

STIPULATED AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Charles R. McClelland

and

02-01989
Phoenix, Arizona

Name of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.
Kirk J. Gill
John S. Simonson

Nature of the Dispute: Customer vs. Member and Associated Persons.

REPRESENTATION OF PARTIES

Charles R. McClelland ("**Claimant**") was represented by David C. Anson, Esq. of Anson, Lammers and Barkley, Tucson, Arizona.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Respondent Merrill Lynch**") was represented by Todd D. Brody, Esq. of Morgan Lewis & Bockius LLP, New York, New York.

Kirk J. Gill ("**Respondent Gill**") and John S. Simonson ("**Respondent Simonson**") were represented by Armand Salese, Esq., Salese & McCarthy, P.C., Tucson, Arizona.

CASE INFORMATION

The Statement of Claim was filed on or about February 20, 2002. Submission Agreement of Claimant Charles L. McClelland was signed on the same date.

A Statement of Answer, Counterstatement of Facts and Affirmative Defenses was filed by Respondent Merrill Lynch Pierce Fenner and Smith, Inc. on or about June 24, 2002, along with a submission agreement.

An Answer was filed by Respondents Kirk J. Gill and John Simonson on or about June 24, 2002 along with a submission agreement.

On or about September 26, 2003 Respondents Kirk J. Gill and John Simonson filed a Motion to Amend Response to Statement of Claim to Add Counterclaim for Declaratory Relief/Judgment.

CASE SUMMARY

Claimant alleged that Respondent Merrill Lynch failed to supervise the activities of Respondents Gill and Simonson and that Respondents Gill and Simonson “made unsuitable and unauthorized investments and breached their contracts with and fiduciary duties to Claimant.”

Unless specifically admitted in their Statements of Answer and Responses, all Respondents denied the allegations of wrongdoing set forth in Claimant’s Statement of Claim and asserted various affirmative defenses.

Respondents Gill and Simonson also moved to assert counterclaims against the Claimants for declaratory relief in the form of expungment.

RELIEF REQUESTED

Claimant requested in his Statement of Claim compensatory and punitive damages in an amount of not less than \$500,000.00, plus attorney’s fees and costs.

Respondent Merrill Lynch requested that Claimant’s Statement of Claim be dismissed in its entirety and it be awarded attorney’s fees.

Respondents Gill and Simonson requested that the Statement of Claim be dismissed in its entirety and sought leave to amend to assert a counterclaim for declaratory relief requesting the Panel to enter an Order that they acted properly in their handling of the Claimant’s account.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Simonson filed a Motion for Summary Judgment which was denied by the Panel.

On February 11, 2004 the parties hereto filed with the NASD a Stipulation to Dismiss and Expunge the Registered Representative Records along with a proposed Stipulated Award.

Also on February 11, 2004 the Claimant filed his Affidavit which states as follows:

“Charles L. McClelland, being first duly sworn, upon his oath deposes and states as follows:

1. My name is Charles L. McClelland. My date of birth is 2/18/1927.
2. In 1995 I opened a trading account at Merrill Lynch. Mr. Gill was the only broker who handled my accounts while at Merrill. I transferred in

approximately 2000 shares of Lucent Technology I obtained while an employee with Bell as well as positions in other telecommunications stocks

3. When I opened my Merrill account I informed Mr. Gill that I had experience buying and selling equities and mutual funds. My trading history included both cash and margin accounts. I informed Mr. Gill I substantial business experience in commercial real estate and from a partnership in a Denny's restaurant.
4. When I opened my Merrill Lynch account, I told Mr. Gill that my primary source of income came from two separate pensions, social security and income from rental property. I was not relying on my Merrill Lynch account for income. I also informed Mr. Gill that my Merrill Lynch account represented less than 1/4 of my net worth.
5. I was repeatedly warned by Mr. Gill that I could loose everything in the market and understood and told Mr. Gill the market was a "crapshoot."
6. I was willing to and did assume an aggressive amount of risk in my Merrill portfolio to achieve my investment goal of total return. I considered the Merrill accounts as trading account with the goal of achieving short term trading profits. I knew that I would incur substantial trading costs with this strategy.
7. I received many letters from Merrill Lynch management advising me that my account was very active, generating substantial trading costs and of my aggressive risk tolerance level. I even spoke to compliance at Merrill Lynch acknowledging my high activity level and attendant costs, my margin debt and the overall performance in my account. I knew what I was doing and I knew the risks I was taking. In September of 1998, I opened another trust account at Morgan Stanley Dean Witter, account number 108 095567 061.
8. The sale and purchase of securities by Mr. Gill were approved by me before they were executed. Mr. Gill explained fully any recommendations for sale and/or purchase of the securities in my accounts. My accounts at Merrill Lynch were non-discretionary and I understood that I had total control of all purchases and sales in the accounts.
9. The trading activity that occurred in my Merrill accounts were not excessive and were consistent with my investment objectives and financial situation. And, Mr. Gill informed me that Merrill Lynch offered a fee based account

that would have cost me much less in transaction costs, an “MLUA” but I declined.

