

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Names of Claimants

Elizabeth and Charles Gosser

vs.

Case Number: 00-03131
Hearing Site: Chicago, Illinois

Names of Respondents

Merrill, Lynch, Pierce, Fenner & Smith, Inc.
and Steven K. Porter

NATURE OF THE DISPUTE

Customers vs. Member and Associated Person

REPRESENTATION OF PARTIES

Elizabeth and Charles Gosser ("Claimants") were represented by Paul Sussman, Esq., Chicago, Illinois, from case filing until approximately March 29, 2002. On or about March 19, 2004, Edwin J. Hull, Esq., Cutler & Hull, Chicago, Illinois, filed a Notice of Representation for Claimants. Claimants were then represented by Erwin Cohn, Esq., Cohn & Cohn, Chicago, Illinois, from May 28, 2004 until August, 18, 2006. As of August 18, 2006, Elizabeth Gosser appeared pro se on behalf of the Claimants.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Steven K. Porter ("Porter"), hereinafter collectively referred to as "Respondents," were represented by Peter E. Cooper, Esq., Lawrence Kamin Saunders & Uhlenhop, Chicago, Illinois.

CASE INFORMATION

The Statement of Claim was filed on or about July 24, 2000. The Submission Agreement of Claimants, Elizabeth and Charles Gosser, was signed on or about July 11, 2000. Claimants' Motion for Leave to File Amended Statement of Claim was filed on or about May 28, 2004. Claimants' Amended Statement of Claim was filed on or about May 28, 2004.

Respondents' Opposition to Claimants' Motion for Leave to Amend their Statement of Claim, was filed on or about July 30, 2004. The Statement of Answer and Affirmative Defenses to Claimants' Amended Statement of Claim and Respondents' Counterclaim was filed jointly by Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Steven K.

Porter, on or about May 31, 2006. The Submission Agreement of Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., was signed on or about August 8, 2006. The Submission Agreement of Respondent, Steven K. Porter, was signed on or about May 12, 2006.

Respondents' Motion to Compel Compliance with NASD Arbitration Code and U.S. District Court Order and to Recuse Arbitration Panel was filed on or about October 21, 2005.

Claimants' Response to Respondents' Motion to Compel, was filed on or about November 7, 2005.

Claimants' Motion to Dismiss Portion of Respondents' Answer to Claimants' Statement of Claim was filed on or about June 20, 2006.

Respondents' Response to Claimants' Motion to Dismiss Portion of Respondents' Answer to Claimants' Statement of Claim was filed on or about July 6, 2006.

Respondents' Motion to Dismiss was filed on or about October 23, 2006.

CASE SUMMARY

Claimants asserted the following causes of action: breach of fiduciary duty; unauthorized transactions; omission of facts; misrepresentations and suitability; violation of the anti-fraud provisions of the Federal Securities Act State Securities Act, and various state and federal statutes; common law fraud; violation of the State of Illinois Deceptive Business Practices Act; failure to supervise; and negligence. The causes of action related to the recommendation and purchase of various unspecified securities. Claimants alleged that Respondents recommended high commission unsuitable products, in which they suffered substantial penalties for loans and withdrawals.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: Merrill Lynch acted in good faith and, accordingly, cannot be held liable as a control person of Porter under Section 20(a) of the Securities Exchange Act of 1934, 17 U.S.C. §78t(a) (2001); Claimants' claims for relief are barred by the applicable statutes of limitations and repose; Claimants ratified all trades entered in their Accounts; Claimants failed to mitigate their damages in contravention of Illinois law; Claimants are estopped from asserting claims for damages; the claims failed to state a claim against Respondents upon which relief can be granted; and Respondents are not liable to Claimants in any amount because at all times relevant herein they acted properly, in good faith and in a commercially reasonable manner with respect to Claimants' accounts.

Merrill Lynch, Pierce, Fenner & Smith, Inc. and Steven K. Porter asserted a Counterclaim against the Gossers for indemnification.

RELIEF REQUESTED

Claimants requested an award in the amount of:

Actual/Compensatory Damages	\$ 500,000.00
Exemplary/Punitive Damages	\$1,000,000.00
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees.

In the Counterclaim, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Steven K. Porter requested an award in the amount of:

Actual/Compensatory Damages	\$ 500,000.00
Exemplary/Punitive Damages	\$1,000,000.00
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified
Expungement	

Claimants did not file an answer to the Counterclaim.

OTHER ISSUES CONSIDERED & DECIDED

On or about April 10, 2002, the Honorable Blanche M. Manning of the United States District Court for the Northern District of Illinois entered an Order of Dismissal. In the Agreed Order of Dismissal, the parties agreed that the Gossers would follow the Court's Memorandum and Order in amending their Statement of Claim in Arbitration No. 00-03131, and not to seek to arbitrate any claims that arose more than six years prior to July 20, 2000.

