

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
Patricia Sukonik

Case Number: 03-02930

Names of the Respondents
Merrill Lynch, Pierce, Fenner & Smith
Patrick J. Walsh

Hearing Site: Philadelphia, Pennsylvania

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

REPRESENTATION OF PARTIES

Claimant, Patricia Sukonik, hereinafter referred to as "Claimant", was represented by Michael J. Willner, Esq., Miller Faucher and Cafferty, LLP, Philadelphia, Pennsylvania.

Respondents, Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") and Patrick J. Walsh ("Walsh"), hereinafter collectively referred to as "Respondents", were represented by G. Jeffrey Boujoukos, Esq., Morgan Lewis & Brockius, LLP, Philadelphia, Pennsylvania.

CASE INFORMATION

Statement of Claim filed on June 6, 2003.

Claimant signed an undated Uniform Submission Agreement.

Statement of Answer filed by Respondents on August 28, 2003.

A representative of Respondent Merrill signed the Uniform Submission Agreement on August 27, 2003.

Respondent Walsh signed the Uniform Submission Agreement on January 2, 2004.

CASE SUMMARY

Claimant, in her Statement of Claim asserted the following causes of action, among others: breach of contract, failure to supervise, breach of fiduciary duty, misrepresentations, non-disclosures, unauthorized trading, churning, omission of fact, and suitability. The causes of action relate to the purchase and sale of unspecified common stocks and options.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses, among others: failure to state a claim upon which relief may be granted; contributory and/or comparative negligence; Claimant's claims are barred by the doctrines of estoppel, waiver, ratification and laches; and failure to mitigate damages.

RELIEF REQUESTED

Claimant in her Statement of Claim requested:

Compensatory Damages	\$ 200,000.00
Punitive Damages	amount unspecified
Treble Damages	amount unspecified
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified
Disgorgement of profits	amount unspecified

Respondents in their Statement of Answer requested: that the Statement of Claim be dismissed in its entirety; that forum fees be assessed against Claimant; that the Arbitration Panel (the "Panel") issue an order directed that Respondent Walsh's record maintained at the Central Registration Depository ("CRD") be expunged; that Claimant be ordered to pay Respondents' costs and attorneys' fees associated with the defense of this matter; and such other and further relief as the Panel deem just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

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

1. In her resume, Claimant describes herself as an educator, attorney, and businessperson with executive experience in decision-making, planning, organizational structure, operations, sales and marketing, and management of personnel, in industry and arts.
2. Claimant holds three academic degrees:
 - A. Bachelor of Science in Education with a dual major in education and fine arts from Temple University;
 - B. Master of Arts in education (Fine Arts, Art History and Education) from Arcadia University, and
 - C. Juris Doctor from Widener University, School of Law.
3. Claimant is admitted to practice law in New Jersey, Pennsylvania and the District of Columbia, having either passed a bar exam or been admitted on motion, and having been found fit by each of the respective bar examiners.

4. Claimant has a documented condition known as dyslexia. As a result of her condition she was permitted certain educational modifications while at law school and modifications to conditions under which she took the bar exams of at least one state.
5. On the recommendation of a friend, Claimant sought out Respondent, Patrick Walsh, for the specific purpose of exploring the possibility of investing her money in a plan that involved covered call writing.
6. Prior to contacting Mr. Walsh, Claimant invested through an independent broker identified as one Randy Charles. Mr. Charles accommodated Claimant's dyslexia by developing a matrix style "tracking-sheet" by which Claimant could track her investments and understand the status of her portfolio. Eventually, Mr. Charles advised Claimant that he could no longer handle her account because it was not large enough. This was another reason why Claimant sought a new financial advisor. However, Mr. Charles agreed, for a fee, to continue to prepare tracking sheets for Claimant, and did so, using the Merrill Lynch statements, for an extended period of time after Claimant moved her accounts to Merrill Lynch. The testimony indicated that at Claimant's direction, Respondent was sending a copy of Claimant's monthly statements to Mr. Charles and to Claimant's accountant, Leon Goldberg, up to at least July Of 2002.
7. Notwithstanding what she had set forth on her resume, Claimant was not employed and had difficulty finding and holding employment. Money earned through Claimant's ventures into the art business provided minimal or no contribution to her income.
8. Although she once received a \$5,000.00 annual stipend from her mother, this source of funds ended before the facts that constitute the subject of this arbitration arose.
9. Immediately preceding, at, and during the period of time applicable to this matter, Claimant's sole source of income was her financial portfolio, as originally structured by Mr. Charles, and then by Respondent Walsh. In or about the time Claimant first invested with Respondents, this portfolio had a value of approximately \$400,000.00.
10. Walsh agreed to accept Claimant as a client, and to implement a covered call writing strategy for her account.
11. In her initial consultation with Respondent Walsh, Claimant advised him that based on her analysis of her expenditures for the previous year, she required an annual income of \$41,000.00 from her portfolio. Claimant also advised Respondent Walsh that she was dyslexic, and would need additional help in understanding what was occurring in her portfolio.
12. Respondent Walsh advised Claimant that this amount was not possible and recommended a monthly payout of \$2,100.00, (\$25,200.00 per annum) and informed Claimant that she would have to make up the difference from other sources.
13. To facilitate the covered call writing strategy, Respondent Walsh had Claimant open two

