

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

John V. Cioffi and William J. Burke, (Claimants) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., (Respondent)

Case Number: 01-00692

Hearing Site: New York, New York

REPRESENTATION OF PARTIES

Claimants, John V. Cioffi ("Cioffi") and William J. Burke ("Burke"), hereinafter collectively referred to as "Claimants": Anthony Paduano, Esq., Paduano & Weintraub LLP, New York, NY.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., hereinafter referred to as "Respondent": David F. McComb, Esq., Rubin & Associates, P.C., Paoli, PA.

CASE INFORMATION

Statement of Claim filed on or about: February 9, 2001.

Cioffi signed the Uniform Submission Agreement: January 31, 2001.

Burke signed the Uniform Submission Agreement: January 31, 2001. .

Statement of Answer filed by Respondent on or about: July 20, 2001.

Respondent signed the Uniform Submission Agreement: July 20, 2001.

CASE SUMMARY

Claimants asserted the following causes of action: breach of contract and failure to pay deferred compensation.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants' claims are barred in whole or in part because any and all losses sustained by Claimants were due to their own failures and omissions, their own conduct or negligence, or their own failure to mitigate; Claimants fail to set forth any facts upon which relief can be granted, including satisfaction of any of the required predicate acts necessary to state a basic claim or any requisite duty on the part of Respondent, failure to state a statutory basis for a claim, failure to exhaust applicable administrative or regulatory remedies, and failure to establish recoverable damages; New York's wage law is inapplicable to this litigation because Respondent's Financial Consultant Capital Award Accumulation Plan ("the Plan") is incentive compensation, payment of which is not governed by this law; all of Respondent's actions were made in good faith and for

proper business reasons; the claims are barred in whole or in part because Claimants have sustained no legally recognized injury arising from the conduct alleged; Claimants are precluded from any recovery because the damages they seek are necessarily speculative and not recoverable as a matter of law; Claimant fails to state a claim for attorneys' fees; Claimants fail to state a claim for punitive damages because no conduct alleged to have been engaged in by Respondent could possibly be considered to constitute "so extreme and outrageous as to go beyond the bounds of all decency tolerated by a civilized community" as required by law; Claimants' claims are barred in whole or in part by the doctrines of waiver and estoppel; Claimants' claims are barred in whole or in part by the doctrine of unclean hands; and Claimants could have mitigated their alleged losses and other damages, if any.

RELIEF REQUESTED

Claimants requested:

- a. An Award of damages in the full amount of their respective Awards under the Plan, less amounts paid to date, plus legal interest thereon to the date of Award by the Panel, and thus an amount not less than \$2,000,000.00 for Cioffi and \$2,000,000.00 for Burke;
- b. Interest as allowed by law; and
- c. Attorneys' fees, the costs of this action, and such other and further relief as the Panel deems just and proper.

Respondent requested that Claimants' claims be denied in their entirety, that all costs be assessed against Claimants, and that Respondent be awarded such other and further relief as the Panel deems reasonable and proper under the circumstances presented in this arbitration proceeding.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent filed a Motion for Summary Judgement on September 9, 2002. Claimants filed a Memorandum of Law in Opposition to Respondent's Motion for Summary Judgement on October 1, 2002. The Panel reserved decision on said Motion until the conclusion of the case. After due consideration, the Panel denied Respondent's Motion for Summary Judgement.

Claimant Burke was not present at the hearings that took place on October 2, 2002, October 3, 2002, and November 18, 2002, and Claimant Cioffi was not present at the hearing that took place on November 19, 2002. However, both Claimants were represented by their counsel at all hearing dates. The Panel determined that Claimants received due notice of the hearings, and that arbitration of the matter would proceed without said Claimants present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

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 evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are hereby dismissed in their entirety.
2. Each party shall bear its own costs.
3. All other requests for relief are hereby 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:

Initial claim filing fee	= \$ 600.00
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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, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

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

Adjournment Fees

Adjournments requested during these proceedings:

June 17, 18, 19 & 20, July 16, 17, 18 & 19, 2002,
adjournment by Respondent

= WAIVED

Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing 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:

One (1) Pre-hearing session with a single arbitrator x \$450.00 = \$ 450.00
Pre-hearing conference: September 24, 2002 1 session

One (1) Pre-hearing session with Panel x \$1,200.00 = \$ 1,200.00
Pre-hearing conference: January 18, 2002 1 session

Nine (9) Hearing sessions x \$1,200.00 = \$10,800.00
Hearing Dates: October 1, 2002 2 sessions
October 2, 2002 2 sessions
October 3, 2002 1 session
November 18, 2002 2 sessions
November 19, 2002 2 sessions

Total Forum Fees = \$12,450.00

1. The Panel has assessed \$6,225.00 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$6,225.00 of the forum fees against Respondent.

Fee Summary

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
<u>Forum Fees</u>	<u>= \$ 6,225.00</u>
Total Fees	= \$ 6,825.00
<u>Less payments</u>	<u>= \$ 1,800.00</u>
Balance Due NASD Dispute Resolution	= \$ 5,025.00

2. Respondent is solely liable for:

Member Fees	= \$ 7,600.00
<u>Forum Fees</u>	<u>= \$ 6,225.00</u>
Total Fees	= \$13,825.00
<u>Less payments</u>	<u>= \$ 7,600.00</u>
Balance Due NASD Dispute Resolution	= \$ 6,225.00

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

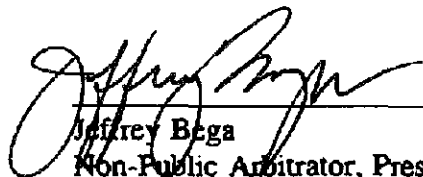
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Arbitration No. 01-00692
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ARBITRATION PANEL

Jeffrey Bega	-	Non-Public Arbitrator, Presiding Chair
Judith C. Greene	-	Non-Public Arbitrator
Bernard J. McGuire	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



Jeffrey Bega
Non-Public Arbitrator, Presiding Chair

Signature Date

Judith C. Greene
Non-Public Arbitrator

Signature Date

Bernard J. McGuire
Non-Public Arbitrator

Signature Date

December 31, 2002

Date of Service (For NASD Dispute Resolution use only)

NASD Dispute Resolution
Arbitration No. 01-00692
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Non-Public Arbitrator, Presiding Chair

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Judith C. Greene
Non-Public Arbitrator

Signature Date


Bernard J. McGuire
Non-Public Arbitrator

Signature Date

December 31, 2002
Date of Service (For NASD Dispute Resolution use only)