

Stipulated Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Frank and Cynthia Wittosch, (Claimants) v. Merrill Lynch, Pierce, Fenner & Smith Incorporated and David P. Conrad, (Respondents)

Case Number: 03-05142

Hearing Site: Chicago, IL

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

REPRESENTATION OF PARTIES

Claimants, Frank and Cynthia Wittosch (hereinafter collectively referred to as "Claimants"): Andrew Stoltmann, Maddux, Hargett & Caruso, P.C., Chicago, IL.

Respondents, Merrill Lynch, Pierce, Fenner & Smith Incorporated and David P. Conrad (hereinafter collectively referred to as "Respondents"): Eunice E. Lee, Bingham McCutchen LLP, Boston, MA.

CASE INFORMATION

Statement of Claim filed on or about: June 25, 2003

Claimants Frank and Cynthia Wittosch signed Uniform Submission Agreements: June 25, 2003

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

Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and David P. Conrad signed Uniform Submission Agreements: August 8, 2003

CASE SUMMARY

Claimant(s) asserted the following causes of action: unsuitable investments, negligence, misrepresentations and omissions, failure to supervise, violation of the Illinois Securities Law of 1953, violations of NASD Conduct Rules, breach of contract, constructive fraud/breach of fiduciary duty and common law fraud.

Unless specifically admitted in its Answer, Respondent(s) denied the allegations of wrongdoing set forth in the Statement of Claim and asserted the following defenses:

Claimants fail to state a claim upon which relief can be granted; Claimants suffered no damages resulting from any acts or omissions of the Respondents; Respondents are not liable to Claimants in any amount because, at all times relevant herein, Respondents acted properly and in good faith with respect to Claimants' account; under the terms of the customer agreements executed by Claimants, all substantive claims raised by Claimant with respect to their account are to be determined under New York law, which bars their claims under Illinois law or the law of any state other than New York; Claimants ratified Respondents' conduct with respect to each and every purchase or sale; All risks inherent in the investments at issue were fully disclosed and/or known to Claimants. Moreover, any losses incurred by Claimants were the direct result of adverse economic or market conditions and/or the acts of persons not under Respondents' control; Claimants failed to mitigate their damages; Claimants directed, approved and/or authorized each and every transaction for their account and/or ratified, accepted, acquiesced and confirmed in all respects such transactions. As such, Claimants' claims are barred by the equitable doctrines of estoppel, laches, ratification, and waiver; Claimants' allegations of securities fraud under federal and/or state law, including allegations that Merrill Lynch or its agents violated the Illinois Securities Laws, are barred by the applicable statutes of limitations; At all relevant times, Merrill Lynch maintained an adequate and reasonable system of supervision and control over its employees, and at all relevant times acted in good faith and did not at any time, directly or indirectly, induce any act or acts constituting a violation or cause of action, thus, Merrill Lynch is not subject either to "control person" or *respondeat superior* liability; Claimants are not entitled to an award of attorneys' fees, punitive damages, interest or the costs of this proceeding; Claimants' alleged losses were proximately caused by their own conduct, negligence, comparative or contributory negligence, and therefore, Claimants are precluded from recovery; All transactions upon which Claimants base their alleged claims were conducted in accordance with all applicable rules and regulations and in compliance with all applicable provisions of state and federal law; there is no legal basis for a damage claim based on the theory that an investor decided not to sell a stock in reliance on the statement of another. The United States Supreme Court has expressly so ruled; any claims based on the Claimants' decisions to hold certain securities, whether or not in reliance on Respondents' advice, must therefore be dismissed; Claimants failed to use the requisite due diligence in monitoring, trading, managing, and handling their account.

RELIEF REQUESTED

Claimants requested: compensatory damages of \$135,399; attorneys fees and costs of arbitration, including but not limited to expert witness fees, expenses and accounting fees as specifically authorized under the IL Securities Law of 1953; lost interest at the statutory rate of 10% annually, as authorized under the IL Securities Law of 1953; pre and post-award interest at the statutory rate; and punitive damages.

Respondents requested dismissal of the Statement of Claim in its entirety. In furtherance of the parties' resolution of this matter, Respondents seek an Order recommending expungement of the CRD registration records of Respondent David P. Conrad of all reference to these proceedings.