separate Merrill Lynch accounts. The first was a standard brokerage account, and the second was a Merrill Lynch Unlimited Advantage Account, referred to at the hearing as a MLUA account. The MLUA account had the feature of permitting unlimited trades for a minimal, flat, annual fee. Shortly after opening the MLUA account, Claimant called Respondent Walsh and objected to a commission charge for a transaction that Claimant stated was not in order, based on her MLUA agreement.

14. Respondent Walsh structured Claimant's portfolio with approximately 60 percent in high-grade equities and 40 percent in cash, fixed income securities and other securities such as mutual funds.

15. During the period of time that Claimant maintained her account with Merrill Lynch, the combined accounts suffered out of pocket losses of \$15,514.00. Of this amount, however, \$8,054.00 was attributable to the decline of value of mutual funds that Claimant had purchased elsewhere, and transferred into the Merrill Lynch brokerage account and \$4,565.00 was attributable to fees incurred in the MLUA account. Thus the securities, including bonds, equities, options and mutual funds recommended by Respondent Walsh, declined in value by \$2,895.00 over the 31 months Claimant maintained her accounts at Merrill Lynch.

16. During the period that Claimant maintained her accounts at Merrill Lynch there was a general, overall decline in the market, and the market was categorized as a Bear Market.

17. The evidence supports a finding that the nature of securities and the specific securities that Mr. Walsh selected for inclusion in Claimant's Merrill Lynch accounts were not unsuitable, and performed extremely well during an adverse market period, and the Panel so finds.

18. No significant loss, if any at all, to the value of Claimant's Merrill Lynch accounts was attributable to the covered call writing strategy implemented by Respondent Walsh. The evidence supports a finding that, in and of itself, the covered call strategy implemented by Respondent Walsh was not unsuitable for Claimant, and the Panel so finds.

19. Claimant asserts that the covered call writing strategy implemented by Respondents was, in and of itself, too complex for a person with Claimant's degree of dyslexia to understand without extra assistance. In support of its contention, Claimant cites to Section III of Respondent Merrill Lynch's Compliance Manual entitled RECOMMENDATIONS AND DEALING WITH CLIENTS, which, in pertinent part, provides:

"SUITABILITY, RECOMMENDATIONS AND RESEARCH OPINIONS

You must have a reasonable basis for believing that a recommendation is suitable. Know the client, know the product, and consider factors, including the client's

- financial situation and objectives,
- legal and other restrictions, and
- ability to understand and sustain the risk."

The degree of risk may reflect the nature of the investment itself (e.g., leverage) and its

market, or factors such as concentrations or margins. Since the analysis must be applied to each transaction for each client, "wholesale" recommendations are not appropriate."

20. Claimant contends that her dyslexia, when combined with Respondents' failure to adequately provide a means by which she could understand what was happening in her account, led her to believe that the value of her account and the earnings in her account were higher than what they actually were. As a result, Claimant instituted a policy of spending that she would not have instituted, had she known the correct status of her account and its ability to generate income.

21. The evidence supports a finding, and the Panel so finds that the sole reason that Claimant's Merrill Lynch accounts declined in value was the Claimants overspending. Claimant's overspending was the direct cause of a drawdown of funds in the account, the result of which was the need to liquidate securities in the account, and the inability of the lowered value account to generate a sufficient amount of funds to sustain Claimant's overspending. The Panel so finds.

22. Claimant contends that Respondents were responsible for her overspending, because they implemented a strategy too complex for her to understand, and led her to believe that her account was in a better position than it actually was.

23. Both parties presented expert witness that addressed the issue of dyslexia. Neither expert witness, however, actually examined Claimant.

24. Claimant's witness, Dr. Baggio, relying on prior medical reports and testing of Claimant, testified to the fact of Claimant's dyslexia, but did not address the degree of her individual disability, nor the precise way in which Claimant was affected by her disability. Dr. Baggio described dyslexia and explained the broad scope of conditions that fall into the category of dyslexia.

