

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

James Schiffman IRA and Nancy Schiffman IRA (Claimants) v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Steve Vincenzo Costanzo, and Steven Smola (Respondents)

Case Number: 02-05790

Hearing Site: Cleveland, Ohio

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

**REPRESENTATION OF PARTIES**

Claimants James Schiffman IRA ("J. Schiffman IRA") and Nancy Schiffman IRA ("N. Schiffman IRA") hereinafter collectively referred to as "Claimants": Timothy A. Canning, Esq., Novato, CA.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Steve Vincenzo Costanzo ("Costanzo"), and Steven Smola ("Smola") hereinafter collectively referred to as "Respondents": Dominick F. Evangelista, Esq., previously Thomas L. Weisenbeck, Esq., Bressler, Amery & Ross, P.C., Florham Park, NJ.

**CASE INFORMATION**

Statement of Claim filed on or about: September 25, 2002.

Claimants signed the Uniform Submission Agreement: September 7, 2002.

Joint Statement of Answer filed by Respondents on or about: November 21, 2002.

Respondent Merrill Lynch did not sign the Uniform Submission Agreement.

Respondent Costanzo did not sign the Uniform Submission Agreement.

Respondent Smola did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimants asserted the following causes of action: fraud; negligence; breach of contract; and breach of fiduciary duty. The causes of action relate to shares of EMC Corp., Siebel Systems, and Network Appliance as well as JDS Uniphase, Sun Microsystems, and Silicon Storage.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$820,000.00; pre-award interest at the legal rate; reasonable costs and fees, including expert witness fees and attorneys' fees pursuant to *Digital Analog Design Corp. v. North Supply Co.* (Ohio 1992) 590 N.E.2d 737 and *Wing Leasing Inc. v. M&B Aviation* (Ohio App. 1988) 542 N.E.2d 671; and punitive damages pursuant to Ohio Rev. Stat. §2315.21; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212 (1995), and *Logsdon v. Graham Ford Co.* (Ohio 1978) 376 N.E.2d 1333.

Respondents requested that the Arbitrators dismiss the Statement of Claim, with prejudice, in its entirety; enter an order expunging or striking Claimants' claim from Respondent Costanzo's and Respondent Smola's permanent registration records maintained by the CRD; costs; and other further relief as they deem just and proper.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Respondents did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and, having answered the claim, and appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

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. Any and all relief not specifically addressed herein, including punitive damages, 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	= \$375.00
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#### **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 persons 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:

March 23-26, 2004 adjournment by Respondents	= \$1,200.00
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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: December 8, 2003 1 session	

Two (2) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: April 22, 2003 1 session	
March 26, 2004 1 session	

Five (5) Hearing sessions @ \$1,200.00	= \$ 6,000.00
Hearing Dates: May 14, 2004 2 sessions	
November 22, 2004 2 sessions	
November 23, 2004 1 session	

Total Forum Fees	= \$ 8,850.00
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1. The Panel has assessed \$4,425.00 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$4,425.00 of the forum fees jointly and severally against Respondents Merrill Lynch, Constanzo, and Smola.

### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimants requested duplication of hearing tapes = \$45.00
2. Respondents requested duplication of hearing tapes = \$45.00

### **Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$4,425.00
<u>Administrative Costs</u>	= \$ 45.00

Total Fees	= \$4,845.00
<u>Less payments</u>	<u>= \$1,635.00</u>
Balance Due NASD Dispute Resolution	= \$3,210.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$7,000.00
Total Fees	= \$7,000.00
<u>Less payments</u>	<u>= \$7,000.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents are jointly and severally liable for:

Adjournment Fee	= \$1,200.00
Forum Fees	= \$4,425.00
<u>Administrative Costs</u>	<u>= \$ 45.00</u>
Total Fees	= \$5,670.00
<u>Less payments</u>	<u>= \$1,245.00</u>
Balance Due NASD Dispute Resolution	= \$4,425.00

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

ARBITRATION PANEL

John S. Weisheit	-	Public Arbitrator, Presiding Chairperson
Andrew G. Young	-	Public Arbitrator
Ann W. Hartmann	-	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 S. Weisheit  
Public Arbitrator, Presiding Chairperson

12-14-04  
Signature Date

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Andrew G. Young  
Public Arbitrator

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Signature Date

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Ann W. Hartmann  
Non-Public Arbitrator

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Signature Date

December 17, 2004  
Date of Service (For NASD Dispute Resolution use only)

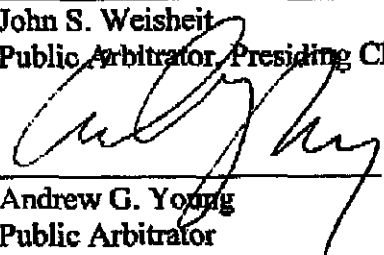
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Andrew G. Young  
Public Arbitrator

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