

Award
NASD Dispute Resolution

In the Matter of the Consolidated Arbitration Number 03-00548

Angeline Davis-Nave Claimant v. Merrill Lynch, Pierce, Fenner & Smith Incorporated and
Marsha A. Kemppainen, Respondents (Case Number: 03-00548)

Consolidated with

Robert Nave, Claimant v. Merrill Lynch, Pierce, Fenner & Smith Incorporated Incorporated and
Marsha A. Kemppainen, Respondents (Case Number: 03-01370)

Hearing Site: Portland, Oregon

Nature of Dispute: (03-00548) Customer v. Member Firm and Associated Person
(03-01370) Customer v. Member Firm and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

Richard M. Layne, Esq.
Layne & Lewis, LLP
Portland, Oregon

For Respondents:

Dennis K. Egan, Esq.
Butzel Long
Bloomfield Hills, Michigan

CASE INFORMATION (03-00548)

Statement of Claim filed: January 15, 2003

Claimant's Uniform Submission Agreement signed: January 12, 2003

Joint Statement of Answer filed by Respondents: April 7, 2003

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission
Agreement signed: March 14, 2003

Respondent Marsha A. Kemppainen's Uniform Submission Agreement: April 25, 2003

CASE INFORMATION (03-01370)

Statement of Claim filed: January 22, 2003

Claimant's Uniform Submission Agreement signed: January 17, 2003

Joint Statement of Answer filed by Respondents: April 6, 2003

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission Agreement signed: July 15, 2003

Respondent Marsha A. Kemppainen's Uniform Submission Agreement: None submitted

CASE SUMMARY (03-00548)

In her Statement of Claim, Claimant alleged breach of contract, negligence, failure to supervise, omission of facts, breach of fiduciary duty, suitability, violation of section 12(2) and section 15 of the Securities Act of 1933, violation of sections 10(b), 10(b)-5 and 20 of the Securities Exchange Act of 1934, violation of section 45.55.010 of the Alaska Securities Act and misrepresentation involving the purchase of unspecified volatile technology stocks.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim.

RELIEF REQUESTED (03-00548)

Claimant requested unspecified compensatory damages, unspecified punitive damages and costs including attorneys' fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, expungement of any reference to this claim from the registration records of respondent Marsha A. Kemppainen, and costs.

CASE SUMMARY (03-01370)

In his Statement of Claim, Claimant alleged breach of contract, negligence, failure to supervise, omission of facts, breach of fiduciary duty, suitability, violation of section 12(2) and section 15 of the Securities Act of 1933, violation of sections 10(b), 10(b)-5 and 20 of the Securities Exchange Act of 1934, violation of section 45.55.010 of the Alaska Securities Act and misrepresentation involving the purchase of unspecified volatile technology stocks.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim.

RELIEF REQUESTED (03-01370)

Claimant requested unspecified compensatory damages, unspecified punitive damages, interest, costs, and attorney's fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, expungement of any reference to this claim from the registration records of respondent Marsha A. Kemppainen, and costs.

OTHER ISSUES CONSIDERED AND DECIDED

In NASD Arbitration Case Number 03-1370 Respondent Marsha A. Kemppainen did not file with the NASD Dispute Resolution a properly executed submission agreement but is required to submit to arbitration pursuant to the Code and having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

On or about August 11, 2003, the Parties stipulated to the consolidation of NASD Case Number: 03-00548 with NASD Case Number: 03-01370 under the lower Case Number: 03-00548.

At the hearing, the Panel granted Claimants' oral motion to amend the Statement of Claim to have Oregon Law apply to the case instead of Alaska Law. Respondents' oral motion to apply Alaska Law and disallow application of Oregon Law was denied. The Panel allowed liberal amendment of the Statement of Claim.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

ARBITRATORS' COMMENTS ON DISCOVERY

The Respondents' resistance to cooperate with routine discovery requests increased the level of contentiousness, prolonged the process, and made it necessary to schedule extra pre-hearing proceedings. All of this sufficiently troubled the Panel to make these comments in light of the NASD emphasis on voluntary compliance with discovery as laid out in the Discovery Guide.