25. Respondent's expert witness, Dr. Malamut, testified as to how dyslexia patients learn to deal with their disability by developing coping mechanisms. Dr. Malamut stated that there are many methods that help dyslexics understand, among which are time, repetition, and multiple format presentations. Dr. Malamut cited Respondent's multi-format monthly statement as an example, pointing to data that was presented in bar graph, pie chart and columnar format.

26. The Panel notes that the Merrill Lynch account statement set forth the current value of Claimant's combined accounts in large, bold print, and that was the only item on a single line in a very prominent place in the upper quarter of the first page of each statement. Thus, all Claimant would have to do to know the value of her portfolio each month would be to read this single entry on the statement.

27. While both experts provided information that was helpful to the Panel in understanding Claimant's disability, the Panel gave greater weight to the testimony of Dr. Malamut, in that her testimony addressed the specifics of Respondent's monthly statement, and how a person with dyslexia would develop methods to understand the contents of the statement.

28. In response to Claimant's contention that she was unable to understand what was happening in her account, Respondent Walsh, testified to having an extensive number of meetings with Claimant (as many as 15 meetings). Walsh testified that at the meetings he would explain to Claimant what was happening in her accounts. In addition, he stated that he would also answer Claimant's questions and explain what was happening in her accounts during the course of numerous telephone calls that occurred during the period that Claimant maintained her Merrill Lynch accounts.

29. Respondent Walsh testified that over the course of two years there were approximately 15 occasions when he warned Claimant about her withdrawals from her account. He recalled occasions when he specifically told Claimant that she would have to stop withdrawing money from her account, and that if she needed extra income she would have to get it from other sources. He suggested that she sell some of her art collections. Mr. Walsh advised Claimant that if she kept over-spending, she would cause the value of her portfolio to decline, and this would impair its ability to earn income. Mr. Walsh testified that when he told this to Claimant, he believed that she understood what he was telling her, and that he based his belief on the responses that he received from Claimant during the conversations. The Panel gives great weight to Mr. Walsh's testimony.

30. The overwhelming weight of the credible evidence provided by the parties during this arbitration supports a finding that Mr. Walsh made every possible attempt to accommodate Claimant's dyslexia, and did all that he could to help Claimant to understand that if she continued overspending, she would imperil the value of her portfolio, and the Panel so finds.

31. The evidence supports a finding that Respondents went to more than adequate means to know their client and that their recommendation and implementation of a covered call writing strategy for Claimant was not unsuitable, and the Panel so finds.

32. In light of the fact that the current monthly value of her combined Merrill Lynch accounts could be readily ascertained by reading a simple, single number on her statement; in light of the testimony of Respondent Walsh as to his advising Claimant that she was spending too much money from the account; in light of Claimant's ability to understand other matters, as demonstrated by evidence presented at the hearing; in light of the fact that Claimant's Merrill Lynch statements were being sent to others whom Claimant could have asked for help; in light of the fact that Claimant was able to notice a commission charge on the MLUA account, and told Respondent Walsh to cancel the charge based on the MLUA agreement; in light of the testimony of Dr. Malamut; in light of Claimant's life experience, as set forth on her resumes; in light of her academic achievements and capabilities; and in light of the weight attributed by the Panel to all of the evidence presented at the hearing, the Panel has serious reservations about the credibility of Claimant's testimony that she was misled into believing that the status of her account was something other than it actually was, that she did not understand what the status of her account was, or that she could not understand what the status of her account was..

33. The Panel finds that, with the exception of the \$15,514.00 out of pocket loss, for which Respondents are not responsible, the only cause of the diminution of value of Claimant's account

was Claimant's failure to limit her spending.

34. The Panel finds that the evidence presented at the hearing did not support an allegation of fraud, misrepresentation, or intent to deceive by Respondents.

35. Claimant withdrew all claims for relief under the provisions of the Americans with Disabilities Act, and the Panel makes no rulings or findings under this Act.

36. Claimant's Statement of Claim, as against both Respondent Merrill Lynch and Respondent, Patrick J. Walsh is dismissed in its entirety, and with prejudice.

37. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Walsh's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Walsh must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

38. The Court should be advised that the Panel bases its recommendation on the following finding:

1) The claim, allegation, or information is clearly erroneous in that: a) Claimant has not proven the allegation against Respondent, Walsh; b) The Panel has determined that Respondent, Walsh went to more than adequate means to know his client, and c) The overwhelming weight of the credible evidence provided by the parties during this arbitration supports a finding that Mr. Walsh made every possible attempt to accommodate Claimant's dyslexia, and did all that he could to help Claimant to understand that if she continued overspending, she would imperil the value of her portfolio.

