

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Amir Heshmatpour and Kathy Heshmatpour, Claimants v. Merrill Lynch, Pierce, Fenner & Smith Incorporated and Nicholas A. DeNucci, Respondents

Case Number: 03-04709

Hearing Site: Seattle, Washington

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

REPRESENTATION OF PARTIES

For Claimants:

Bruce D. Oaks, Esq.
Richard B. Fosher, Esq.
Oakes & Fosher, LLC
St. Louis, Missouri

For Respondents:

Brian D. Donnelly, Esq.
Dominick F. Evangelista,
Esq.
Bressler, Amery & Ross, P.C.
Florham Park, New Jersey

CASE INFORMATION

Statement of Claim filed: June 23, 2003

Amended Statement of Claim filed: June 16, 2003

Claimant Amir Heshmatpour's Uniform Submission Agreement signed: June 18, 2003

Claimant Kathy Heshmatpour's Uniform Submission Agreement signed: June 17, 2003

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Nicholas A. DeNucci: September 2, 2003

Joint Amended Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Nicholas A. DeNucci: June 28, 2004

Respondent Nicholas A. DeNucci's Uniform Submission Agreement signed: November 25, 2003

Respondent Merrill Lynch, Pierce, Fenner & Smith Inc.'s Uniform Submission Agreement signed: November 26, 2003

CASE SUMMARY

Claimants' Statement of Claim alleged churning, unsuitability, issuance of intentionally false and misleading research reports, breach of fiduciary duty, violation of federal securities laws, violation of the Washington Securities Act, common law fraud, unjust enrichment, negligence, and negligent supervision. Claimants' allegations involved transactions in their margin accounts and in stocks such as Amazon.com, Go2.net, Xoom.com, TheGlobe.com, Net2phone, and Infospace.

Claimants' Amended Statement of Claim reasserted the allegations contained in Claimants' Statement of Claim and added an allegation of failure to supervise. Claimants' allegations involved transactions in their margin accounts and in stocks such as Amazon.com, America On-Line, Athome.com, Broadcom Corp, CMGI, Inc., Converse Technology, Corvis Corp, Computer Sciences Corp, Dell Inc., EMC Corp, Globalnet Corp, Go2Net.com, Infospace, Inktomi, Intel Corp, Internet Holders, Intuit Inc., Lucent Technologies Inc., Metromedia Fiber Networks, MRV Communications, Microsoft Corp, Net2phone Inc., Netscape Communications, Network Appliance Corp, Openwave Systems Inc, Oracle Corp, RealNetworks, RF Micro Devices Inc, TheGlobe.com, Yahoo, and Zoom.com.

Respondents' Answer and Amended Answer denied the allegations of wrongdoing set forth in Claimants' Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimants' Statement of Claim requested unspecified compensatory damages, return of the commissions, fees and margin interest that were charged to Claimants' account, \$50,000,000.00 in punitive damages, pre- and post-judgment interest, costs, and attorney's fees.

Claimants' Amended Statement of Claim requested \$2,650,517.06 in compensatory damages, \$50,000,000.00 in punitive damages, pre-and post-judgment interest, reimbursement of filing and forum fees, costs, and attorney's fees.

Respondents' Answer and Amended Answer requested dismissal of Claimants' Statement of Claim in its entirety and assessment of the costs of the arbitration against Claimants.

OTHER ISSUES CONSIDERED AND DECIDED

On May 19, 2004, Claimants filed a Motion to File First Amended Statement of Claim pursuant to NASD Code of Arbitration Procedure Rule 10328(c). On June 2, 2004, Respondents filed an Opposition to Claimants' Motion for Leave to Amend the Statement of Claim. On June 3, 2004, Claimants filed a Reply to Respondents' Opposition to Claimants' Motion to File First Amended Statement of Claim. On June 16, 2004, the Panel heard oral argument from the parties regarding Claimants' motion and granted the motion on that date.

