

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Peter A. Dow, TTEE U/A DTD
10/30/1988 Peter A. Dow Trust

and

Case Number: 02-05598
Hearing Site: Southfield, Michigan

Name of Respondent

Merrill Lynch Pierce Fenner & Smith

NATURE OF DISPUTE

Customer v. Member

REPRESENTATION OF PARTIES

Peter A. Dow, TTEE U/A DTD 10/30/1988 Peter A. Dow Trust ("Claimant") was represented by Walter Baumgardner, Esq., Musilli, Baumgardner & Parnell, P.C., St. Clair Shores, Michigan.

Merrill Lynch Pierce Fenner & Smith ("Respondent") was represented by Dennis K. Egan, Esq., Butzel Long, Bloomfield Hills, Michigan.

CASE INFORMATION

The Statement of Claim was filed on or about September 20, 2002. The Submission Agreement of Claimant, Peter A. Dow Trust, was signed on or about October 7, 2002, by Peter A. Dow, Trustee.

Statement of Answer was filed by Respondent Merrill Lynch Pierce Fenner & Smith on or about March 17, 2003. The Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith was signed on or about December 30, 2002, by Michael E. Olney.

CASE SUMMARY

Claimant asserted the following causes of action: negligence, fraud, and violation of Rule 10b-5. The causes of action relate to the Claimant's allegations that Respondent lost Claimant's shares of Institute for Advanced Technology which Claimant had tendered to Respondent along with Claimant's shares in Learning Byte International. Claimant asserted that Respondent's loss prevented a timely exchange of the shares for Digital Think and necessitated Claimant's withdrawal of funds from his qualified retirement plans to finance his obligation to provide capital to the founders of Learning Byte International for their new startup company.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted defenses including the following: Respondent is not liable for negligence; Claimant's losses if any, were caused by his own negligence; Claimant's losses, if any, were caused by a non-party; Respondent never lost Claimant's securities, Respondent never sent Claimant false or fraudulent statements; and Claimant failed to act reasonably to mitigate his damages.

RELIEF REQUESTED

Claimant requested an award in the amount of \$1,014,478.00, plus interest, attorney fees, and costs.

Respondent requested that the claims asserted against it be dismissed in their entirety and that it be awarded its costs and attorneys' fees, that Claimant be assessed forum fees, and such other further and different relief the panel deems appropriate.

OTHER ISSUES CONSIDERED & DECIDED

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. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Dispute Resolution ("NASD").

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1.) Respondent, Merrill Lynch Pierce Fenner & Smith, is liable for and shall pay to Claimant, Peter A. Dow, TTEE U/A DTD 10/30/1988 Peter A. Dow Trust, the sum of \$303,100.00 in compensatory damages;
- 2.) Respondent, Merrill Lynch Pierce Fenner & Smith, is liable for and shall pay to Claimant, Peter A. Dow, TTEE U/A DTD 10/30/1988 Peter A. Dow Trust, the sum of \$500 as reimbursement for his filing fee; and
- 3.) Any relief not specifically enumerated, including punitive damages and attorney fees, is hereby denied with prejudice.

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 = \$ 500.00

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(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith.

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

Adjournment Fees

Adjournments requested during these proceedings:

February 17-18, 2004, adjournment requested jointly (fee waived)	= \$ 1,200.00
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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:

One (1) Pre-hearing session with Panel x \$1,200.00	= \$ 1,200.00
Pre-hearing conference: July 23, 2003 1 session	
One (1) Hearing sessions x \$1,200.00	= \$ 2,400.00
Hearing Date: May 5, 2004 2 sessions	
<u>Total Forum Fees</u>	<u>= \$ 3,600.00</u>

The Arbitration Panel has assessed \$3,600.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith.

Fee Summary

Claimant, Peter A. Dow, TTEE U/A DTD 10/30/1988 Peter A. Dow Trust, is liable for:

<u>Initial Filing Fee</u>	<u>= \$ 500.00</u>
<u>Total Fees</u>	<u>= \$ 500.00</u>
<u>Less payments</u>	<u>= \$ 2,700.00</u>
<u>Balance refunded by NASD Dispute Resolution</u>	<u>= \$ 2,200.00</u>

Respondent, Merrill Lynch Pierce Fenner & Smith, is liable for:

<u>Member Fees</u>	<u>= \$ 8,550.00</u>
<u>Forum Fees</u>	<u>= \$ 3,600.00</u>
<u>Total Fees</u>	<u>= \$12,150.00</u>
<u>Less payments</u>	<u>= \$ 8,550.00</u>
<u>Balance Due NASD Dispute Resolution</u>	<u>= \$ 3,600.00</u>

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

ARBITRATION PANEL

Matthew W. Schlegel, Esq. - Public Arbitrator, Presiding Chair
Timothy J. Currier, Esq. - Public Arbitrator
Anthony J. Bove, III - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Matthew W. Schlegel, Esq.
Matthew W. Schlegel, Esq.
Public Arbitrator, Presiding Chair

05/07/04
Signature Date

/s/ Timothy J. Currier, Esq.
Timothy J. Currier, Esq.
Public Arbitrator

05/06/04
Signature Date

/s/ Anthony J. Bove, III
Anthony J. Bove, III
Non-Public Arbitrator

05/06/04
Signature Date

05/07/04
Date of Service (For NASD office use only)

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