38. Respondents' request for costs and attorneys' fees is dismissed in its entirety and with prejudice.

39. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below.

40. Any and all relief not specifically addressed herein, including punitive and treble damages, is denied in its entirety.

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 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	= \$ 2,250.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 4,000.00</u>
Total Member Fees	= \$ 7,000.00

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 a single arbitrator @ \$ 450 = \$ 450.00
Pre-hearing conference: April 23, 2004 1 session

Two (2) Pre-hearing sessions with Panel @ \$ 1,200 = \$ 2,400.00
Pre-hearing conference: December 29, 2003 1 session
September 10, 2004 1 session

Twenty-Seven (27) Hearing sessions @ \$ 1,200 = \$ 32,400.00
Hearing Dates: June 2, 2003 2 sessions
June 3, 2003 2 sessions
June 4, 2003 2 sessions
June 5, 2003 2 sessions
June 6, 2003 2 sessions
June 7, 2003 2 sessions
August 26, 2003 2 sessions
August 27, 2003 2 sessions
August 30, 2003 2 sessions
November 1, 2004 2 sessions
November 2, 2004 2 sessions
December 20, 2004 2 sessions
December 21, 2004 2 sessions
January 3, 2005 2 sessions
January 4, 2005 3 sessions

Total Forum Fees = \$35,250.00

1. The Panel has assessed \$ 17,625.00 of the forum fees to Claimant.
2. The Panel has assessed \$ 17,625.00 of the forum fees 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 not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimant requested tape duplication = \$ 225.00

SEE SUMMARY

Claimant is assessed and shall pay:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 17,625.00
<u>Administrative Costs</u>	<u>= \$ 225.00</u>
Total Fees	= \$ 18,225.00
<u>Less payments</u>	<u>= \$ 1,800.00</u>
Balance Due NASD Dispute Resolution	= \$ 16,425.00

Respondent, Merrill Lynch, is assessed and shall pay:

Member Fees	= \$ 7,000.00
<u>Forum Fees</u>	<u>= \$ 17,625.00</u>
Total Fees	= \$ 24,625.00
<u>Less payments</u>	<u>= \$ 7,000.00</u>
Balance Due NASD Dispute Resolution	= \$ 17,625.00

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

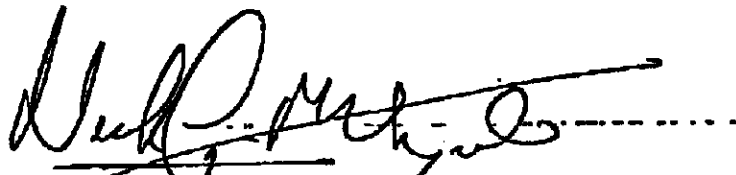
ARBITRATION PANEL

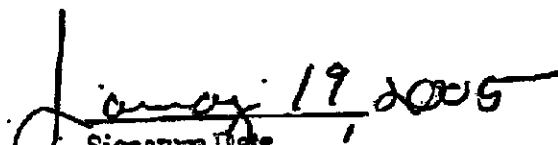
Nickolas F. Monteforte, Esq.	-	Public Arbitrator, Presiding Chairperson
Abraham Harry Bunis	-	Public Arbitrator, Panelist
James M. Waters	-	Non-Public Arbitrator, Panelist

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Concurring Arbitrators' Signatures


Nicholas P. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson


Signature Date January 19, 2005

Abraham Harry Bunis
Public Arbitrator, Panelist

Signature Date

James M. Waters
Non-Public Arbitrator, Panelist

Signature Date

January 24, 2005
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

Nickolas F. Momeforte, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Abraham Harry Bania

Abraham Harry Bania
Public Arbitrator, Panelist

1/24/05
Signature Date

James M. Waters
Non-Public Arbitrator, Panelist

Signature Date

1/24/05
Date of Service (For NASD Dispute Resolution office use only)

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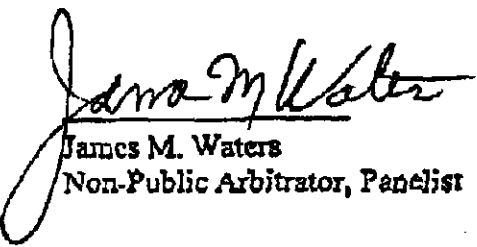
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Nickolas F. Monteforte, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Abraham Harry Bunis
Public Arbitrator, Panelist

Signature Date


James M. Waters
Non-Public Arbitrator, Panelist

1/24/05
Signature Date

January 24, 2005
Date of Service (For NASD Dispute Resolution office use only)