

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

Thomas Pfeifer and Christine Pfeifer, individually and
as trustees of their respective IRAs

Case Number: 01-03886

Name of the Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.
and Barry Killian

Hearing Site: Chicago, Illinois

REPRESENTATION OF PARTIES

Andrew J. Stoltmann, Esq. of the firm Maddox Hargett & Caruso, PC located in Chicago Illinois represented Claimants Thomas Pfeifer and Christine Pfeifer individually and as trustees of their respective IRAs, hereinafter collectively referred to as "Claimants." They were initially represented by Stuart R. Berkowitz, Esq. and were for a time represented by James J. Eccleston and Stephen S. Berkeley of the firm Eccleston & Associates, PC n/k/a Shaheen Novoselsky Staat & Filipowski, PC located in Chicago, Illinois.

John Monical, Esq., Peter Cooper, Esq., and Mitchell B. Goldberg, Esq. of the firm Lawrence Kamin Saunders & Uhlenhop, LLC located in Chicago, Illinois represented Respondents Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") and Barry Killian ("Killian"), hereinafter collectively referred to as "Respondents."

CASE INFORMATION

Statement of Claim filed on or about: July 23, 2001.

Claimants Thomas Pfeifer and Christine Pfeifer jointly submitted an undated Uniform Submission Agreement.

Joint Statement of Answer filed by Respondents on or about: November 29, 2001.

First Amended Statement of Claim filed on or about: November 30, 2001.

Joint Statement of Answer to the First Amended Statement of Claim filed on or about: February 15, 2002.

Respondents' Motion for Judgment as to Losses Incurred after May 2001 filed on or about: January 10, 2003.

Claimants' Response to Respondents' Motion for Judgment as to Losses Incurred after May 2001 filed on or about: January 27, 2003.

Claimants' Pre-Hearing Memorandum filed on or about: April 21, 2003.

Respondents' Joint Pre-Hearing Memorandum of Law filed on or about: April 21, 2003.

Claimants' Motion to Compel filed on or about: October 04, 2002.
Respondents' Response to Claimants' Motion to Compel filed on or about: October 24, 2002.
Respondents' Motion to Compel filed on or about: October 03, 2002.
Claimants' Response to Respondents' Motion to Compel filed on or about: October 24, 2002.
Respondents' Motion for Rule to Show Cause filed on or about March 27, 2003 and subsequently withdrawn on or about March 28, 2003.
Respondents' Second Motion for Rule to Show Cause filed on or about: April 10, 2003.
Claimants' Response to Respondents' Second Motion for Rule to Show Cause filed on or about: April 14, 2003.

CASE SUMMARY

Claimants asserted the following causes of action:

- Violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.
- Violation of the Illinois Securities Law of 1953 and Rule 130.850(a) promulgated thereunder.
- Violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/10, *et seq*;
- Common Law Fraud;
- Breach of Fiduciary Duty;
- Negligence;
- Breach Contract;
- Control Person liability as to Respondent Merrill Lynch under Section 20(a) of the Securities Exchange Act of 1934; and
- Respondeat Superior as to Respondent Merrill Lynch.

The causes of action relate to the Cisco Systems, Lucent Technologies, Sun Microsystems, Tellabs, Nortel Networks, Johnson & Johnson, and Eli Lilly stocks in their joint account. With respect to Claimants' IRA accounts, the causes of action relate to Nuveen Networking and Storage Portfolio, the Nuveen Fiber Optics Portfolio, EMC Corporation, and Legato Systems, and Global Technology Fund.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses:

- Merrill Lynch acted in good faith and cannot be held liable as a control person;
- Claimants ratified the transactions;
- Claimants failed to mitigate damages;
- Claimants are estopped from asserting their claims;
- Claimants have failed to state a claim upon which relief may be granted;
- Respondents acted properly, in good faith, and in a commercially reasonable manner with respect to Claimants' accounts;
- Claimants assumed the risk; and

- All transactions upon which Claimants base their allegations against Respondents were conducted in accordance with all applicable Exchange rules and regulations.

RELIEF REQUESTED

Claimants requested:

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| Compensatory Damages | \$222,554.00 |
| Punitive Damages | unspecified |
| Interest | unspecified |
| Attorneys' Fees | unspecified |
| Other Costs | unspecified |
| Other Monetary/Non-Monetary Relief if any: | any relief the panel deems just and equitable |

Respondents requested:

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| Attorneys' Fees | unspecified |
| Other Costs | unspecified |
| Other Monetary/Non-Monetary Relief if any: | denial and dismissal of claims; expungement of Respondent Killian's CRD Record, and any such other and further relief as the Panel believes is proper. |

OTHER ISSUES CONSIDERED AND DECIDED

Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Barry Killian did not file with NASD Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

The Chairperson conducted a discovery prehearing conference call on November 20, 2002 during which the parties agreed to produce contested documentation. The Chairperson accepted the parties' agreements thereby disposing of the Claimants' and Respondents' respective Motions to Compel Discovery.