10. Although I have lost money in my Merrill Lynch accounts, as most people did who were invested in the stock market during this period of time, these losses were not the fault of Kirk Gill. I followed my investments carefully and understood and accepted the risks involved with my investment strategy. I understood completely that Mr. Gill could not guarantee success in the stock market.
11. John Simonson, a member of the Gill/Simonson Group at Merrill Lynch, never offered me any investment advice nor executed any trade in my accounts. Mr. Simonson, like Mr. Gill, was not the cause of any monetary loss that I have sustained while my accounts were at Merrill Lynch through February 16, 2001, nor did Messrs. Gill and Simonson engage in any improper or illegal conduct in the handling of my account.
12. Permitting the information about this arbitration proceeding to remain in the CRD system for Kirk Gill and John Simonson would be harmful to their reputation and status in the securities business and because it is just and equitable I have directed my attorneys to dismiss all claims against them in this matter and stipulate to a stipulated award that orders the expungement of this claim from their CRD record.”

The parties have agreed that the Stipulated Award in this matter may be executed in counterpart copies. The parties have agreed to receive conformed copies of the award while the original(s) remain on file with the NASD Dispute Resolution (the “NASD”).

AWARD

After considering the pleadings, the Affidavit of the Claimant, the Stipulation to Dismiss and Expungement of Registered Representative Record, and proposed Stipulated Award, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant’s withdrawal of his claims is accepted and Respondents Gill and Simonson are dismissed from this matter, with prejudice.
2. The Panel recommends the expungement of all references in the above-captioned arbitration from Respondents Kirk J. Gill and John Simonson’s records maintained by the NASD CRD, with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54 Respondents Gill and Simonson must obtain confirmation from a Court of competent jurisdiction before the CRD will execute the expungement directive.

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 = \$300.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm(s) is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	\$	1,700.00
Pre-hearing process fee	\$	750.00
Hearing process fee	\$	2,750.00
Total Member Fees	\$	5,200.00

Adjournment Fees

Adjournments requested during these proceedings:

Hearing Date(s), July 9-11, 2003, adjournment requested by all parties (fee waived by Arbitration Panel)	= \$1,125.00
Hearing Date(s), January 20-22, 2004, adjournment requested by all parties (fee waived by Arbitration Panel)	= \$1,500.00

Forum Fees and Assessments

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

3 Pre-hearing session(s) with Panel	x	1,125.00	\$	3,375.00
October 21, 2002	1	session		
November 5, 2002	1	session		

September 26, 2003 1 session
Total Forum Fees \$ 3,375.00

The Arbitration Panel has assessed \$1,125.00 of the forum fees to Charles R. McClelland.

The Arbitration Panel has assessed \$1,125.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc..

The Arbitration Panel has assessed \$1,125.00 of the forum fees jointly and severally to Kirk J. Gill and John S. Simonson.

Fee Summary

Claimant, Charles R. McClelland, shall be and hereby is liable for:

Initial Filing Fee	= \$	300.00
Adjournment Fee	= \$	500.00
<u>Forum Fees</u>	= \$	1,125.00
Total Fees	= \$	1,925.00
<u>Less payments</u>	= \$	-1,425.00
Balance Due NASD Dispute Resolution	= \$	500.00

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., shall be and hereby is liable for:

Member Fees	= \$	5,200.00
Adjournment Fee	= \$	500.00
<u>Forum Fees</u>	= \$	1,125.00
Total Fees	= \$	6,825.00
<u>Less payments</u>	= \$	-4,150.00
Balance Due NASD Dispute Resolution	= \$	2,675.00

Respondents, Kirk J. Gill and John S. Simonson, shall be and hereby are jointly and severally liable for:

Adjournment Fee	= \$	500.00
<u>Forum Fees</u>	= \$	1,125.00
Total Fees	= \$	1,625.00
<u>Less payments</u>	= \$	-375.00
Balance Due NASD Dispute Resolution	= \$	1,250.00

All balances are due to NASD Dispute Resolution

ARBITRATION PANEL

Jay A. Canel, Esq. - Public Arbitrator, Presiding Chair
Alfred Lindeman - Public Arbitrator
Daniel B. Skelton - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Jay A. Canel
Jay A. Canel, Esq.
Public Arbitrator, Presiding Chair

March 15, 2004
Signature Date

/s/ Alfred Lindeman
Alfred Lindeman
Public Arbitrator

March 15, 2004
Signature Date

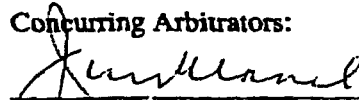
/s/ Daniel B. Skelton
Daniel B. Skelton
Non-Public Arbitrator

March 15, 2004
Signature Date

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Alfred Lindeman - Public Arbitrator
Daniel B. Skelton - Non-Public Arbitrator

Concurring Arbitrators:



Jay A. Canel, Esq.
Public Arbitrator, Presiding Chair

March 15, 2004

Signature Date

Alfred Lindeman
Public Arbitrator

Signature Date

Daniel B. Skelton
Non-Public Arbitrator

Signature Date

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Alfred Lindeman - Public Arbitrator
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Concurring Arbitrators:

Jay A. Canel, Esq.
Public Arbitrator, Presiding Chair



Alfred Lindeman
Public Arbitrator

Signature Date

3/15/04

Signature Date

Daniel B. Skelton
Non-Public Arbitrator

Signature Date

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Alfred Lindeman - Public Arbitrator
Daniel B. Skelton - Non-Public Arbitrator


Concurring Arbitrators:

Jay A. Canel, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Alfred Lindeman
Public Arbitrator

Signature Date



Daniel B. Skelton
Non-Public Arbitrator

3-15-04

Signature Date