**

For Claimants: Edward and Rita Foon ("Foon") were represented by Anthony V. Trogan, Jr., Esq. of Weisman, Trogan, Young & Schloss, P.C., located in Birmingham, Michigan.

For Respondents: Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch") and Sidney Kogan ("Kogan") were represented by Clarence L. Pozza, Esq. of Miller, Canfield, Paddock and Stone, located in Detroit, Michigan.

**CASE INFORMATION**

Statement of Claim filed: August 19, 1992.

Claimants' Submission Agreement signed on: August 11, 1992.

Respondents' General Denial and Affirmative Defenses to the Statement of Claim filed by Merrill Lynch and Kogan on: October 12, 1992.

Respondent Merrill Lynch's Submission Agreement signed on: November 5, 1992 by John R. Cummings, First Vice President, Merrill Lynch, Pierce Fenner & Smith, Inc.

Respondent Kogan's Submission Agreement signed on: November 4, 1992.

**HEARING INFORMATION**

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: July 13, 1994 for One (1) session;  
July 28, 1994 for Three (3) sessions;  
July 29, 1994 for Three (3) sessions; and  
August 3, 1994 for One (1) session.

Hearing Location: Southfield, Michigan.

### **CASE SUMMARY**

Claimants alleged that Respondent Kogan, while employed by Respondent Merrill Lynch, traded the accounts of Claimants for the benefit of Respondents by engaging in the following conduct:

1. Excessive trading in securities;
2. Selling to Claimants Merrill Lynch sponsored securities almost exclusively, often recommending the sale of old positions and acquisitions of new products to meet Merrill Lynch quotas;
3. Recommending and purchasing for Claimants' account products such as limited partnerships which were illiquid and not marketable;
4. The sale of products to Claimants which were of high risk and unsuitable for Claimants; and
5. Respondents failed to diversify Claimants' portfolio so that it became concentrated in illiquid, unmarketable, high-risk investments which provided little or no potential for appreciation and irregular income.

Claimants were in their sixties and had no experience with the stock market prior to their involvement with Respondents. Claimants had advised Respondents that their desire was to invest in low-risk, safe investments which would provide a certain level of income and the ability to retire comfortably.

Based upon the above allegations, Claimants asserted claims for violation of the high standard of conduct established by the NASD Rules of Fair Practice and the NYSE Rules; common law fraud; federal and state securities fraud; churning; breach of fiduciary duty; and violation of the Federal RICO Act, 18 USC §1962.

Respondents denied the material allegations of the Statement of Claim, asserting several affirmative defenses, including the following:

1. The Statement of Claim failed to state a claim upon which relief can be granted;
2. The Statement of Claim is barred by reason of the applicable statute of limitations, Claimants' contributory negligence, and by the doctrines of waiver, estoppel, laches and relief;

3. The claims are barred by reason of Claimants' ratification of the actions complained of in their Statement of Claim;
4. Claimants exercised active control over their accounts with Respondents and all investments related thereto;
5. The alleged actions of Respondents were not the proximate cause or cause in fact of any alleged injury; and
6. Respondents exercised due care and acted in good faith in respect to Claimants and Claimants' accounts.

#### **RELIEF REQUESTED**

Claimants requested the entry of an award against Respondents in the sum of \$250,000.00 as out-of-pocket loss; interest at the rate of 12%; all costs of arbitration; actual attorneys' fees in, an amount to be determined by the Panel; exemplary and punitive damages in an amount to be determined by the Panel; RICO damages in an amount to be determined by the Panel; and the rescission of all transactions and payment of all monies necessary to make Claimants whole.

Respondents requested that the claim be dismissed and that Respondents be awarded their costs and fees sustained in this action.

#### **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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and Sidney Kogan are jointly and severally liable for and shall pay to Claimants Edward and Rita Foon the sum of \$20,000.00;
2. The claims for punitive damages, exemplary damages and RICO damages are hereby dismissed with prejudice and denied in their entirety;
3. The parties shall bear their own costs of arbitration, including attorneys' fees,

except for those specifically enumerated herein; and

4. All relief not specifically granted is hereby denied.

**FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Eight (8) hearing sessions x \$750.00 per session = \$6,000.00.

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 Claimants, Edward and Rita Foon. Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and Sidney Kogan are jointly and severally liable for and shall pay to the Claimants Edward and Rita Foon the sum of \$200.00 as reimbursement of the claim filing fee. In addition, Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. and Sidney Kogan are jointly and severally liable for and shall pay to the NASD the sum of \$6,000.00 as forum fees. Fees are payable to the National Association of Securities Dealers, Inc.

**Concurring Arbitrators' Signatures**

Name

Date

/s/ Howard F. Lynn

Howard F. Lynn  
Public Arbitrator

September 29, 1994

/s/ Harold I. Gach, Esq.

Harold I. Gach, Esq.  
Industry Arbitrator

October 4, 1994

**Dissenting Arbitrator's Signature**

Arbitrator James C. Steffl dissents and would enter an award of no cause of action and divide the fees and costs evenly between the parties.

/s/ James C. Steffl, Esq.

James C. Steffl, Esq.  
Public Arbitrator, Chairperson

October 3, 1994

For NASD Use Only

Date of Decision: October 7, 1994