

## **NASD AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

### Names of Claimants

Ray Cloer,  
Lu-Ray Petroleum, Incorporated  
and Cloer Equipment Company

and

95-03716

### Names of Respondents

Merrill Lynch, Pierce Fenner & Smith, Incorporated,  
Charles Mugg and  
Timothy Patterson

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## **REPRESENTATION OF PARTIES**

Ray Cloer, Lu-Ray Petroleum, Inc. and Cloer Equipment Co. ("Claimants") were represented by Jan P. Garvin, Esq. of Consumer Arbitration Services located in Oklahoma City, OK.

Merrill Lynch, Pierce Fenner & Smith, Inc., Charles Mugg and Timothy Patterson ("Respondents") were represented by Todd A. Zuckerbrod, Esq. of Merrill Lynch, Pierce Fenner & Smith, Inc. located in New York, NY.

## **CASE INFORMATION**

The Statement of Claim was filed on or about July 12, 1995.

The Submission Agreement of Claimant, Ray Cloer was signed on July 12, 1995. The Submission Agreements of Claimants, Lu-Ray Petroleum, Inc. and Cloer Equipment Co. were executed on August 10, 1995 by Ray Cloer, Vice President.

The Joint Statement of Answer of all Respondents was filed on or about October 6, 1995.

The Submission Agreement of Respondent, Merrill Lynch, Pierce Fenner & Smith, Inc. was signed on October 2, 1995 by John R. Cummings, First Vice President and Assistant General Counsel.

### **HEARING INFORMATION**

The hearing was held in Oklahoma City, OK on the following dates:

- April 10, 1996 for two (2) sessions
- April 11, 1996 for two (2) sessions

### **CASE SUMMARY**

In the Statement of Claim, Ray Cloer ("Cloer"), Lu-Ray Petroleum, Inc. and Cloer Equipment Co. alleged that Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch") by and through its registered representative, Charles Mugg ("Mugg") made material misrepresentations to them concerning Alliance funds causing a loss of over \$37,400.00 of principle in 90 days. Cloer alleged that he was an inexperienced investor who opened five accounts with Merrill Lynch - an IRA account for himself, an IRA for his wife, a custodial account for each of their two children and a money market account. Claimants contended that Mugg was aware of Claimants' businesses sometimes required large, immediate infusions of cash and that the Claimants opened the accounts for the purpose of depositing operating cash in interest bearing accounts and/or cash accounts at the best available rates. Claimants maintained that Mugg recommended money market accounts and short-term certificates of deposit since the inception of the business cash operating accounts. According to the claim, Cloer telephoned Mugg on January 19, 1994 to ask about increasing the yields and why the total amount invested was in cash accounts/money market accounts instead of certificates of deposit also inquiring about the possibility of buying U.S. Treasuries. As alleged, based on Mugg's recommendation during this conversation, Claimants authorized the purchase of Alliance Fund. According to the Claimants, Mugg did not explain the risks and did not provide Claimants with a prospectus prior to the purchase. As alleged, upon receipt of the prospectus along with the confirmation statement showing a decline in the value of the Alliance Fund, Cloer contacted Mugg who told him not to worry and that the price would come back. Claimants alleged that Mugg did not make a recommendation to sell the funds although the price continued to decline, did not offer any alternate investments and did not offer to refund the Claimants for their losses. Claimants asserted that a registered representative should not place a cash account into a bond or equity fund nor in an investment subject to currency fluctuations. Claimants made other allegations against Merrill Lynch, Mugg and Timothy Patterson ("Patterson"), Mugg's supervisor, including, but not limited to, failure to supervise, unsuitability and breach of fiduciary duty.

