

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Morgan Stanley DW, Inc. (Claimant) v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and David Fagenson (Respondents)

Case Number: 02-05298

Hearing Site: New York, New York

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

REPRESENTATION OF PARTIES

Claimant Morgan Stanley DW, Inc. ("MSDW") hereinafter referred to as "Claimant": Darren A. Luma, Esq. and Donald N. Cohn, Esq., previously Victor H. Sigoura, Esq., Greenberg Traurig, New York, NY. Previously represented by: Gregory E. Peterson, Esq. and Tricia B. O'Reilly, Esq., Connell Foley, LLP, Roseland, NJ.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"): Louis M. Lagalante, Esq., Gallagher, Harnett & Lagalante, LLP, New York, NY.

Respondent David Fagenson ("Fagenson"): Jon Paul Robbins, Esq., McLaughlin & Stern, LLP, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: September 6, 2002.

Amendment to Statement of Claim filed on or about: June 4, 2003.

Claimant's Answer to Counterclaim of Respondent Fagenson filed on or about: January 27, 2003.

Claimant's Amended Answer to Respondent's Amended Counterclaim, Motion to Strike Defense and Motion to Dismiss filed on or about: December 9, 2003.

Claimant signed the Uniform Submission Agreement: September 3, 2002.

Statement of Answer filed by Respondent Merrill Lynch on or about: December 27, 2002.
Respondent Merrill Lynch did not sign the Uniform Submission Agreement.

Statement of Answer and Counterclaim filed by Respondent Fagenson on or about: December 27, 2002.

Respondent Fagenson signed the Uniform Submission Agreement: December 24, 2002.

CASE SUMMARY

Claimant asserted the following causes of action: breach of promissory note dated 10/14/99; breach of promissory note dated 11/2/99; breach of restrictive covenant; and tortious interference with contract and prospective economic advantage. Unless specifically admitted in its Answer to Counterclaim and Amended Answer to Respondent's Amended Counterclaim, Claimant denied the allegations made in the Counterclaim and asserted various affirmative defenses.

Unless specifically admitted in its Answer, Respondent Merrill Lynch denied the allegations made in the Statement of Claim.

Unless specifically admitted in his Answer and Counterclaim, Respondent Fagenson denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In his Counterclaim, Respondent Fagenson asserted the following causes of action: breach of terms of the promissory notes; constructive discharge; and set-off.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested the principal balance due and owing under Note 1 in the amount of \$419,904.33; interest accrued during the term of Note 1 at the higher rate of 5% per annum or the applicable Federal rate in the amount of \$16,796.17; interest at the higher rate of 5% per annum or the applicable Federal rate on the balance due and owing under Note 1 from the date of default to the date of payment; the principal balance due and owing under Note 2 in the amount of \$269,617.49; interest accrued during the term of Note 2 at the higher rate of 5% per annum or the applicable Federal rate in the amount of \$7,976.26; interest at the higher rate of 5% per annum or the applicable Federal rate on the balance due and owing under Note 2 from the date of default to the date of payment; damages resulting from the breach by Respondent Fagenson of his employment agreement; costs, including attorneys' fees as agreed to under the terms of the Note; and any and all further relief that the Panel deems just and proper. In addition, Claimant requested that it be granted an award against Respondent Merrill Lynch for damages resulting from Merrill Lynch's tortious interference with Claimant's contractual rights and prospective economic advantages, including but not limited to compensatory damages, costs, attorneys' fees, and all other relief that the Panel deems just and proper.

In the Amendment to the Statement of Claim, Claimant requested that in addition to the relief sought in the Statement of Claim, it be granted an award against Respondent Fagenson on account of his mishandling of the above referenced customer accounts in the total amount of \$23,279.12, plus interest and attorneys' fees.

In its Amended Answer to Respondent's Amended Counterclaim, Motion to Strike and Motion to Dismiss, Claimant requested that the Panel reject the new Counterclaim and dismiss it in its entirety.

