

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

Kevin C. Foley
Kevin C. Foley IRA
Julianna Foley IRA

Case Number: 02-04730

Names of the Respondents

Christopher MacNamara
Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Washington, DC

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

REPRESENTATION OF PARTIES

Claimants, Kevin C. Foley, Kevin C. Foley IRA and Julianna Foley, hereinafter collectively referred to as "Claimants", were not represented by counsel and appeared at the hearing *pro se*.

Respondents, Christopher MacNamara ("MacNamara") and Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter collectively referred to as "Respondents", were represented by Ethan Leonard, Esq. and Neal Brickman, Esq. of the Law Offices of Neal Brickman, New York, New York.

CASE INFORMATION

Statement of Claim filed on August 9, 2002.

Claimants signed the Uniform Submission Agreement on August 4, 2002.

Joint Statement of Answer filed by Respondents on October 8, 2002.

Respondents filed an Amended Statement of Answer on October 11, 2002.

Respondent MacNamara signed the Uniform Submission Agreement on October 7, 2002.

A representative of Respondent Merrill Lynch executed the Uniform Submission Agreement on September 18, 2002.

CASE SUMMARY

Claimants asserted the following causes of action, among others: negligence, breach of fiduciary duty, suitability, misrepresentation, and omission of facts. The causes of action relate to the purchase of various Mutual Funds including Goldman Sachs Internet Tollkeeper Fund ("GITAX"), Massachusetts Investors Fund ("MIGFX"), and Putnam International New Opportunities Fund ("PINOX").

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses, among others: Claimants failed to state a claim upon which relief can be granted; Claimants' claims are barred by the doctrines of laches, estoppel and unclean hands; any allegations of malfeasance cannot be maintained as Claimants suffered no harm from participating in Merrill Lynch Unlimited Account and failed to mitigate their losses; Claimants ratified every transaction made in the Accounts and are barred from now seeking damages based on any such transactions; Claimants' claim for breach of fiduciary duty is barred by the economic loss rule; and, Respondents owed no fiduciary duty to Claimants with reference to the Accounts which were non-discretionary accounts over which Claimants had and maintained complete control.

RELIEF REQUESTED

Claimants in their Statement of Claim requested:

Compensatory Damages	\$63,000.00
Punitive Damages	\$30,000.00
Attorneys' Fees	\$ 1,250.00
Other Costs	\$ 975.00

Respondents in their Statement of Answer requested that Claimants' claims be dismissed in their entirety and that they be awarded all costs and attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

At the hearing, Respondents moved to dismiss Julianna Foley from the Statement of Claim. The Arbitration Panel ("Panel") granted the Motion.

At the hearing Respondents moved to dismiss the claim. The Panel denied the motion.

At the hearing, Respondents requested that the Panel recommend the expungement of all references to this arbitration from the NASD Central Registration Depository ("CRD") record of Respondent MacNamara.

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 and 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. Claimants' claims are denied in their entirety;
2. The parties shall bear their respective costs, including attorney's fees, except as Fees are specifically addressed below;

specifically addressed below;

3. All claims for attorney's fees are denied in their entirety; and,
4. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent MacNamara's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent MacNamara must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
5. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

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 = \$ 225.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch is a party.

Member surcharge	= \$1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$1,700.00
Total Member Fees	= \$3,550.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

September 29, 2003-October 1, 2003 adjournment by Claimants fee waived

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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:

One (1) Pre-hearing session with Panel @ \$750.00	= \$ 750.00
Pre-hearing conferences: April 28, 2003 1 session	
Six (6) Hearing sessions @ \$ 750.00	= \$4,500.00

	March 17, 2004	2 sessions	
	March 18, 2004	2 sessions	
Total Forum Fees			= \$5,250.00

1. The Panel has assessed \$2,625.00 of the forum fees to Claimant Kevin Foley.
2. The Panel has assessed \$1,312.50 of the forum fees to Respondent Merrill Lynch.
3. The Panel has assessed \$1,312.50 of the forum fees to Respondent MacNamara.

FEE SUMMARY

1. Claimants are jointly and severally assessed and shall pay the following fees:

Initial Filing Fee	= \$ 225.00
Total Fees	= \$ 225.00
Less payments	= \$ 225.00
Balance Due NASD Dispute Resolution	= \$ 00.00
2. Claimant Kevin Foley is assessed and shall pay the following fees:

Forum Fees	= \$2,625.00
Total fees	= \$2,625.00
Less payments	= \$ 750.00
Balance Due NASD Dispute Resolution	= \$1,875.00
3. Respondent Merrill Lynch is assessed and shall pay the following fees:

Member Fees	= \$3,550.00
Forum Fees	= \$1,312.50
Total fees	= \$4,862.50
Less payments	= \$3,550.00
Balance Due NASD Dispute Resolution	= \$1,312.50
4. Respondent MacNamara is assessed and shall pay the following fees:

Forum Fees	= \$1,312.50
Total fees	= \$1,312.50
Less payments	= \$ 00.00
Balance Due NASD Dispute Resolution	= \$1,312.50


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

ARBITRATION PANEL

Ellen S. Saltzman, Esq.	-	Public Arbitrator, Presiding Chairperson
Mary E. Beach, Esq.	-	Public Arbitrator, Panelist
E. Robert Kent, Jr., Esq.	-	Non-Public Arbitrator, Panelist

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Concurring Arbitrators' Signatures



Ellen S. Saltzman, Esq.
Public Arbitrator, Presiding Chairperson

March 29, 2004

Signature Date

Mary H. Heach, Esq.
Public Arbitrator, Panelist

Signature Date

E. Robert Kent, Jr., Esq.
Non-Public Arbitrator, Panelist

Signature Date


3/31/04

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

Concurring Arbitrators' Signatures

Ellen S. Saltzman, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date



Mary E. Beach, Esq.
Public Arbitrator, Panelist



Signature Date

E. Robert Kent, Jr., Esq.
Non-Public Arbitrator, Panelist

Signature Date



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

2004-03-31 10:42

03/29/2004 11:47 FAX 202 728 8002

NASD DISPUTE RESOLUTION

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Arbitration No. 03-04790

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Concurring Arbitrators' Signatures

Ellen S. Seltman, Esq.

Public Arbitrator, Presiding Chairperson

Signature Date

Mary E. Beach, Esq.

Public Arbitrator, Panelist

Signature Date



E. Robert Kent, Jr., Esq.

Non-Public Arbitrator, Panelist

3/30/04

Signature Date

3/31/04

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