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) Robert Nave's claims are denied in their entirety.
- 2) In Arbitration Case No. 03-00548, the Panel finds that there was no unauthorized trading nor was there churning in Claimant Angeline Davis-Nave's account. The Panel recognizes further that Claimant Angeline Davis-Nave was not financially naive. The Panel is concerned with the lack of portfolio diversification, the suitability of the recommendations for a retired senior client, and the encouragement to use margin in a volatile portfolio during a rapidly falling market.
- 3) Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Marsha A. Kemppainen are jointly and severally liable to and shall pay Claimant Angeline Davis-Nave compensatory damages in the sum of \$47,500.00.
- 4) Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Marsha A. Kemppainen are jointly and severally liable to and shall pay Claimant Angeline Davis-Nave interest on the sum of \$47,500.00 at a rate of 9% per annum from the date of service of the award until the date of payment of the award to Claimant.
- 5) Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Marsha A. Kemppainen are jointly and severally liable to and shall pay Claimant Angeline Davis-Nave the sum of \$19,000.00 in attorney's fees, pursuant to ORS 59.115 (10).
- 6) Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Marsha A. Kemppainen are liable to and shall pay Claimant Angeline Davis-Nave the sum of \$7,240.04 in costs. This sum includes the reimbursement of witness fees.
- 7) Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Marsha A. Kemppainen are liable to and shall pay Claimant Angeline Davis-Nave the sum of \$250.00 as reimbursement for filing fees.
- 8) Claimants are directed to return to Respondents any and all documents provided in Case Number 03-00548 and marked "confidential", especially the first set ruled illegible as well as all those subsequently submitted appropriately marked "confidential". All documents are to be returned at the expense of Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated per c.o.d. shipping instructions from the Respondent.
- 9) All other relief requested and not expressly granted is denied.

FEES (03-00548)

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:

Initial claim filing fee = \$ 250.00

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 Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,200.00</u>
Total Member Fees	= \$4,450.00

Adjournment Fees

The following adjournment fees are assessed:

October 13-15, 2003, adjournment requested by all parties = Waived

Forum Fees and Assessments

The 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 Panel/Chair. The following fees are assessed:

(4) Pre-hearing conference sessions with the Panel @ \$1,000.00/session = \$4,000.00

Pre-hearing conferences:	June 25, 2003	1 session
	July 23, 2003	1 session
	September 29, 2003	1 session
	January 27, 2004	1 session

(5) Hearing sessions @ \$1,000.00/session = \$5,000.00

Hearings:	March 1, 2004	2 sessions
	March 2, 2004	2 sessions
	March 3, 2004	1 session

Total Forum Fees = \$ 9,000.00

1. The Panel assessed \$9,000.00 of the forum fees jointly and severally to Respondents.

Fee Summary (03-00548)

1. Claimant Angeline Davis-Nave is charged with the following fees and costs:

Initial Filing Fee	= \$ 250.00
<u>Less payments</u>	= \$(1,250.00)
Refund Due Claimant	= \$ (1,000.00)
2. Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is charged with the following fees and costs:

Member Fees	= \$ 4,450.00
<u>Less payments</u>	= \$(4,450.00)
Balance Due NASD Dispute Resolution	= \$ 0.00
3. Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Marsha A. Kemppainen are charged jointly and severally with the following fees and costs:

<u>Forum Fees</u>	= \$ 9,000.00
Balance Due NASD Dispute Resolution	= \$(9,000.00)

FEES (03-01370)

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:

Initial claim filing fee	= \$ 250
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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 Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
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Fee Summary (03-01370)

1. Claimant Robert Nave is charged with the following fees and costs:

Initial Filing Fee	= \$ 250.00
<u>Less payments</u>	<u>= \$(1,250.00)</u>
Refund Due Claimant	= \$(1,000.00)

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

Member Fees	= \$ 1,500.00
<u>Less payments</u>	<u>= \$(1,500.00)</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

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

Elizabeth L. Morrison - Public Arbitrator, Presiding Chair

Christopher C. S. Blattner, Esq. - Public Arbitrator

R. Lee Smith - Non-Public Arbitrator

Concurring Arbitrators' Signatures


Elizabeth L. Morrison
Chair, Public Arbitrator

4/8/04
Signature Date

Christopher C. S. Blattner, Esq.
Public Arbitrator

Signature Date

R. Lee Smith
Non-Public Arbitrator

Signature Date

April 8, 2004
Date of Service

ARBITRATION PANEL

Elizabeth L. Morrison - Public Arbitrator, Presiding Chair

Christopher C. S. Blattner, Esq. - Public Arbitrator

R. Lee Smith - Non-Public Arbitrator

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Elizabeth L. Morrison
Chair, Public Arbitrator

Signature Date



Christopher C. S. Blattner, Esq.
Public Arbitrator

4/8/04

Signature Date

R. Lee Smith
Non-Public Arbitrator

Signature Date

April 8, 2004

Date of Service

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Christopher C. S. Blattner, Esq.

Public Arbitrator

R. Lee Smith

Non-Public Arbitrator

Concurring Arbitrators' Signatures

Elizabeth L. Morrison
Chair, Public Arbitrator

Signature Date

Christopher C. S. Blattner, Esq.
Public Arbitrator

Signature Date

R. Lee Smith

R. Lee Smith
Non-Public Arbitrator

4-7-04
Signature Date

April 8, 2004
Date of Service