Claimant, Charles Gosser, passed away in August, 2005.

On or about May 16, 2006, the Panel entered an Order in regard to Respondents' Motion to Compel Compliance with NASD Arbitration Code and U.S. District Court Order and to Recuse Arbitration Panel. The Panel allowed the motion in part and denied the motion in part as follows:

- 1) The current panel is duly constituted by the expressed approval of parties at the initial pre-hearing conference and accordingly by the current panel has no basis for recusal;
- 2) All issues of eligibility shall be determined according to the NASD Rules, decision in 00 C 6991, and the expressed commitment of Claimant's in the Court's Agreed Order of Dismissal made in April 2002 and noted Respondent's letter to NASD, December 1, 2003;
- 3) An evidentiary hearing on issues of eligibility only shall be conducted at the NASD offices, June 22-23, 2006 at 9:00 a.m. without further notice;
- 4) A hearing regarding eligible claims shall be conducted at dates to be determined on May 18, 2006 conference call at 2:00 p.m. but no later than 90 days from June 30, 2006 or September 30, 2006.

On or about July 14, 2006, the Panel entered an Order in regard to all issues of eligibility pursuant to the Panel's Order dated May 16, 2006. The Panel's Order is as follows:

- 1) All issues of eligibility having been heard to this panel's May 16, 2006 order, the panel rules Claimant has failed to establish the eligibility of any transaction and investment made prior to July 20, 1994;
- 2) All issues relating to claims arising since July 20, 1994 shall proceed to hearing as scheduled and according to the Rules of NASD;
- 3) Claimant's Motion to Dismiss a portion of Respondents' Answer to Claimant's Statement of Claim will be taken with the case to be heard in September, 2006.

During the November 20, 2006 pre-hearing conference, Respondents stated that if the Panel dismissed Claimants' claims, they would withdraw their Counterclaim.

On or about December 14, 2006, the Panel entered an Order in regard to Respondents' Motion to Dismiss. The Panel's Order is as follows:

Following an initial Pre-Hearing Telephonic Conference and Scheduling Order entered June 20, 2006 wherein both parties were represented by counsel, the panel received evidence relevant to the timeliness of certain claims commencing June 22, 2006. The Scheduling Order further reserved September 12, 2006 and additional days to receive evidence on all timely made claims. The Scheduling Order considered and required that discovery proceed in a timely manner unless any party representative gave notice to the Dispute Resolution Staff or unless any

other issue necessitated a further pre-hearing conference in order to attain resolution including the submission of briefs for the panel's consideration or, in the event the panel requested briefs. After addressing all remaining administrative matters, the panel directed the order to remain in effect unless amended.

Subsequent to August 17, 2006, at the written request for postponement by Claimants including notice to the Dispute Resolution Staff that Claimants were seeking to secure another legal representative; and, upon the concurrence of Respondents stating the case was not ready for hearing, the panel granted Claimants a postponement August 28, 2006, and scheduled a further pre-hearing conference to convene September 12, 2006, and assessed postponement fees to Claimants.

On September 12, 2006, the panel convened the pre-hearing conference to address discovery and fairness issues raised by the parties as a result of Claimants' request for postponement. In addition to Claimants who participated pro se, and Respondents' counsel, the full panel heard from each party upon the Chairman inquiring of the discovery abuse and fairness issues raised by respondents, to which Claimants responded. When it was evident to the panel that all parties had been given the opportunity for a full presentation of the issues, a discussion was had with the parties on a fair procedure to resolve the discovery issues while Claimants sought legal representation. Following discussion of all requests for relief and responses; and upon consultation with the entire panel and consideration of the calendars of all parties and the panel for a date to proceed with the postponed hearing, the panel ordered Respondents' counsel to communicate with Claimants (and in the event Claimants shall retain further legal representation, then that counsel) on or prior to Friday, September 16, 2006 providing Claimants with a complete list of discovery requests to which Respondents stated they had received no response. The panel ordered Claimants to take 30 days from September 18, 2006 or until October 16, 2006, to provide Respondents with the informational and factual matters and materials requested or, to notify Respondents and NASD staff of an objection thereto. In the event Claimants notified NASD of an objection a discovery conference would be scheduled. The panel suggested the parties work together and cooperate to attain the requested discovery in order that the postponed hearing may proceed November 6, 2006 at 9:00 a.m. The panel suggested it may need to waive procedural rules to effect the body and spirit of this order.

Subsequent to the September 12, 2006 pre-hearing conference, NASD Dispute Resolution Staff notified the panel it received Claimants' September 7th hand written statement together with a single sheet tax form

in which Claimants declared they were unable to pay a postponement fee based upon their income. Though the panel was not aware of Claimants' September 7, 2006 declaration on September 12, 2006 and Claimants did not advise the panel of their objection to the panel's assessment of the fee, in agreement with NASD Dispute Resolution Staff, the panel reviewed its August 28, 2006 Pre hearing Conference Order that assessed the postponement fee to Claimants and treating the Claimants' September 7, 2006 communication to the NASD staff as a request for reconsideration the panel found no new or other reason to modify its assessment of the postponement fee and denied Claimants' request.