On June 28, 2004, Respondents filed an Amended Answer. In accordance with Rule 10328(c), the Panel approved the filing of Respondents' Amended Answer.

On August 24, 2004, Respondents filed a Motion in Limine seeking to exclude certain investigative reports and claims made by the Securities and Exchange Commission ("SEC") and the New York State Attorney General relating to alleged fraud by Respondent Merrill Lynch, Pierce, Fenner & Smith, Incorporated in connection with research reports written regarding securities issued by certain Merrill Lynch, Pierce, Fenner & Smith, Incorporated underwriting clients. The Panel granted the Motion in Limine with respect to the investigation reports and the charging documents issued by the SEC and the New York State Attorney General.

- On July 9, 2004, Respondents filed a Motion to Dismiss Claimants' First Amended Statement of Claim for failure to comply with the Chair's March 30, 2004 discovery Order, or, in the alternative, Second Motion to Compel. On July 13, 2004, Claimants filed a Response to Respondents' Motion to Dismiss/Motion to Compel.
- On July 9, 2004, Claimants filed a Motion for Adverse Inference and Other Sanctions. On July 13, 2004, Respondents filed a Response to Claimants' Motion for Adverse Inference and Other Sanctions.
- On July 12, 2004, Respondents filed a Motion to Dismiss Claimants' claims relating to Infospace. On July 13, 2004, Claimants filed a Response to Respondents' Motion to Dismiss Claimants' claims relating to Infospace.

On July 15, 2004, the Panel issued an Order regarding the discovery matters that were raised in the parties' July 2004 motions but deferred consideration of Respondents' Motions to Dismiss and Claimants' Motion for Adverse Inference and Other Sanctions until the evidentiary hearing.

- (a) Respondents' Motion to Dismiss: During the August 2004 segment of the hearing, the Panel granted Respondents' Motion to Dismiss unless Claimants clearly and unequivocally withdrew from the class action pending against Merrill Lynch with respect to its Infospace research and evidenced their withdrawal by submitting a written affidavit to the court hearing the case and to class counsel no later than the close of Claimants'

case. Claimants were also instructed to provide a copy of the affidavits to NASD for transmission to the Panel. On September 24, 2004, Claimants signed such affidavits, which were forwarded to class counsel on October 4, 2004 and to NASD on October 25, 2004. The affidavits were transmitted to the Panel on November 1, 2004, and the Panel rules that Claimants' filing of such affidavits renders moot Respondents' Motion to Dismiss.

- (b) Claimants' Motion for Adverse Inference and Other Sanctions: Claimants alleged that Respondents failed to produce certain documents and to provide information. Respondents made similar objections to Claimants' alleged failure to produce documents. The Panel reserved decision regarding Claimants' motion until the completion of the hearing. The Panel rules that both Claimants and Respondents are culpable with respect to discovery but, in light of the ultimate substantive result of this arbitration proceeding, it denies all motions before it that relate to discovery sanctions.

The parties and the Panel agreed that the official record of the arbitration hearing would be provided by the court reporter and that consequently, the arbitration hearing would not be taped.

The parties 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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

The Panel has concluded that the testimony of Amir Heshmatpour was not credible and that many of the losses suffered by Claimants were the result of Claimant Amir Heshmatpour's own conduct. Thus, no compensatory damages are awarded to Claimants. The Panel further found that the conduct of Nicholas A. DeNucci contributed somewhat to Claimants' losses and was such that all allocable costs of the proceeding, including forum fees, should be assessed to Respondents jointly and severally. Accordingly:

- 1) Claimants' claims are denied in their entirety.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) 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 = \$ 600.00

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	= \$ 3,750.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 5,500.00</u>
Total Member Fees	= \$10,000.00

Adjournment Fees

The following adjournment fees are assessed:

July 20-24, 2004, adjournment requested by Respondents = \$ 1,200.00

The Panel assessed the adjournment fee to Respondents Merrill Lynch, Pierce, Fenner & Smith, Incorporated and Nicholas A. DeNucci jointly and severally.

