

## **NASD AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Name of Claimant

Francis W. Winn

and

93-02205

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Charles D. Kirkham, Jr.

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### **REPRESENTATION OF PARTIES**

Francis W. Winn ("Claimant") was represented by Charles Michael Gray, Esq., Gray & Thomas, Dallas, Texas.

Merrill Lynch, Pierce, Fenner & Smith, Inc. and Charles D. Kirkham, Jr. ("Respondents") were represented by Robert L. Wright, Esq., Gardere & Wynne, Dallas, Texas.

### **CASE INFORMATION**

The Statement of Claim was filed on or about June 2, 1993. Submission Agreement of Claimant Francis W. Winn was signed on May 6, 1993.

Respondents' Motion to Dismiss and Statement of Answer Subject Thereto was filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Charles D. Kirkham, Jr. on or about September 7, 1993. Submission Agreement of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. was signed on July 30, 1993 by David G. McCabe. Submission Agreement of Respondent Charles D. Kirkham, Jr. was signed on July 30, 1993.

### **HEARING INFORMATION**

A pre-hearing conference was held on Wednesday, September 14, 1994 for one (1) session with the full panel to hear argument on the Respondents' Motion to Dismiss and discovery issues.

The hearing was held on Wednesday, October 5, 1994 for two (2) sessions and Thursday, October 6, 1994 for two (2) sessions in Dallas, Texas for a total of five hearing sessions.

### **CASE SUMMARY**

Claimant alleged that Respondents were negligent, negligently misrepresented the nature of the security purchased, engaged in fraud and breach of fiduciary duty, engaged in breach of contract, and breached the covenant of good faith and fair dealing. Specifically, Claimant alleged that Respondent Kirkham made misrepresentations as to the safety of the investment, the collateral behind the investment, the financial capability of the issuer to pay off the bonds at maturity, and that the bonds were backed by equipment without which the issuing company could not operate. Claimant further alleged that in reliance upon the misrepresentations of Respondent Kirkham, he purchased Ohio State Air Quality Development Revenue Bonds of Jones & Laughlin Steel Corporation ("LTV bonds"). Claimant further alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith & Co.

Respondent denied the allegations set forth in the Statement of Claim. Respondents specifically stated that the Claimant frequently purchased bonds through other brokerage firms or based on other advice that he received. It was denied by Respondents that the Claimant had indicated that his investment objectives were extremely safe investment vehicles, that in fact, the Claimant had invested in highly speculative real estate, invested heavily in low dollar stock, and invested in a variety of grades of bonds. Respondents also stated that Claimant always maintained absolute control over the investment activity in his account and any investment which was made upon the recommendation of Respondent Kirkham was discussed with and approved by the Claimant. Furthermore, Respondents stated that the Claimant was a highly sophisticated investor who was fully equipped and capable of making his own determination as to whether to purchase the bonds in question. The following affirmative defenses were asserted by the Respondents: the claims are barred by the doctrines of waiver, estoppel, ratification, laches, limitations, and unclean hands; and the claims are barred as a result of the Claimant's failure to mitigate

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$108,001.85, pre-award interest in an amount equal to the tax-free benefit unpaid to Claimant from purchase to maturity, punitive damages, pre-award and post-award interest and attorneys' fees as allowed by law. In the alternative, Claimant requested rescission of the transaction made on the basis of the purchase of the bonds and a return to the Claimant of the purchase price thereof, plus punitive damages, pre-award and post-award interest as allowed by law and attorneys' fees.

Respondent requested that the claims asserted against it be denied in its entirety and that it be awarded its' costs and attorneys' fees.

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

During the hearing session conducted telephonically on September 14, 1994, the full panel heard argument by counsel on Respondents' Motion to Dismiss. The Motion to Dismiss was based upon §15 of the NASD Code of Arbitration Procedure and upon applicable statutes of limitation. After considering the arguments presented on behalf of the parties and the pleadings, the panel denied the Motion to Dismiss.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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. All claims asserted in this matter against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Charles D. Kirkham, Jr. shall be and hereby are dismissed and denied in their entirety.
2. Each party shall bear its own costs, expenses and fees incurred in this matter not specifically enumerated herein.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There were five (5) sessions x \$750 = \$3,750 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 \$200 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD by the Claimant Francis W. Winn.

Claimant Francis W. Winn shall be and hereby is liable for and shall pay to the NASD the sum of \$3,000 as the balance due for forum fees. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

/s/ Douglas F. Pierce, Esq.  
Douglas F. Pierce, Esq.  
Public Arbitrator, Presiding Chair

November 3, 1994

/s/ Hubert H. CHASE  
Hubert H. Chase  
Public Arbitrator

November 3, 1994

/s/ Lyn Lane  
Lyn Lane  
Industry Arbitrator

November 7, 1994

*Served by NASD: November 15, 94.*