Merrill Lynch, Mugg and Patterson denied the allegations set forth in the Statement of Claim. Respondents specifically stated that the Lu-Ray Petroleum, Inc. and Cloer Equipment, Inc. business accounts were opened in February and March, 1989. Prior to 1994, these accounts were allegedly largely invested in certificates of deposit yet in January 1994, Cloer allegedly advised Mugg that he was interested in alternative investments with the possibility of higher income or growth since the oil and equipment business had been slow and certificate of deposit and money market fund rates were low. Respondents alleged that Cloer asked Mugg for his suggestions for mutual fund investments without fees for his business accounts. Respondents also alleged that Cloer was provided with three prospectuses for the Alliance funds and that Mugg discussed items such as maturity dates of the bonds and the potential fluctuations due to interest and currency rates with Cloer prior to the purchase date. Respondents asserted the following affirmative defenses:

1. The Statement of Claim failed to state a claim for which relief can be granted;
2. Claimants were estopped from asserting the claims set forth in the Statement of Claim due to their own acts and conduct;
3. Claimants, acting with full knowledge of the facts, ratified, approved, accepted, acquiesced in and confirmed in all respects the acts complained of in the Statement of Claim ; and
4. The Claimants failed to mitigate their alleged damages, if any.

#### **RELIEF REQUESTED**

Ray Cloer, Lu-Ray Petroleum, Inc. and Cloer Equipment Co. requested an award in the amount of \$37,400.00 in actual damages, \$12,605.00 for lost income, \$25,000.00 in punitive damages plus costs, expenses and attorneys' fees.

Merrill Lynch, Pierce Fenner & Smith, Inc., Charles Mugg and Timothy Patterson requested that the claims asserted against them be denied in their entirety and that they be awarded their costs.

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

In the Statement of Answer, Timothy Patterson requested that he be dismissed from this arbitration case on the basis that there are no factual allegations against him which would give rise to a cause of action. At the hearing, the Claimants voluntarily dismissed with prejudice all allegations against Respondent, Timothy Patterson.

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. Respondents, Merrill Lynch, Pierce Fenner & Smith, Inc. and Charles Mugg are hereby, jointly and severally, liable for and shall pay to the Claimants, Ray Cloer, Lu-Ray Petroleum, Inc. and Cloer Equipment Co. the sum of \$10,000.00 in actual damages as well as simple interest at a rate of 6% per annum from the date of receipt of this award until paid;
2. Respondents, Merrill Lynch, Pierce Fenner & Smith, Inc. and Charles Mugg are hereby, jointly and severally, liable for and shall pay to the Claimants, Ray Cloer, Lu-Ray Petroleum, Inc. and Cloer Equipment Co. the amount of \$3,125.00 in attorneys' fees. In determining to award attorneys' fees, the arbitrators considered the pleadings, the testimony and the evidence presented by the parties plus;
3. Any relief not specifically granted is hereby denied; and
4. The parties shall bear their own costs except for those specifically enumerated herein.

### **FORUM FEES**

Forum fees are calculated at the rate of \$500.00 per hearing session. There were four (4) sessions x \$500.00 = \$2,000.00 in forum fees. Pursuant to Section 43(b) of the Code of Arbitration Procedure (the "Code"), 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 Section 43(c) of the Code, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$150.00 and shall retain as forum fees the hearing session deposit in the amount of \$500.00 previously deposited with the NASD by the Claimants, Ray Cloer, Lu-Ray Petroleum, Inc. and Cloer Equipment Co. Respondents, Merrill Lynch, Pierce Fenner & Smith, Inc. and Charles Mugg are jointly and severally liable for and shall pay to the Claimants, Ray Cloer, Lu-Ray Petroleum, Inc. and Cloer Equipment Co. the sum of \$650.00 as reimbursement. Respondents, Merrill Lynch, Pierce Fenner & Smith, Inc. and Charles Mugg are jointly and severally liable for and shall pay to the NASD the sum of \$1,500.00 in additional forum fees. Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures:

Dated:

Thomas A. Bamberger, Esq.  
Thomas A. Bamberger, Esq.  
Public Arbitrator, Presiding Chair

May 4, 1996

John K. Ulrey  
John K. Ulrey  
Public Arbitrator

May 6, 1996

Ira W. Painton  
Ira W. Painton  
Industry Arbitrator

May 6, 1996

Date NASD served the award: May 10, 1996