

11/94

N.A.S.D. AWARD

9411069

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Jerome F. Van DeMotte

93-04806

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

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CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on November 18, 1993, Claimant Jerome F. Van DeMotte, through his representative, Robert N. Rapp, Esq. of Caffee, Halter & Griswold, Cleveland, OH, alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. wrongfully withheld compensation and payment for accrued vacation time from him. The Claimant further alleged that he was employed by Respondent for 9 years until his voluntary resignation on June 11, 1993, and that during the time he was employed by Respondent his compensation was composed partially of contingent compensation which was based upon satisfaction of various award or other performance criteria. The Claimant contended that included among such contingent compensation items was the entitlement to "recognition club" benefits, particularly that known as the "President's Club". The Claimant further contended that at the time he voluntarily left the employ of Respondent, he had already qualified for, and was due to receive, the "President's Club" recognition for 1992 performance in the amount of \$2,000.00. The Claimant alleged that he was also entitled to payment for 6.5 accrued vacation days for 1993, which when valued in accordance with 1992 compensation and pro-rated, translates to \$3,167.06. Claimant further alleged that the above amounts have been wrongfully withheld from the time of his resignation, and therefore, he is entitled to recover that amount.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., through its representatives, Joshua P. Cohen, Esq. and Daniel E. Anker, Esq., maintained in its Answer and Supplemental Answer that the Claimant has no right to compensation in connection with the President's Club Award due to the fact that only current Merrill Lynch financial consultants are eligible for President's Club payments. The Respondent further maintained that upon leaving Merrill Lynch's employ as of June 11, 1993, the Claimant lost eligibility for these payments. The Respondent contended that former brokers must repay Merrill Lynch for any amount by which their monthly draw

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exceeded their actual production before becoming eligible for accrued vacation pay, and therefore Claimant has no right to accrued vacation pay because the sum owed by him negated his claim. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. further contended that Claimant has not produced a contract that obligates it to make any "President's Club" payment to Claimant, and that payment for accrued vacation time is a benefit available as a discretionary matter and Claimant had no contractual right to receive it. Respondent further maintained that Claimant himself has provided exhibits showing that "President's Club" compensation is contingent and within Respondent's discretion.

Claimant, in his response to Respondent's Supplemental Answer, alleged that he is not seeking a gratuitous or contingent payment, but only seeks to recover that to which he is entitled.

In its Reply Brief, Respondent maintained that Claimant has not presented a single substantive basis to support his claims and that the resolution of this conflict depends upon the legal ramifications of the parties' employment agreement, not the idiosyncratic notions of fairness that Claimant has invoked.

#### **RELIEF REQUESTED**

Claimant Jerome F. Van DeMotte requested \$5,096.97 in actual damages, plus interest from June 11, 1993 at 10% until the full amount is paid and as assessment of forum costs against the Respondent.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested that the claims of the Claimant be dismissed.

#### **AWARD**

Pursuant to Section 10 of the NASD, Inc. Code of Arbitration Procedure, a single Industry Arbitrator, Robert Shiffra, Esq., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant in November, 1993 and by the Respondent on March 16, 1994.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to Claimant Jerome F. Van DeMotte \$3,087.97 in actual damages.

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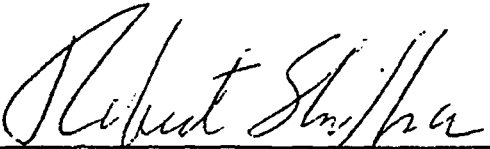
2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to Claimant Jerome F. Van DeMotte simple interest at the rate of 10% per annum from July 1, 1993 until the date of payment of the Award.
3. The parties shall bear their respective costs.
4. The \$575.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Jerome F. Van DeMotte shall be retained by the NASD, Inc. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay \$575.00 to the Claimant as reimbursement of the filing fee.

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**AFFIRMATION**

I, ROBERT SHIFFRA, ESQ., do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

  
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Signature of Arbitrator

DATE OF DECISION:

November 23, 1994