NASD Dispute Resolution Staff notified the panel Claimants sought a further postponement without payment of the assessed postponement fee. Respondents opposed Claimants' second request for postponement October 23, 2006. In the second request for postponement Claimants' charged the panel's chair with bias necessitating the chair's proposal to resign. The panel considered the charge of bias unfounded and gave thorough review to the need for sanctions including dismissal of the Statement of Claim, drawing adverse inferences, preclusion of evidence or further assessment of fees, costs, or expenses. NASD Dispute Resolution Staff urged the granting of a further postponement and assessment of additional fees to permit Claimants to respond to Respondents' proposal of dismissal of claimants' case. Claimants were allowed to November 14, 2006 to respond to a Motion to Dismiss and NASD scheduled a further conference November 20, 2006 to consider Claimants' response and Respondents' request for dismissal.

On November 20, 2006, Claimants failed to participate after having been specifically notified in writing and by advance telephone notice of the time, place and method of the telephone conference. As a result, the Claimants failed to address their failure to provide requested discovery, their failure to pay assessed postponement fees and failed to oppose the motion to dismiss their claims.

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.

AWARD

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

1. Claimants' claims, each and all, are hereby denied and dismissed with prejudice ;

2. The Counterclaim of Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Steven K. Porter, is withdrawn with prejudice;
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent, Steven K. Porter's, registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondent, Steven K. Porter, must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
4. Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
5. Any relief not specifically enumerated, including punitive damages and attorneys' fees, is hereby denied with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial Claim filing fee	= \$ 500.00
Counterclaim filing fee	= \$2,000.00

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. In this matter, the member firm is Merrill Lynch, Pierce, Fenner & Smith, Inc.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

Adjournment Fees

Adjournments granted during these proceedings:

September 12-15, 2006 hearing dates, adjournment requested by Claimants= \$1,200.00

November 6-9, 2006 hearing dates, adjournment requested by Claimants = \$1,500.00

Forum Fees and Assessments

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

Six (6) Pre-hearing sessions with Panel x \$1,200.00 = \$ 7,200.00

Pre-hearing conferences:	December 9, 2003	1 session
	May 9, 2006	1 session
	May 18, 2006	1 session
	September 12, 2006	1 session
	October 26, 2006	1 session
	November 20, 2006	1 session

Five (5) hearing sessions x \$1,200.00 = \$ 6,000.00

Hearing Dates:	June 22, 2006	2 sessions
	July 13, 2006	2 sessions
	July 14, 2006	1 session

Total Forum Fees = \$13,200.00

The Panel has assessed \$13,200.00 of the forum fees jointly and severally to Elizabeth and Charles Gosser.

FEE SUMMARY

Claimants, Elizabeth and Charles Gosser, are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
Adjournment Fees	= \$ 2,700.00
Forum Fees	= \$13,200.00
Total Fees	= \$16,400.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution	= \$14,700.00

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., is liable for:

Member Fees	= \$ 7,600.00
Counterclaim Filing Fee	= \$ 2000.00
<u>Total Fees</u>	<u>= \$ 9,600.00</u>
<u>Less payments</u>	<u>= \$11,450.00</u>
Refund Due Merrill Lynch, Pierce, Fenner & Smith, Inc.	= \$ 1,850.00

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

ARBITRATION PANEL

Richard C. Moenning, Esq. - Public Arbitrator, Presiding Chair
Charles Orlove - Public Arbitrator
Howard B. Silverman - Non-Public Arbitrator

Concurring Arbitrators' Signatures:

/s/ Richard C. Moenning, Esq.
Richard C. Moenning, Esq.
Public Arbitrator, Presiding Chair

12/20/06
Signature Date

/s/ Charles Orlove
Charles Orlove
Public Arbitrator

12/20/06
Signature Date

/s/ Howard B. Silverman
Howard B. Silverman
Non-Public Arbitrator

12/19/06
Signature Date

12/20/06
Date of Service (For NASD office use only)

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., is liable for:

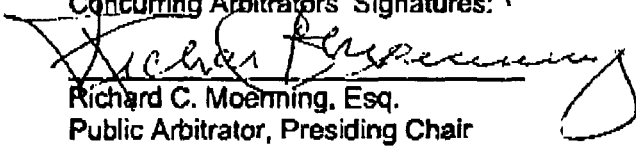
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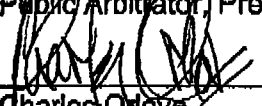
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12/19/06

Signature Date