
Stipulated Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Names of the Claimants

Willie Smith, Jr., TTEE
Willie Smith, Jr., IRRA

Case Number: 03-04426

Names of the Respondents

Merrill Lynch, Pierce, Fenner & Smith Incorporated
James David Gardner

Hearing Site: Little Rock, Arkansas

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

REPRESENTATION OF PARTIES

For Willie Smith, Jr., TTEE and Willie Smith, Jr., IRRA, hereinafter collectively referred to as "Claimants":
Grant E. Fortson, Esq., Lax, Vaughan, Fortson, McKenzie & Rowe, Little Rock, Arkansas.

For Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill") and James David Gardner
("Gardner"), hereinafter collectively referred to as "Respondents": Bruce W. Day, Esq. and Bill P. Guest,
Esq., Day Edwards Propester & Christensen, P.C., Oklahoma City, Oklahoma.

CASE INFORMATION

Statement of Claim filed on or about: June 17, 2003.

Claimants signed the Uniform Submission Agreements: June 17, 2003.

Amended Statement of Claim filed by Claimants on or about: January 20, 2004.

Statement of Answer filed by Respondents on or about: August 19, 2003.

Respondent Merrill signed the Uniform Submission Agreement: July 10, 2003.

Respondent Gardner signed the Uniform Submission Agreement: August 14, 2003.

CASE SUMMARY

Claimant asserted the following causes of action: unsuitability; common law fraud (misrepresentations and omissions); constructive fraud; negligence; breach of fiduciary duty; failure to supervise; and violation of Arkansas Securities Act. The causes of action relate to the reallocation of investments in an unspecified variable annuity, as well as the purchase of various internet common stocks, including, but not limited to, CGMI and Internet Capital Group, Inc.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants failed to state a claim upon which relief can be granted; Claimants' claims are barred by the applicable statute of limitations; Claimants' claims are barred by the doctrines of waiver, estoppel, ratification and laches; Claimants' claims are barred because Respondents had a good faith basis for their

recommendations, if any; Claimants' claims are barred because the risks inherent in the investments at issue were fully disclosed or known to Claimants and Claimants assumed those risks; Claimants' claims are barred because Claimants failed to mitigate their damages; Claimants' claims are barred because Claimants suffered no damages by reason of the acts complained of in the Statement of Claim, as amended; Claimants' alleged damages, if any, were proximately caused by Claimants' own conduct; and Claimants do not have a private right of action for alleged violation of NASD rules. See *Silverstein v. Merrill Lynch*, 618 F.Supp. 436 (S.D.N.Y. 1985).

RELIEF REQUESTED

Claimants requested the following relief: actual damages in excess of \$300,000.00, punitive damages, attorneys' fees, interest, costs, and all other just and proper relief.

Respondents requested dismissal of Claimant's claim, assessment of costs and fees against Claimants, and expungement from Respondent Gardner's NASD Central Registration Depository ("CRD") record of all references to these proceedings.

OTHER ISSUES CONSIDERED AND DECIDED

On or about July 30, 2004, the parties filed with NASD Dispute Resolution a notice of settlement.

On or about August 17, 2004, the parties filed with NASD Dispute Resolution a proposed Stipulated Award for review and approval by the Panel.

In furtherance of the parties' agreement concerning the resolution of this matter, Claimants and Respondents requested an Order from the Panel recommending expungement from Respondent Gardner's NASD CRD record of all references to these proceedings.

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

AWARD

After considering the pleadings and the stipulation of the parties, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The parties have agreed to settle this matter for a sum certain to be paid by Respondent Merrill;
2. Claimants' claims are hereby dismissed in their entirety, with prejudice, and all other requests for relief are denied;
3. All parties are to bear their own attorneys' fees;
4. Discovery in this matter has established grounds for withdrawal of the claims in the Statement of Claim against Respondent Gardner, as being without sufficient factual basis;

5. Settlement and expungement of reference to these proceedings from the registration records of Respondent Gardner maintained by the NASD CRD would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements;
6. Accordingly, the Panel recommends that all references to the above-captioned arbitration be expunged from Respondent Gardner's registration records maintained by the NASD CRD, with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Gardner must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

FEES

Pursuant to the NASD Code of Arbitration Procedure (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
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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 firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Respondent Merrill is a member firm and a party:

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

Adjournment Fees

No adjournments were requested in this matter.

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 in this matter.

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 during this proceeding.

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with the Panel @ \$1,125.00/session	= \$1,125.00
Pre-hearing conference: March 9, 2004 1 session	
<hr/> Total Forum Fees	<hr/> = \$1,125.00

Pursuant to the agreement of the parties, the Panel has assessed forum fees as follows:

\$562.50 to Claimants, jointly and severally
\$562.50 to Respondent Merrill

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.

No administrative costs were incurred during this proceeding.

Fee Summary

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 562.50
Retained Hearing Session Deposit pursuant to Rule 10332(f) of the Code	= \$ 562.50
<hr/> Total Fees	<hr/> = \$1,425.00
Less payments	= \$1,425.00
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 0.00

Respondent Merrill is solely liable for:

Member Fees	= \$5,200.00
Forum Fees	= \$ 562.50
<hr/> Total Fees	<hr/> = \$5,762.50
Less payments	= \$5,200.00
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 562.50

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

ARBITRATION PANEL

Eric Spencer Buchanan, Esq.	-	Public Arbitrator, Presiding Chairperson
K. Steve Kimball, CFA	-	Public Arbitrator
Clifton J. Ladd	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/
Eric Spencer Buchanan, Esq.
Public Arbitrator, Presiding Chairperson

September 22, 2004
Signature Date

/s/
K. Steve Kimball, CFA
Public Arbitrator

September 18, 2004
Signature Date

/s/
Clifton J. Ladd
Non-Public Arbitrator

September 22, 2004
Signature Date

September 27, 2004
Date of Service (For NASD Dispute Resolution office use only)

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ARBITRATION PANEL

Eric Spencer Buchanan, Esq.
K. Steve Kimball, CFA
Clifton J. Ladd

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Public Arbitrator, Presiding Chairperson
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures


Eric Spencer Buchanan, Esq.
Public Arbitrator, Presiding Chairperson

22 Sept 04
Signature Date

K. Steve Kimball, CFA
Public Arbitrator

Signature Date

Clifton J. Ladd
Non-Public Arbitrator

Signature Date

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

ARBITRATION PANEL

Eric Spencer Buchanan, Esq.
K. Steve Kimball, CFA
Clifton J. Ladd

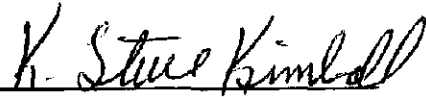
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Public Arbitrator, Presiding Chairperson
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures

Eric Spencer Buchanan, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date



K. Steve Kimball, CFA
Public Arbitrator

9/18/04

Signature Date

Clifton J. Ladd
Non-Public Arbitrator

Signature Date

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

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ARBITRATION PANEL

Eric Spencer Buchanan, Esq.	-	Public Arbitrator, Presiding Chairperson
K. Steve Kimball, CFA	-	Public Arbitrator
Clifton J. Ladd	-	Non-Public Arbitrator

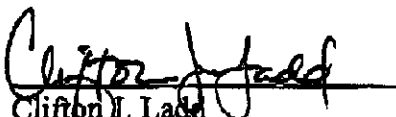
Concurring Arbitrators' Signatures

Eric Spencer Buchanan, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

K. Steve Kimball, CFA
Public Arbitrator

Signature Date


Clifton J. Ladd
Non-Public Arbitrator

09/22/04
Signature Date

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