

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

---

In the Matter of the Arbitration Between:

Name of the Claimants

Case Number: 02-07575

Dubicki Living Trust,  
Margaret Dubicki, and  
Edward P. Dubicki

Name of the Respondents

Hearing Site: Baltimore, Maryland

Merrill Lynch, Pierce, Fenner & Smith, and Inc.  
and Kent V. Pearce

---

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

REPRESENTATION OF PARTIES

Claimants Dubicki Living Trust ("Trust"), Margaret Dubicki ("M. Dubicki") and Edward P. Dubicki ("E. Dubicki"), hereinafter collectively referred to as "Claimants", were represented by Michael Knoll, Esq., Attorney at Law, Briarcliff Manor, New York.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Kent V. Pearce ("Pearce"), hereinafter collectively referred to as "Respondents", were represented by Ira L. Oring, Esq., Fedder and Garten, PA, Baltimore, Maryland.

CASE INFORMATION

Statement of Claim filed on December 10, 2002.

Claimants M. Dubicki and E. Dubicki signed the Uniform Submission Agreement on November 21, 2002.

M. Dubicki and E. Dubicki as Trustees of Claimant Trust signed the Uniform Submission Agreement on May 19, 2003.

Statement of Answer filed by Respondents on February 26, 2003.

Respondent Pearce signed the Uniform Submission Agreement on June 4, 2003.

A representative of Respondent Merrill Lynch executed the Uniform Submission Agreement on January 13, 2003.

CASE SUMMARY

Claimants asserted the following causes of action, among others: breach of fiduciary duty, breach of contract, fraud, violation of Federal Securities Laws, violation of Maryland Securities Laws and Maryland Common Law, violation of NYSE Rules and NASD Rules of Fair Practice, failure to supervise and *Respondeat Superior*. The causes of action relate to the purchase and sale

of unspecified securities.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses, among others: laches, assumption of risk, waiver, ratification, estoppel, failure to state a claim upon which relief may be granted, Respondents acted in good faith, failure to mitigate, Claimants authorized all transactions, contributory negligence, Respondents acted in a commercially reasonable manner, Respondents maintained an adequate and reasonable system of supervision, and statute of limitations.

#### RELIEF REQUESTED

Claimants in their Statement of Claim requested:

Compensatory Damages	\$260,179.00
Punitive Damages	amount unspecified
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified

Respondents in their Statement of Answer requested that the Statement of Claim be dismissed; that all references to this arbitration in Respondent Pearce's Central Records Depository records be expunged; and that they be awarded costs, forum fees, attorneys' fees, and such other and further relief as the Panel deems appropriate.

#### OTHER ISSUES CONSIDERED AND DECIDED

At the hearing, Respondents made a Motion to Dismiss. The Panel denied said motion.

#### AWARD

After considering the pleadings, 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. Respondents are jointly and severally liable to and shall pay to Claimants compensatory damages of \$50,000.00;
2. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below; and
3. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

Presiding Chairperson Passman dissents from the Panel's Award.

### 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 = \$ 300.00

#### 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, Respondent Merrill Lynch is a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00
Total Member Fees	= \$5,200.00

#### 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 @ \$1,125.00 = \$1,125.00

Pre-hearing conference: September 23, 2003 1 session

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

Hearing Dates:	February 17, 2004	2 sessions
	February 18, 2004	2 sessions
	February 19, 2004	2 sessions

---

Total Forum Fees = \$7,875.00

1. The Panel has assessed \$3,937.50 of the forum fees jointly and severally to Claimants.

2. The Panel has assessed \$3,937.50 of the forum fees jointly and severally to Respondents.

### FEE SUMMARY

1. Claimant is assessed and shall pay the following fees:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$3,937.50
Total Fees	= \$4,237.50
Less payments	= \$1,425.00
Balance Due NASD Dispute Resolution	= \$2,812.50

2. Respondent is assessed and shall pay the following fees:

<u>Member Fees</u>	= \$5,200.00
<u>Total Fees</u>	= \$5,200.00
<u>Less payments</u>	= \$5,200.00
Balance Due NASD Dispute Resolution	= \$ 0.00

4. Respondents are jointly and severally assessed and shall pay the following fees:

<u>Forum Fee</u>	= \$3,937.50
Balance Due NASD Dispute Resolution	= \$3,937.50

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

ARBITRATION PANEL

Marshall Passman	-	Public Arbitrator, Presiding Chairperson
Maureen Power Wilkerson, Esq.	-	Public Arbitrator, Panelist
Bonnie K. Wachtel, Esq.	-	Non-Public Arbitrator, Panelist

02/24/04 10:29

301 564 4988

WILKERSON ESQ

002

NASD Dispute Resolution  
Arbitration No. 02-07575  
Award Page 5

Concurring Arbitrators' Signatures

Maureen Power Wilkerson

Maureen Power Wilkerson, Esq.  
Public Arbitrator, Panelist

2/24/04  
Signature Date

Bonnie K. Wachtel, Esq.  
Non-Public Arbitrator, Panelist

Signature Date

Dissenting Arbitrator's Signature

Marshall Passman  
Public Arbitrator, Presiding Chairperson

Signature Date

2/25/04  
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Maureen Power Wilkerson, Esq.  
Public Arbitrator, Panelist

\_\_\_\_\_  
Signature Date

Bonnie K. Wachtel

Bonnie K. Wachtel, Esq.  
Non-Public Arbitrator, Panelist

2/23/04  
Signature Date

Dissenting Arbitrator's Signature

\_\_\_\_\_  
Marshall Passman  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
Signature Date

2/25/04  
Date of Service (For NASD Dispute Resolution office use only)

Arbitration No. 02-07575

Award Page 5

Concurring Arbitrators' Signatures

Maureen Power Wilkerson, Esq.  
Public Arbitrator, PanelistSignature DateBonnie K. Wachtel, Esq.  
Non-Public Arbitrator, PanelistSignature Date

Dissenting Arbitrator's Signature

Marshall PassmanMarshall Passman  
Public Arbitrator, Presiding ChairpersonFeb 24, 2004  
Signature Date2/25/04

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