

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Names of Claimants

Dorothea M. Smothers;  
Warren C. Smothers;  
John C. Smothers; individually and as Trustee of the  
John C. Smothers Children's Trust;  
Warrena C. Loessin; individually and as Trustee of the  
Warrena C. Smothers Children's Trust;  
J. Paul Smothers; and  
Lory Ann McDonald;

and

95-03814

Names of Respondents

Merrill Lynch Pierce Fenner & Smith Inc.; and  
Blanche D. Lindsey.

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### **REPRESENTATION OF PARTIES**

For Claimants: All Claimants were represented by Joel H. Pullen, Esq. in San Antonio, Texas.

For Respondents: Both Respondents were represented by A. Michael Ferrill, Esq. of Cox & Smith in San Antonio, Texas.

### **CASE INFORMATION**

The Claimants' Statement of Claim filed on: August 7, 1995

The Submission Agreements of Claimants Warren C. Smothers, Dorothea M. Smothers, John C. Smothers individually and as Trustee, Warrena C. Loessin individually and as Trustee, J. Paul Smothers, and Lory Ann McDonald were signed on: July 14, 1995.

The Claimants' Amended Statement of Claim was filed on: November 4, 1996

The Claimants' Response to Respondents' Amended Answer and Counterclaim was filed on: December 17, 1996.

The Respondents' Statement of Answer was filed on: December 4, 1995

Respondent Blanche Lindsey's Submission Agreement was signed on: October 5, 1995.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement was signed on: September 7, 1995 by Michael J. Stewart, First Vice President of Merrill Lynch.

The Respondents' Amended Statement of Answer and Counterclaim was filed on: November 1, 1996  
Respondents' Response to Claimants' Amended Statement of Claim was filed on: December 17, 1996.

### **HEARING INFORMATION**

Pre-Hearing Conferences were held on: May 30, 1996 for one (1) session; and  
June 19, 1996 for one (1) session.

The Hearing was held on: January 28, 1997 for two (2) sessions;  
January 29, 1997 for two (2) sessions;  
January 30, 1997 for two (2) sessions;  
January 31, 1997 for two (2) sessions;  
March 24, 1997 for two (2) sessions;  
March 25, 1997 for two (2) sessions;  
March 26, 1997 for two (2) sessions; and  
March 27, 1997 for two (2) sessions.

Hearing Location: Houston, Texas

### **CASE SUMMARY**

Claimants alleged common law fraud, fraudulent concealment, misrepresentation, negligent misrepresentation, breach of fiduciary duty, usury, violations of federal and state security laws. Claimants specifically alleged that:

1. Respondent Blanche D. Lindsey ("Lindsey") served as Claimants' investment adviser employed by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").
2. All Claimants were unsophisticated investors with no investment experience. At all times, Claimants relied upon Lindsey's investment advice.
3. Claimants defined their investment objectives as low-risk.
4. Lindsey recommended that Claimants purchase a Monarch Life Insurance Company investment plan.
5. Lindsey falsely represented the Monarch product as appropriate, safe, diversified and flexible.

6. Lindsey failed to inform Claimants that any money loaned to the Claimants would be taken out of the Monarch investment.
7. Without informing any Claimant, Respondents charged Claimant Dorothea M. Smothers substantially higher than standard premium rates.
8. In spite of Claimants' conservative investment objectives, Lindsey recommended substantial purchases of highly speculative Furr Cafeterias, Inc. stock. Lindsey never informed Claimants that the stock was highly speculative.
9. Respondents failed to give Claimants available account discounts.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated:

10. Claimants received and read the Monarch Plan prospectus as well as monthly account statements. As such, Claimants were aware of all aspects of the Monarch Plan.
11. Additionally, Claimant Dorothea Smothers was aware of and signed a document explaining her life insurance special classification.
12. Respondents fully informed Claimants of the various fees and loan structuring.
13. Respondents recommended that Claimants sell their Furr's Cafeteria stock. However, Claimants chose to hold their stock and continued to receive dividends. Respondents provided no proof that the stock was highly speculative.
14. Claimants also exaggerated their damages claim.
15. The affirmative defenses of statute of limitations, laches, ratification, estoppel, waiver, failure to mitigate damages as well as failure to state a claim upon which relief may be granted bar Claimants' allegations.

#### **RELIEF REQUESTED**

Claimants requested an award in the amount of \$2,675,000 in actual/compensatory damages, exemplary damages in an undisclosed amount; interest; attorney's fees; and expenses.

Respondents denied the claims asserted against them and asked the panel to award them costs and attorney's fees.

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

By letters submitted in November of 1996, the parties agreed to the filing of the Claimants' Amended Statement of Claim and the Respondents' Amended Statement of Answer along with the related responses. In accordance with §10328 of the Code of Arbitration Procedure (the "Code"), the undersigned arbitrators gave their consent to the filing of the amended pleadings.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

### **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 and Amended Statement of Claim submitted by the Claimants are denied in their entirety and dismissed with prejudice.
2. The Counter-claim submitted by the Respondents is denied in its entirety and dismissed with prejudice;
3. The parties shall bear their own costs including attorney's fees except for forum fees which are specifically addressed below; and
4. Any relief not specifically granted herein is hereby denied in its entirety.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference. There were two (2) pre-hearing sessions x \$300 = \$600. There were sixteen (16) hearing sessions x \$1,000 = \$16,000. Thus, \$600 + \$16,000 = \$16,600 in total forum fees. Pursuant to §10332(b) of 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 §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$250 and shall

retain as forum fees the hearing session deposit in the amount of \$1000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution the sum of \$500 for the member surcharge.

Pursuant to §10332 of the Code, Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Blanche D. Lindsey are jointly and severally liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the amount of \$15,600.00 in forum fees.

**Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Concurring Arbitrators' Signatures:

Dated:

Douglas F. Pierce, Esq.

May 16, 1997

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

Nick Sacaris

May 12, 1997

Nick Sacaris  
Public Arbitrator

Walton L. Huff

May 12, 1997

Walton L. Huff  
Industry Arbitrator

For NASD use only:

Date served: May 16, 1997