In an order dated February 3, 2003 the Panel denied Respondents' Motion for Judgment as to Losses incurred after May 2001.

Respondents' Second Motion for Rule to Show Cause as to why sanctions should not be imposed for discovery failures was denied.

At hearing Respondents motioned to dismiss all claims brought under the Illinois Securities Act of 1953. At the close of Claimants' case, Respondents requested a dismissal of all claims. Both motions are denied.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Thomas Pfeifer and Christine Pfeifer, individually and as trustees to their respective IRAs, the sum of \$113,000.00 as compensatory damages.
2. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. solely liable for and shall pay to Claimants Thomas Pfeifer and Christine Pfeifer, individually and as trustees to their respective IRAs, the sum of \$7,000.00 as attorneys fees. After consideration of the parities' pleadings and arguments, the panel finds authority to award attorney's fees in both federal and state statutory law, as well as the NASD rules.
3. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Thomas Pfeifer and Christine Pfeifer, individually and as trustees to their respective IRAs, the sum of \$3,912.00 as costs. After consideration of the parities' pleadings and arguments, the panel finds authority to award costs in both federal and state statutory law, as well as the NASD rules.
4. Any and all claims asserted by Claimants Thomas Pfeifer and Christine Pfeifer, individually and as trustees to their respective IRAs, against Barry Killian are denied.
5. Except as enumerated herein, parties shall bear their own costs, including attorney's fees.
6. Any and all relief not specifically addressed herein, including interest and punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

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|--------------------------|-------------|
| Initial claim filing fee | = \$ 300.00 |
|--------------------------|-------------|

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, pursuant to Rules 10333 and 10328(b) Merrill Lynch Pierce Fenner & Smith, Inc. is assessed the following fees:

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|-------------------------|--------------|
| Member surcharge | = \$1,700.00 |
| Pre-hearing process fee | = \$ 750.00 |
| Hearing process fee | = \$2,750.00 |

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

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| Three (3) Pre-hearing sessions with a single arbitrator at \$450.00 | = \$ 1,350.00 |
| Pre-hearing conferences: | |
| November 20, 2002 | 1 session |
| April 14, 2003 | 1 session |
| April 23, 2003 | 1 session |
| One (1) Pre-hearing sessions with Panel at \$1,125.00 | = \$ 1,125.00 |
| Pre-hearing conferences: | |
| July 15, 2002 | 1 session |
| Nine (9) Hearing sessions at \$1,125.00 | = \$10,125.00 |
| Hearing Dates: | |
| April 28, 2003 | 2 sessions |
| April 29, 2003 | 2 sessions |
| April 30, 2003 | 2 sessions |
| May 02, 2003 | 1 session |
| May 12, 2003 | 2 sessions |
| Total Forum Fees | = \$12,600.00 |

The Panel assessed the \$12,600.00 in forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

SEE SUMMARY

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| 1. Claimant Thomas Pfeifer and Christine Pfeifer are jointly and severally liable for: | |
| Initial Filing Fee | = \$ 300.00 |
| Mediation Fees | = \$ 531.25 |
| <u>Total Fees</u> | <u>= \$ 831.25</u> |
| <u>Less payments</u> | <u>= \$ 1,425.00</u> |
| Refund Due from NASD Dispute Resolution | = \$ 593.75 |
| 2. Respondent Merrill Lynch Pierce Fenner & Smith is solely liable for: | |
| Member Fees | = \$ 5,200.00 |
| Mediation Fees | = \$ 406.25 |
| Forum Fees | = \$12,600.00 |
| <u>Total Fees</u> | <u>= \$18,206.25</u> |
| <u>Less payments</u> | <u>= \$ 5,400.00</u> |
| Balance Due NASD Dispute Resolution | = \$12,806.25 |
| 3. Respondent Barry Killian is solely liable for: | |
| Mediation Fees | = \$ 250.00 |
| <u>Total Fees</u> | <u>= \$ 250.00</u> |
| <u>Less payments</u> | <u>= \$ 250.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 0.00 |

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

| | | |
|------------------------|---|--|
| Hon. Michael S. Jordan | - | Public Arbitrator, Presiding Chairperson |
| Roby P. Biggert, Esq. | - | Public Arbitrator |
| Jeffrey S. Fannon | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures

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|---|-------------------------|
| /s/ Michael S. Jordan | 05/29/03 |
| _____ Hon. Michael S. Jordan Public Arbitrator, Presiding Chairperson | _____ Signature Date |
| /s/ Rody P. Biggert | 05/29/03 |
| _____ Roby P. Biggert, Esq. Public Arbitrator | _____ Signature Date |
| /s/ Jeffrey S. Fannon | 05/29/03 |
| _____ Jeffrey S. Fannon Non-Public Arbitrator | _____ Signature Date |

05/30/03

Date of Service (For NASD Dispute Resolution office use only)