

## **NASDR AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.**

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**In the Matter of the Arbitration Between**

**Name of Claimant**

**Phelps Industries, Incorporated**

**and**

**Case Number 93-03427**

**Names of Respondents**

**Merrill Lynch, Pierce Fenner & Smith, Incorporated,  
William B. Jolly and Emmett Beard**

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### **REPRESENTATION OF PARTIES**

**Phelps Industries, Inc. ("Claimant") was represented by Ivo Phelps.**

**Merrill Lynch, Pierce Fenner & Smith, Inc. ("Respondent") was represented by Scott Daniel, Esq. of Hilburn, Calhoun, Harper, Pruniski & Calhoun, Ltd. from North Little Rock, AR.**

### **CASE INFORMATION**

**The Statement of Claim was filed on or about September 1, 1993.**

**The Submission Agreement of Claimant, Phelps Industries, Inc. was signed on August 24, 1993 by Ivo Phelps, President.**

**The Statement of Answer of Respondents, Merrill Lynch, Pierce Fenner & Smith, Ancient William Jolly was filed on or about February 9, 1996.**

**The Amended Statement of Answer and Counter-Claim of Respondents, Merrill Lynch, Pierce Fenner & Smith, Inc. and William Jolly was filed on or about March 1, 1996.**

**The Submission Agreement of Respondent, Merrill Lynch, Pierce Fenner & Smith, Inc. was signed on February 29, 1996 by Robert E. Goldberg, Vice President and Senior Counsel.**

**The Submission Agreement of Respondent, William Jolly was signed on April 8, 1996.**

### **HEARING INFORMATION**

The hearing was held on August 27, 1996 in Little Rock, AR for one (1) hearing session.

### **CASE SUMMARY**

In the Statement of Claim, Phelps Industries, Inc. Profit Sharing Plan sought to recover the principal and interest on two limited partnerships. Claimant alleged that the purchase of Media Partners limited partnership on April 18, 1986 at a cost of \$15,000.00 and the purchase of AMFAC/JMB Hawaii limited partnership on December 29, 1988 for \$10,000.00 were made at the recommendation of Emmett Beard, a broker at Merrill Lynch. Claimant claimed that at the time of the purchases, the partnerships were described as very safe investments for Claimant's pension and profit sharing plan. As alleged, the investments had no value and could not be sold at the time of filing the Claim. Claimant contended that the limited partnerships were improper investments for a pension and profit sharing plan and should not have been recommended.

Respondents, Merrill Lynch, Pierce Fenner & Smith, Inc. and William Jolly denied the allegations set forth in the Statement of Claim. Respondents specifically stated the New York State Supreme Court permanently stayed any and all claims arising out of acts which occurred prior to December 20, 1987 leaving the claim regarding the \$10,00.00 investment made on December 29, 1988. Respondents asserted many affirmative defenses including, but not limited to, failure to state a claim upon which relief may be granted, estoppel, waiver, ratification, laches, failure to mitigate, and the Claim is barred by the applicable Statutes of Limitation. In his Counter-Claim, Jolly alleged that the motivation for bringing a claim against him or for refusing to dismiss him was to harm his reputation and good name and to use the arbitration process to injure him economically.

### **RELIEF REQUESTED**

Claimant requested an award in the sum of \$25,000.00 in actual damages plus interest in the amount of \$20,350.00.

Respondents, Merrill Lynch, Pierce Fenner & Smith, Inc. and William B. Jolly requested that the claims asserted against them be denied in their entirety and that Respondent, William B. Jolly be awarded \$30,000.01 in actual damages.

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

On or about April 21, 1994, the New York State Supreme Court issued an Order permanently staying this arbitration with respect to any and all claims arising out of acts which occurred prior to December 20, 1987.

Upon review of the file, the undersigned arbitrators determined that Respondent, Emmett Beard was not properly served with the Statement of Claim pursuant to Sections 13 and 25 of the NASDR Code

of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that Respondent, Emmett Beard had not received due notice of the hearing as required under Section 26 of the Code.

On or about July 15, 1996, Respondent, William B. Jolly filed a motion to dismiss pursuant to Section 16 of the NASDR Code of Arbitration Procedure. According to a letter dated August 6, 1996 from the Claimant, Phelps Industries, Inc. dismissed its claims against Jolly with prejudice. In addition, Jolly withdrew his counter-claim against the Claimant pursuant to correspondence dated August 15, 1996. Therefore, Jolly was removed as a party to this action.

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 NASDR.

#### **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. The Statement of Claim is hereby denied in its entirety;
2. The parties shall bear their own costs and expenses except for those specifically enumerated herein; and
3. All requests for relief not specifically granted are hereby denied.

#### **FORUM FEES**

Forum fees are calculated at the rate of \$400.00 per hearing session. There was one (1) session x \$400.00 plus one (1) per-hearing session x \$300.00 = \$700.00 in forum fees. Pursuant to Section 43(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a per-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 43(c) of the Code, the National Association of Securities Dealers Regulation, Inc. ("NASDR") shall retain the non-refundable filing fee in the amount of \$100.00 and shall retain as forum fees the hearing session deposit in the amount of \$400.00 previously deposited with the NASDR by the Claimant, Phelps Industries, Inc. Respondent, Merrill Lynch, Pierce Fenner & Smith, Inc. is hereby liable for and shall pay to the Claimant, Phelps Industries, Inc. the sum of \$50.00 as reimbursement. Respondent, Merrill Lynch, Pierce Fenner & Smith, Inc. is hereby liable for and shall pay to the NASDR the amount of \$350.00 in forum fees. NASDR shall also retain the non-refundable filing fee for the Counter-Claim in the sum of \$500.00 previously submitted by Respondent, William B. Jolly in accordance with Section 43(c) of the Code.

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

Signed:

Dated:

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Leah Balk, Esq.  
Public Arbitrator, Presiding Chair

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Jack F. Marlow, Esq.  
Public Arbitrator, Panelist

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Gary S. Jefferson, Esq.  
Industry Arbitrator, Panelist

Date served by the NASDR:

9-23-96