

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimants

Subhash Kapur, as Trustee of the Metro
Rehabilitation Service, Inc. Defined Benefit
Pension; and Subhash Kapur d/b/a Oakland
Mgmt. & Leasing

and

NASD Case Number: 95-00706

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.; and
Gerald J. Hoskins

REPRESENTATION OF PARTIES

Claimants Subhash Kapur, as Trustee of the Metro Rehabilitation Service, Inc. Defined Benefit Pension and Subhash Kapur d/b/a Oakland Mgmt. & Leasing ("Claimants") were represented by Lawrence S. Schultz, Esq. of Driggers, Schultz, Herbst & Paterson located in Troy, Michigan.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Gerald J. Hoskins ("Hoskins") were represented by Clarence L. Pozza, Esq. of Miller, Canfield, Paddock & Stone, PLC located in Detroit, Michigan.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") by Claimants on or about February 10, 1995.

Claimant Subhash Kapur, as Trustee of the Metro Rehabilitation Service, Inc. Defined Benefit Pension's Submission Agreement was signed on February 25, 1995 by Subhash Kapur.

Claimant Subhash Kapur's Submission Agreement was signed on January 25, 1994.

The Statement of Answer was filed with the NASD by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald J. Hoskins on or about May 12, 1995.

Respondent Merrill Lynch's Submission Agreement was signed on May 12, 1995 by William J. Crowe, Jr., Vice President and Senior Counsel of Merrill Lynch.

Respondent Gerald J. Hoskins' Submission Agreement was signed on May 5, 1995.

HEARING INFORMATION

The hearing was held on March 28, 1996 for two (2) sessions, March 29, 1996 for two (2) sessions, and April 29, 1996 for two (2) sessions. The hearing location was Southfield, Michigan.

CASE SUMMARY

Claimants alleged that Subhash Kapur ("Kapur") was a conservative investor who sought a reasonable return on his investments. Claimants maintained that Kapur's primary objective was return of principal. Claimants contended that Kapur maintained his personal d/b/a account, as well as his firm's pension plan account with Respondent Merrill Lynch, and that Respondent Hoskins served as Claimants' financial consultant.

Claimants asserted that, in September 1993, Respondent Hoskins called Kapur and recommended that the pension cash be invested in Alliance North American Income Government Trust Class C ("Alliance Trust"). Claimants alleged that Kapur consented to the pension plan investing \$150,000 in the Alliance Trust. Claimants also contended that Kapur invested \$1,200,000 from the d/b/a account in the Alliance Trust. Claimants asserted that Respondent Hoskins failed to give Kapur a prospectus. Claimants maintained that Respondent Hoskins failed to disclose the high degree of risk to principal involved in the Alliance Trust.

Claimants alleged that, in late February 1994, Respondent Hoskins advised Kapur that the principal in the Alliance Trust was fluctuating, and that Kapur was losing principal. Claimants maintained that Kapur demanded that the entire investment be liquidated.

Claimants asserted that Respondents violated federal and Michigan securities laws, the Michigan Consumer Protection Act, the common law, the rules of the New York Stock Exchange, the rules

of the National Association of Securities Dealers, and the provisions of the Employment Retirement Security Income Act.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald J. Hoskins denied all liability to Claimants in the Statement of Answer. Respondents alleged that Kapur's stated investment objectives were moderate risk and growth and income. Respondents contended that Kapur was advised that the Alliance Trust consisted of government securities issued by the United States, Canada, and Mexico and moreover, that a position in the portfolio could be invested to securities of Latin and South American governments. Respondents maintained that Kapur was furnished with a prospectus. Respondents alleged that Kapur was a knowledgeable, experienced investor who was seeking increased yield, and was well aware of the effects of interest rates on asset valuations. Respondents asserted that the investments were suitable and in accord with Kapur's objectives and financial circumstances.

Respondents asserted the following affirmative defenses, including: Claimants failed to mitigate their damages; Claimants losses, if any, were not caused by any acts or omissions of Respondents; Claimants but were caused solely and exclusively by Claimants' failure to exercise due diligence in connection with their accounts; Claimants' claims are barred by equitable principals of ratification, estoppel and waiver; Claimants assumed the risk of market fluctuation as they affected their accounts; and Claimants had full and complete control over their accounts.

RELIEF REQUESTED

The Trust sought recovery of out-of-pocket losses of approximately \$9,000, and Kapur sought approximately \$56,000 of such losses, plus interest, costs and attorneys' fees.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald J. Hoskins requested that the Statement of Claim be dismissed in its entirety and that all costs associated with the arbitration be assessed against the Claimant.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed to receive conformed copies of the award while the original(s) 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. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay to Claimant Subhash Kapur, as Trustee of the Metro Rehabilitation Service, Inc. Defined Benefit Pension compensatory damages in the amount of Five Thousand Dollars and No Cents (\$5,000.00), inclusive of interest;
2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay to Claimant Subhash Kapur d/b/a Oakland Mgmt & Leasing compensatory damages in the amount of Twenty Five Thousand Dollars and No Cents (\$25,000.00), inclusive of interest;
3. The claims against Respondent Gerald J. Hoskins are dismissed in their entirety with prejudice;
4. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay to the National Association of Securities Dealers, Inc. all forum fees incurred in this matter;
5. Other than forum fees which are specified below, the parties shall each bear their own respective costs and attorney's fees;
6. Any relief not specifically enumerated is hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session and \$300 per pre-hearing session, if any. There were six (6) hearing sessions x \$500 = \$3,000. Total forum fees = \$3,000. 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 \$150 previously deposited with the NASD by the Claimants. The NASD shall refund the hearing session deposit in the amount of \$500 previously deposited with the NASD by the Claimants.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay forum fees in the amount of \$3,000. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for, and shall pay the Section 45 Member Surcharge in the amount of \$300.

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

Concurring Arbitrators' Signatures

/s/ Robert J. Scafuri

Robert J. Scafuri, Esq.

Chairperson

Public Arbitrator

May 10, 1996

Dated:

/s/ Howard F. Lynn

Howard F. Lynn

Panelist

Public Arbitrator

May 14, 1996

Dated:

/s/ Patrick R. Sughrue

Patrick R. Sughrue

Panelist

Industry Arbitrator

May 10, 1996

Dated:

For NASD use only:

Date award served on the parties: May 20, 1996