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:

Two (2) pre-hearing conference sessions with a single arbitrator @ \$ 450.00/session = \$ 900.00

Pre-hearing conferences:	March 26, 2004	1 session
	March 29, 2004	1 session

Four (4) pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$ 8,400.00

Pre-hearing conferences:	December 8, 2003	1 session
	June 16, 2004	1 session
	July 15, 2004	1 session
	July 27, 2004	1 session
	December 17, 2004	1 session
	January 6, 2005	1 session
	February 28, 2005	1 session

NASD Dispute Resolution
Arbitration No. 03-04709
Award Page 6 of 7

Fifteen (15) hearing sessions @ \$1,200.00/session = \$ 18,000.00

Hearings:	August 24, 2004	2 sessions
	August 25, 2004	2 sessions
	August 26, 2004	2 sessions
	August 27, 2004	2 sessions
	April 25, 2005	2 sessions
	April 26, 2005	2 sessions
	April 27, 2005	3 sessions

Total Forum Fees = \$ 27,300.00

The Panel assessed \$27,300.00 of the forum fees to Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Nicholas A. DeNucci.

Fee Summary

1. Claimants Amir Heshmatpour and Kathy Heshmatpour are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 600.00
<u>Less payments</u>	= \$(1,800.00)
Refund Due Claimants	= \$(1,200.00)

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

Member Fees	= \$ 10,000.00
<u>Less payments</u>	= \$(10,000.00)
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Nicholas A. DeNucci are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 27,300.00
<u>Adjournment Fee</u>	= \$ 1,200.00
Total Fees	= \$ 28,500.00
<u>Less Payments by Merrill Lynch, Pierce, Fenner & Smith Incorporated</u>	= \$ (1,200.00)
Balance Due NASD Dispute Resolution	= \$ 27,300.00

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.

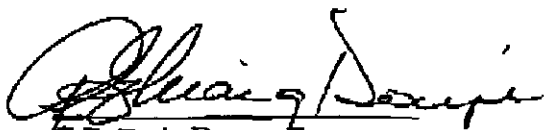
ARBITRATION PANEL

G.E. Craig Doupe
Bernard F. Vail
Clarence F. Roed

-
-
-

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures



G.E. Craig Doupe, Esq.
Chair, Public Arbitrator

5/4/05
Signature Date

Bernard F. Vail
Public Arbitrator

Signature Date

Clarence F. Roed
Non-Public Arbitrator

Signature Date

5/5/05
Date of Service

NASD Dispute Resolution
Arbitration No. 03-04709
Award Page 7 of 7

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G.E. Craig Doupe
Bernard F. Vail
Clarence F. Roed

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Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures

G.E. Craig Doupe, Esq.
Chair, Public Arbitrator

Signature Date

Bernard F. Vail
Bernard F. Vail
Public Arbitrator

May 4, 2005
Signature Date

Clarence F. Roed
Non-Public Arbitrator

Signature Date

5/5/05
Date of Service

NASD Dispute Resolution
Arbitration No. 03-04709
Award Page 7 of 7

ARBITRATION PANEL

<i>G.E. Craig Doupe</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Bernard F. Vail</i>	-	<i>Public Arbitrator</i>
<i>Clarence F. Roed</i>	-	<i>Non-Public Arbitrator</i>

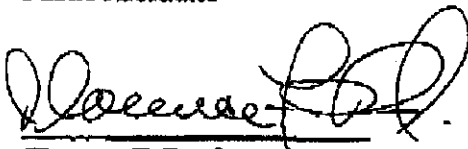
Concurring Arbitrators' Signatures

G.E. Craig Doupe, Esq.
Chair, Public Arbitrator

Signature Date

Bernard F. Vail
Public Arbitrator

Signature Date



Clarence F. Roed
Non-Public Arbitrator

May 3 '05
Signature Date

5/5/5
Date of Service