

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Philip Wu and Kao Wu, Claimants v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and John Dauphin, Respondents

Case Number: 02-05430

Hearing Site: San Francisco, California

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

REPRESENTATION OF PARTIES

For Claimants:

Thomas D. Mauriello, Esq.
Law Offices of Thomas D. Mauriello
San Francisco, California

For Respondents:

Philip A. McLeod, Esq.
Darrell C. Martin, Esq.
Keesal, Young & Logan
San Francisco, California

CASE INFORMATION

Statement of Claim filed: September 10, 2002

Claimants' Uniform Submission Agreement signed: September 6, 2002

Joint Statement of Answer filed by Respondents: February 19, 2003

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Uniform Submission Agreement signed: February 20, 2003

Respondent John Dauphin's Uniform Submission Agreement signed: February 20, 2003

Respondent/Counter-Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Counterclaim filed: February 19, 2003

Claimants/Counter-Respondents' Answer to Counterclaim filed: March 6, 2003

CASE SUMMARY

Claimants alleged churning, breach of contract, unsuitable recommendations, failure to disclose material facts, breach of fiduciary duty, negligence, negligent supervision, violation of California Corporations Code § 25401, fraud and deceit, involving unspecified securities transactions.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses. In its Counterclaim, Respondent/Counter-Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter "Respondent Merrill Lynch") alleged breach of contract and common counts, including open book account, money had and received, money lent and money paid.

Claimants/Counter-Respondents (hereinafter "Claimants") denied the allegations of wrongdoing set forth in Respondents Counterclaim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimants requested compensatory damages in the amount of \$425,000.00, unspecified punitive damages, reimbursement of unspecified margin interest, lost profits, rescission, interest and costs, including attorney's fees.

Respondents requested dismissal of the Claimants' Statement of Claim in its entirety. In its Counterclaim, Respondent Merrill Lynch requested compensatory damages of \$28,281.81, interest and costs, including attorney's fees.

Claimants requested dismissal of the Respondent Merrill Lynch's Counterclaim in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

On January 8, 2003, Claimant and Claimant's counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On March 25, 2003, Respondents' counsel signed a Waiver Agreement on behalf of Respondents expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

The parties 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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims, including claims for punitive damages, are denied in their entirety. This ruling is based upon the following findings:

The Panel finds that although Claimant Philip Wu¹ initially engaged in a conservative trading strategy when he opened his accounts with Merrill Lynch in 1997, he changed to an aggressive trading strategy by the latter part of 1999. The Panel also finds that Respondent John Dauphin tried to convince Mr. Wu to contain his excessive trading zeal. Mr. Wu initially heeded this advice. However, in March of 2000, Claimant decided to "go it alone," making 93 trades on the internet in March of 2000 while making maximum use of his margin capabilities. When the stock market moved downward sharply in the week of April 10, 2000, Mr. Wu was not able to meet a margin call, resulting in liquidation of Claimants' accounts.

The Panel notes that Mr. Wu had Power of Attorney over several other accounts of his relatives. Those accounts also suffered large losses during the same trading period. Further, after the events of April 2000, Claimants opened a new account with another brokerage firm, using money raised by refinancing their home and borrowing from relatives. Mr. Wu continued trading in that account in an effort to recoup his losses.

2. Respondent Merrill Lynch's Counterclaims are denied in their entirety. This ruling is based upon the following findings:

The Panel finds that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. should have been more alert to the obvious changes in Claimants' investment philosophy, especially after the run-up in outstanding margin in February and March of 2000 and the sudden spike in internet activity in March of 2000.

3. The parties shall bear their respective costs, including attorney's fees.

¹ Philip Wu was the active owner of the accounts. The joint tenant on the accounts, Kao Wu, was only a passive owner of the account. She was not involved in the trading activity in the accounts.

4. During the hearing, the Parties stipulated that all references to this matter be expunged from Respondent John Dauphin's registration records. Therefore, the Panel recommends the expungement of all reference to the above captioned arbitration from Respondent John Dauphin's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent John Dauphin must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
5. All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Claimants' initial Claim filing fee	= \$ 300.00
Respondent Merrill Lynch's Counterclaim filing fee	= \$ 1,000.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	= \$ 2,750.00
Total Member Fees	= \$ 5,200.00

Forum Fees and Assessments

The Arbitrator/Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

Three (3) Pre-hearing conference sessions with the Panel @ \$1,125.00/session = \$ 3,375.00

Pre-hearing conferences:	May 28, 2003	1 session
	September 16, 2003	1 session
	October 28, 2003	1 session

Six (6) Hearing sessions @ \$1,125.00/session = \$ 6,750.00

Hearings:	November 11, 2003	2 sessions
	November 12, 2003	2 sessions
	November 13, 2003	2 sessions

Total Forum Fees	= \$10,125.00
-------------------------	----------------------

1. The Panel assessed \$4,725.00 of the forum fees jointly and severally to Claimants.
2. The Panel assessed \$4,725.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.
3. The Panel waived \$675.00 of the forum fees for the September 16, 2003 pre-hearing conference.

Fee Summary

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	= \$ 4,725.00
Total Fees	= \$ 5,025.00
<u>Less payments</u>	= \$(1,575.00)
Balance Due NASD Dispute Resolution	= \$ 3,450.00

2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., is charged with the following fees and costs:

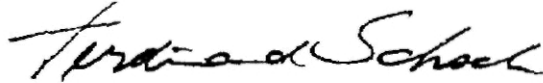
Counterclaim Filing Fee	= \$ 1,000.00
Member Fees	= \$ 5,200.00
<u>Forum Fees</u>	= \$ 4,725.00
Total Fees	= \$10,925.00
<u>Less payments</u>	= \$(5,200.00)
Balance Due NASD Dispute Resolution	= \$ 5,725.00

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

ARBITRATION PANEL

Ferdinand Schoch	-	Public, Presiding Chair
Angie Lane	-	Public/Non-Public Arbitrator
Nicholas J. Caputo	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Ferdinand Schoch
Chair, Public Arbitrator



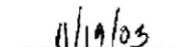
Signature Date

Angie Lane
Public Arbitrator

Signature Date

Nicholas J. Caputo
Non-Public Arbitrator

Signature Date


Date of Service

ARBITRATION PANEL:

Ferdinand Schoch	-	Public, Presiding Chair
Angie Lane	-	Public/Non-Public Arbitrator
Nicholas J. Caputo	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures:

Ferdinand Schoch
Chair, Public Arbitrator

Signature Date

Angie Lane
Public Arbitrator

Signature Date



Nicholas J. Caputo
Non-Public Arbitrator

11/19/03

Signature Date

11/19/03

Date of Service