In its Answer, Respondent Merrill Lynch requested that an award be entered in its favor and against Claimant, denying all of the relief sought; and any other relief that the Arbitration Panel

deems just and appropriate.

In his Answer and Counterclaim, Respondent Fagenson requested that the Panel dismiss the claim against him; compensatory damages in the amount of \$500,000.00; or alternatively, reducing any award to Claimant by the amount of at least \$500,000.00; costs, attorneys' fees; and such other and further relief as the Panel deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Merrill Lynch did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, is bound by the determination of the Panel on all issues submitted.

On or about September 12, 2003, Claimant notified NASD Dispute Resolution that it withdrew its claims against Respondent Merrill Lynch.

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. Respondent Fagenson is liable for and shall pay to Claimant compensatory damages in the amount of \$633,189.00.
2. Respondent's counterclaims are denied in their entirety.
3. The Panel, after due deliberation, was deeply chagrined by the behavior of Claimant's counsel both in terms of its attempted obstreperous tactics and disregard of arbitration hearing protocols. In that regard, the Panel sanctions Morgan Stanley the sum of \$10,000.00.

Accordingly, Claimant is liable for and shall pay to NASD a sanction of \$10,000.00.

4. Any and all relief not specifically addressed herein 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:

Initial claim filing fee	= \$1,250.00
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Fagenson's Counterclaim 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, Morgan Stanley DW, Inc. is a party.

Member surcharge	= \$2,250.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$4,000.00

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, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge	= \$2,250.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$4,000.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

December 9-11, 2003, joint adjournment request	= Waived
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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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: October 12, 2004 1 session	

Three (3) Pre-hearing sessions with Panel @ \$1,200.00	= \$3,600.00
Pre-hearing conferences: June 30, 2003 1 session	
October 8, 2003 1 session	
June 23, 2004 1 session	

Two (2) Hearing sessions @ \$1,200.00	= \$2,400.00
Hearing Date: November 9, 2004 2 sessions	
Total Forum Fees	= \$6,450.00

1. The Panel has assessed \$3,225.00 of the forum fees to Claimant.
2. The Panel has assessed \$3,225.00 of the forum fees to Fagenson.

Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 1,250.00
Member Fees	= \$ 7,000.00
<u>Forum Fees</u>	<u>= \$ 3,225.00</u>
Total Fees	= \$11,475.00
<u>Less payments</u>	<u>= \$ 9,450.00</u>
Balance Due NASD Dispute Resolution	= \$ 2,025.00

2. Respondent Merrill Lynch is solely liable for:

<u>Member Fees</u>	<u>= \$7,000.00</u>
Total Fees	= \$7,000.00
<u>Less payments</u>	<u>= \$3,000.00</u>
Balance Due NASD Dispute Resolution	= \$4,000.00

3. Respondent Fagenson is solely liable for:

Counterclaim Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$3,225.00</u>
Total Fees	= \$3,525.00
<u>Less payments</u>	<u>= \$1,200.00</u>
Balance Due NASD Dispute Resolution	= \$2,325.00

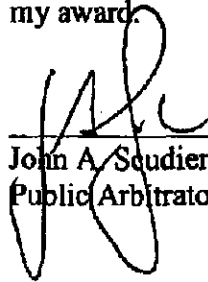
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

John A. Scudiero	-	Public Arbitrator, Presiding Chairperson
John N. Polakas, Esq.	-	Public Arbitrator
J. Scott Colesanti, Esq.	-	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.



John A. Scudiero
Public Arbitrator, Presiding Chairperson

1/5/05

Signature Date

John N. Polakas, Esq.
Public Arbitrator

Signature Date

J. Scott Colesanti, Esq.
Non-Public Arbitrator

Signature Date

January 7, 2005

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

John A. Scudiero	-	Public Arbitrator, Presiding Chairperson
John N. Polakas, Esq.	-	Public Arbitrator
J. Scott Colesanti, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

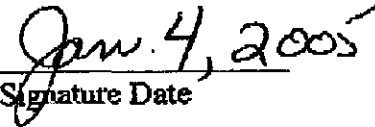
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