

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant

Lotha Kilgore, individually
and on behalf of his commercial
money market account

Case Number: 03-01425

Names of the Respondents

Merrill Lynch, Pierce,
Fenner & Smith, Inc.
John Niedergeses

Hearing Site: Atlanta, Georgia

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

REPRESENTATION OF PARTIES

For Lotha Kilgore, individually and on behalf of his commercial money market account, hereinafter referred to as "Claimant": Hoyt L. Baugh, Jr., Esq., Rainsville, Alabama.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and John Niedergeses ("Niedergeses"), hereinafter collectively referred to as "Respondents": Carranza M. Pryor, Esq. and Elena Parent, Esq., Sutherland, Asbill & Brennan LLP, Atlanta, Georgia.

CASE INFORMATION

Statement of Claim filed on or about: February 19, 2003.

Claimant signed the Uniform Submission Agreement: September 16, 2002.

Statement of Answer filed by Respondents on or about: May 29, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: April 22, 2003.

Respondent Niedergeses signed the Uniform Submission Agreement: May 2, 2003.

Respondents' Motion to Dismiss and Motion for Expungement filed on or about: September 24, 2004.

Claimant's Response to Motion to Dismiss and Motion for Expungement filed on or about: October 19, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: conversion; negligence; breach of contract; fraud; and, misrepresentation and suppression. The causes of action relate to Claimant's shares of stock of First Tennessee National Corporation.

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

RELIEF REQUESTED

Claimant requested the following damages: value of the stock; accrued interest on stock and loans used to cover the dishonored checks; emotional damages; punitive damages; actual and punitive damages in the amount of \$300,000.00; attorneys' fees; and, costs.

Respondents requested that the arbitration panel reject Claimant's Statement of Claim in its entirety and order that all costs and forum fees of this arbitration be borne by Claimant. Respondents further requested that the arbitration panel award them such other and further relief as is deemed just and proper. Further, Respondent Niedergeses requested that all references to this matter be expunged from his permanent registration record maintained by the Central Registration Depository ("CRD").

OTHER ISSUES CONSIDERED AND DECIDED

In their Motion to Dismiss, Respondents asserted that the claim should be dismissed for Claimant's failure to comply with the arbitration panel's June 4, 2004 Order that he substitute new counsel or advise NASD that he is proceeding pro se by July 6, 2004 and concomitant failure to prosecute his case. In their Motion for Expungement, Respondents asserted that the claims against Respondent Niedergeses are without legal merit and/or are defamatory in nature. In response to the Motion to Dismiss and Motion for Expungement, Claimant asserted a dismissal with prejudice is not proper, permitted, nor appropriate and the request for expungement is premature. On or about January 11, 2005, the arbitration panel issued an order which denied Respondents' Motion to Dismiss and Motion for Expungement.

At the evidentiary hearing, Claimant moved to amend the Statement of Claim to increase the amount of claimed punitive damages. The arbitration panel denied the request. In addition, Respondents moved to preclude the testimony of Mitchell Kilgore since he was not listed on Claimant's witness list in a timely manner. The arbitration panel denied the request.

The parties have agreed that the Award in this matter may be executed in counterpart copies.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the undersigned arbitrators (the "Panel") have decided in full and final resolution of the issues submitted for determination as follows:

Respondents are liable, jointly and severally, and shall pay to Claimant the sum of \$46,398.00 in compensatory damages plus the sum of \$27,838.00 that reflects pre-judgment interest at the rate of 12% for five years.