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 and stipulation of the parties, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination and find as follows:

1. The parties have agreed to settle this matter for a sum certain to be paid by Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated.
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. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent David P. Conrad'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 Conrad must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

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 that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch, as a party, is assessed the following fees:

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

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

Parties requested adjournment of the November 16 - 20, 2004 hearing dates in favor of mediation
= \$ 1,125.00 (waived)

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 Panel at \$1,125.00	= \$1,125.00
Pre-hearing conference: April 27, 2004 1 session	
Total Forum Fees	= \$1,125.00

The Panel assessed \$562.50 of the forum fees to Frank and Cynthia Wittosch and assessed \$562.50 of the forum fees jointly and severally to Merrill Lynch Pierce Fenner & Smith, Inc., and David Paul Conrad.

FEE SUMMARY

Claimants Frank and Cynthia Wittosch are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 562.50
Total Fees	= \$ 967.50
Less payments	= \$ 1,425.00
Less transfer of funds to mediation balance	= \$ 125.00
Refund Due from NASD Dispute Resolution	= \$ 437.50

Respondent Merrill Lynch Pierce Fenner & Smith, Inc., is solely liable for:

Member Fees	= \$ 5,200.00
Total Fees	= \$ 5,200.00
Less payments	= \$ 5,637.50
Refund Due from NASD Dispute Resolution	= \$ 437.50

Respondents Merrill Lynch Pierce Fenner & Smith, Inc., and David P. Conrad are jointly and severally liable for:

Forum Fees	= \$ 562.50
Total Fees	= \$ 562.50
Less payments	= \$ 562.50
Balance Due NASD Dispute Resolution	= \$ 0.00

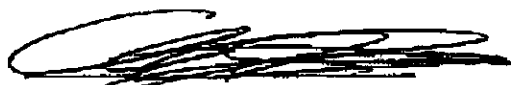
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

NASD Dispute Resolution
Arbitration No. 03-05142
Award Page 6 of 7

Parties' Signatures

By and through their undersigned counsel, the parties stipulate to the entry of this Stipulated Award.

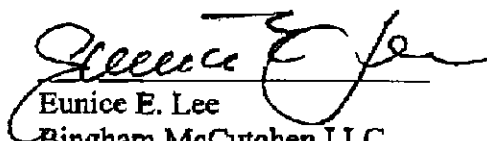
Claimants Frank and Cynthia Wittosch
By their attorneys,



Andrew Stoltmann
Maddux, Hargett & Caruso, P.C.
10 South LaSalle Street, Suite 3300
Chicago, Illinois 60603-1002

1/21/05
Signature Date

Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and David P. Conrad
By their attorneys,



Eunice E. Lee
Bingham McCutchen LLC
150 Federal Street
Boston, MA 02110

1/24/05
Signature Date

ARBITRATION PANEL

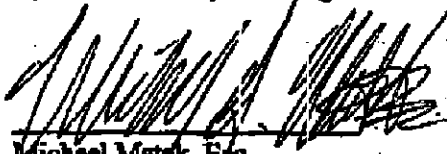
Leonard Nelson, Esq.	-	Public Arbitrator, Presiding Chair
Michael Matek, Esq.	-	Public Arbitrator
Frank Samuelsohn	-	Industry Arbitrator

Concurring Arbitrators' Signatures

Dissent's

Leonard Nelson, Esq.
Public Arbitrator, Presiding Chair

Signature Date



Michael Matek, Esq.
Public Arbitrator

3-30-05

Signature Date

Frank Samuelsohn
Industry Arbitrator

Signature Date

Date of Service (For NASD office use only)

ARBITRATION PANEL

Leonard Nelson, Esq.	-	Public Arbitrator, Presiding Chair
Michael Matek, Esq.	-	Public Arbitrator
Frank Samuelsohn	-	Industry Arbitrator

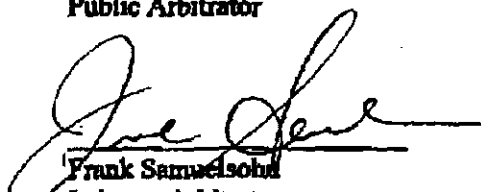
Concurring Arbitrators' Signatures

Leonard Nelson, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Michael Matek, Esq.
Public Arbitrator

Signature Date



Frank Samuelsohn
Industry Arbitrator

3/29/05

Signature Date

Date of Service (For NASD office use only)