

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Nancy Komm, Claimant v. Merrill Lynch, Pierce, Fenner & Smith Inc., Shawn B. Peroff, and John K. Strine, Respondents

Case Number: 03-01720

Hearing Site: Seattle, Washington

Nature of the Dispute: Customer v. Member and Associated Persons

REPRESENTATION OF PARTIES

For Claimant:

Laurel H. Siddoway, Esq.
Randall & Danskin, P.S.
Spokane, Washington

For Respondents:

Julie K. Thrall, Esq.
Dorsey & Whitney LLP
Seattle, Washington

CASE INFORMATION

Statement of Claim filed: March 3, 2003

Claimant's Uniform Submission Agreement signed: September 25, 2002

Joint Statement of Answer filed by Respondents: May 12, 2003

Respondent Merrill Lynch, Pierce, Fenner & Smith Inc.'s Uniform Submission Agreement signed:
March 28, 2003

Respondent Shawn B. Peroff's Uniform Submission Agreement signed: March 17, 2003

Respondent John K. Strine's Uniform Submission Agreement signed: May 12, 2003

CASE SUMMARY

Claimant alleged breach of fiduciary duty, unsuitability, unauthorized trading, fraud, misrepresentation, material omission of facts, violation of federal and state securities laws, and failure to supervise. Claimant's allegations involved transactions in unspecified securities, the majority of which were in the "biotechnology, communications and Internet" sectors of the market.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimant requested unspecified compensatory damages, pre-judgment interest, and costs, including attorney's fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

At the close of Claimant's case, Respondents made a Motion to Dismiss the Statement of Claim on the grounds that Claimant had not submitted evidence sufficient to sustain the allegations. After due deliberation, the Panel denied the motion.

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

FINDINGS

Without identifying all of the factors considered in the Award, the Panel finds as follows: The broker, with one minor exception, solicited all of the trades. The brokers were informed about Claimant's financial circumstances and needs when she opened the account. They were not advised of the diagnosis, made a number of years previously, that Claimant had a chronic illness. That failure has no bearing on the claim or award. The risk Claimant was willing to take was described in the Foundation Report, a financial plan provided to Nancy Konn by Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") as "fair amount of risk." Risk of 100 % investment in the S&P 500 was described as "substantial risk" in the same report. Risk in business to business holders was described as having "substantial risk" as were the other Merrill products that she invested in on Respondent broker's recommendation. When the broker called Claimant about stock investments, Claimant basically told the broker she knew nothing about the securities recommended and would rely on the broker's judgment. The account while nominally a non-discretionary account operated essentially like a discretionary account. Shortly after Claimant opened the account, securities worth approximately \$160,000.00 were sold, triggering a substantial sales fee charged by a mutual fund because of Claimant's short holding period. Claimant was not advised that such a fee would be incurred. Immediately, \$110,000.00 was then invested in Merrill Lynch proprietary products of "substantial risk" per the prospectus. This was a fee-based account. The brokers received a commission out of the Merrill Lynch underwriting fee on the proprietary securities sold to Claimant. Claimant was not informed about this arrangement. Claimant's loss on these securities exceeded \$100,000.00. Based on these and other factors, the Panel finds Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., Shawn B. Peroff and John K. Strine violated the Revised Code of Washington ("RCW") violation of RCW 21.20.010.

The Panel finds that Claimant was fully aware of every detail of the 10 year pay whole life insurance policy transaction recommended to Claimant by Respondents and that Claimant forfeited the policy at the end of the first policy year. Therefore, the Panel finds that Claimant is not entitled to the return of the approximately \$18,000.00 annual premium paid by Claimant on the policy.

AWARD

After considering the pleadings, testimony, evidence presented at the hearing, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., Shawn B. Peroff and John K. Strine are jointly and severally liable to and shall pay Claimant the sum of \$96,100.00 in compensatory damages.
- 2) Claimant's claim for the return of approximately \$18,000.00 paid by Claimant as an annual premium for a 10 year pay whole life policy is specifically denied.
- 3) Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., Shawn B. Peroff and John K. Strine are jointly and severally liable to and shall pay Claimant the sum of \$250.00 as reimbursement for filing costs.
- 4) Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., Shawn B. Peroff and John K. Strine are jointly and severally liable to and shall pay Claimant the sum of \$25,000.00 in attorney's fees, pursuant to Revised Code of Washington (RCW) 21.20.430.
- 5) This Award shall bear interest at the rate of 8% per annum on any balance that remains unpaid thirty (30) days after receipt hereof, unless a motion to vacate has been filed with a court of competent jurisdiction. If this award is the subject of a motion to vacate that is subsequently denied, this award shall bear interest at the rate of 8% per annum on any balance that remains unpaid from date of the court's order denying said motion to vacate.
- 6) All other relief requested and not expressly granted is denied.

FEES

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
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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 Inc. is a 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

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 Chair or the parties and the Panel. The following fees are assessed:

One (1) Pre-hearing conference session with the Panel @ \$1,000.00/session	= \$1,000.00
Pre-hearing conference: September 30, 2003 1 session	
Six (6) Hearing sessions @ \$1,000.00/session	= \$6,000.00
Hearings: July 12, 2004 2 sessions	
July 13, 2004 2 sessions	
July 14, 2004 1 session	
July 15, 2004 1 session	
Total Forum Fees	= \$7,000.00

The Panel assessed the entire balance of the forum fees, in the amount of \$7,000.00, jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., Shawn B. Peroff and John K. Strine.

Administrative Costs

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Claimant requested 66 photocopies @ \$.50: = \$ 33.00

Fee Summary

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

Initial Filing Fee	= \$ 250.00
<u>Administrative Costs</u>	= \$ 33.00
Total Fees	= \$ 283.00
<u>Less payments</u>	= \$(1,425.00)
Refund Due from NASD Dispute Resolution	= \$(1,142.00)

2. Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. 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

4. Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., Shawn B. Peroff and John K. Strine are charged jointly and severally with the following fees and costs:

<u>Forum Fees</u>	= \$7,000.00
Balance Due NASD Dispute Resolution	= \$7,000.00

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

H. Yancey Rorer, Esq.
David E. Wagoner, Esq.
Robert Lewis Brown

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures

H. Yancey Rorer
H. Yancey Rorer, Esq.
Chair, Public Arbitrator

8/10/04
Signature Date

David E. Wagoner, Esq.
Public Arbitrator

Signature Date

Robert Lewis Brown
Non-Public Arbitrator

Signature Date

8/11/04
Date of Service

ARBITRATION PANEL

<i>H. Yancey Reser, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>David E. Wagoner, Esq.</i>	-	<i>Public Arbitrator</i>
<i>Robert Lewis Brown</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures

H. Yancey Reser, Esq.
Chair, Public Arbitrator

Signature Date

David E. Wagoner
David E. Wagoner, Esq.
Public Arbitrator

August 11, 2004
Signature Date

Robert Lewis Brown
Robert Lewis Brown
Non-Public Arbitrator

August 11, 2004
Signature Date

8/11/04
Date of Service