Respondent Merrill Lynch is liable and shall pay to Claimant the sum of \$225,000.00 in punitive damages pursuant to the NASD Code of Arbitration Procedure (the "Code"), Rule 10214; Alabama common law action for negligent misrepresentation and fraud, Ex Parte Michelin North

American, Inc., 795 So. 2d 674, 678-79 (Ala. 2001); fraudulent suppression of material fact, Garner v. JMIC Life Insurance Co., Inc., 693 So. 2d 478 (Ala. Civ. App. 1997); Mastrobouno v. Shearson Lehman Hutton, Inc. 514 U.S. 52, 60-61 (1995); Nelson v. Pike, 882 So. 2d 357, 360 (Ala. Civ. App. 2003); and, Randell v. Banzhoff, 375 So. 2d 445 (Ala. 1979).

Respondents are liable, jointly and severally, and shall pay to Claimant the sum of \$18,559.00 in attorneys' fees and the sum of \$2,205.00 representing Claimant's expenses of litigation pursuant to the Code, Rule 10215, and Alabama law.

Respondent Merrill Lynch is liable and shall pay to Claimant the sum of \$300.00 representing reimbursement of the claim filing fee previously paid by Claimant to NASD Dispute Resolution.

Any and all claims for relief not specifically addressed herein are 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 = \$300.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) 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 a party.

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

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

June 8, 9 and 10, 2004 Hearing Dates, adjournment by Claimant= \$1,125.00 adjournment fee assessed to Claimant.

Three-Day Cancellation Fees

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

No three-day cancellation fees were assessed during these proceedings.

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs

when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

No injunctive relief fees were incurred in this matter.

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:

Two (2) Pre-hearing sessions with the Panel @ \$1,125.00 = \$2,250.00

Pre-hearing conferences: September 30, 2003 1 session
 January 10, 2005 1 session

Five (5) Hearing sessions @ \$1,125.00 = \$5,625.00

Hearing Dates: June 8, 2005 3 sessions
 June 9, 2005 2 sessions

Total Forum Fees = \$7,875.00

The Panel has assessed the total forum fees of \$7,875.00 to Respondent Merrill Lynch.

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 are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred in this matter.

FEE SUMMARY

Claimant is solely liable for:

Initial Filing Fee = \$300.00
Adjournment Fee = \$1,125.00

Total Fees = \$1,425.00
Less payments = \$1,425.00

Balance Due NASD Dispute Resolution = \$0.00

Respondent Merrill Lynch is solely liable for:

Member Fees = \$5,200.00
Forum Fees = \$7,875.00

Total Fees	= \$13,075.00
Less payments	= \$5,200.00
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Balance Due NASD Dispute Resolution	= \$7,875.00

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

ARBITRATION PANEL

Joe E. Manuel, Esq.	-	Public Arbitrator, Presiding Chair
W. William Harness, Esq.	-	Public Arbitrator
Mary O. Pitts, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

_____/S/_____
Joe E. Manuel, Esq.
Public Arbitrator, Presiding Chair

June 15, 2005
Signature Date

_____/S/_____
W. William Harness, Esq.
Public Arbitrator

June 17, 2005
Signature Date

_____/S/_____
Mary O. Pitts, Esq.
Non-Public Arbitrator

June 15, 2005
Signature Date

June 17, 2005
Date of Service (For NASD Dispute Resolution office use only)


Total Fees	= \$13,075.00
Less payments	= \$5,200.00
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W. William Harness, Esq.	-	Public Arbitrator
Mary O. Pitts, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


Joe E. Manuel, Esq.
Public Arbitrator, Presiding Chair

6-15-05
Signature Date

W. William Harness, Esq.
Public Arbitrator

Signature Date

Mary O. Pitts, Esq.
Non-Public Arbitrator

Signature Date

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Joe E. Mannel, Esq.
Public Arbitrator, Presiding Chair

Signature Date



W. William Harness, Esq.
Public Arbitrator



Signature Date

Mary O. Pitts, Esq.
Non-Public Arbitrator

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Mary O. Pitts, Esq.	-	Non-Public Arbitrator

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Public Arbitrator, Presiding Chair

Signature Date

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Public Arbitrator

Signature Date



Mary O. Pitts, Esq.
Non-Public Arbitrator



Signature Date

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