

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Claimant

David L. Freibert

v.

04-00168

Louisville, Kentucky

Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.,
and Richard Scott Park

Nature of Dispute: Customer v. Member and Associated Person

REPRESENTATION OF PARTIES

David L. Freibert ("**Claimant**") was represented by Wesley A. Gersh, Esq., of Morris, Garlove, Waterman & Johnson, PLLC, Louisville, Kentucky.

Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") and Richard Scott Park ("Park"), hereinafter collectively referred to as ("**Respondents**") were represented by Janet P. Jakubowicz, Esq., of Greenman Doll & McDonald, PLLC, Louisville, Kentucky.

CASE INFORMATION

The Statement of Claim was filed on or about January 10, 2004. The Submission Agreement of Claimant was signed on or about January 9, 2004.

The Statement of Answer was filed jointly by Respondents, Merrill Lynch Pierce Fenner & Smith, Inc., and Richard Scott Park, on or about March 5, 2004. The Submission Agreement of Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., was signed on or about February 20, 2004. The Submission Agreement of Respondent, Richard Scott Park, was signed on or about March 15, 2004.

Respondents filed a Motion to Stay on or about June 4, 2004. Claimant filed a Response in Objection to Respondents' Motion to Stay on or about June 22, 2004. Respondents filed a Reply in Support of their Motion to Stay on or about July 12, 2004.

Respondents filed a Motion and Supporting Memorandum to Dismiss, and in the Alternative, Motion to Stay on or about November 30, 2004. Claimant filed a Response in Objection to Respondents' Motion to Dismiss on or about December 15, 2004. Respondents' filed a Reply Memorandum in Support of their Motion to Dismiss on or about December 27, 2004.

Claimant filed a Motion to Strike Respondents' Response and Grant an Award to Claimant on or about June 17, 2005. Respondents filed a Memorandum in Opposition to Claimant's Motion to Strike on or about June 29, 2005.

Respondents filed a Motion for Summary Judgment on or about July 18, 2005. Claimant filed a Memorandum in Response and Objection to Respondents' Motion for Summary Judgment on or about August 16, 2005. Respondents filed a Memorandum in Support of their Motion for Summary Judgment on or about September 9, 2005.

CASE SUMMARY

Claimant asserted causes of action including the following: breach of fiduciary duty; violation of Kentucky Revised Statute (KRS) 292.320(1)(b); violation of KRS 292.320(2); violation of Section 10b-5 of the 1934 Securities Exchange Act; violation of NASD "Know Your Customer Rule"; control person liability; breach of contract and negligence. Claimant asserted that he opened a line of credit with another investor for a limited liability company, Glencoe, of which both individuals were members. Claimant alleged that both of the individuals were required to open securities accounts of \$300,000 and then pledge those accounts to Merrill Lynch through a Financial Assets Security Agreement ("Security Agreement"), in August 1997, as security for the line of credit granted to Glencoe. After that line of credit was repaid, Claimant alleged that Respondents fraudulently induced him to execute a new Security Agreement, in January 1999, which required him to maintain 115% of the outstanding loan to Glencoe. Claimant asserted that Respondents violated the terms of the 1999 Security Agreement by allowing the other individual to make withdrawals without prior written permission and by without allowing Claimant to do the same. Claimant stated that as a result of the withdrawals and the market downturn, the aggregate value of the securities accounts fell below the 115% requirement and that Claimant was solely forced to add the additional deposits to make of the difference. After which, Claimant asked for the account to be liquidated and as a result he suffered losses.

Respondents denied the allegations set forth in the Statement of Claim and asserted defenses including the following: the Statement of Claim failed to state a claim upon which relief could be granted; the damages allegedly suffered by Claimant were not proximately caused by any act attributable to Merrill Lynch; Claimant's failure to investigate and lack of diligence bar any recovery or damages herein; Claimant's claims, in whole or in part, are time barred; Claimant's claims are barred by the principles of laches, waiver, estoppel and ratification; Claimant lacked standing to assert the claims set forth in the Statement of Claim because Respondents did not owe any fiduciary duties in connection with the 1997 and 1999 Security Agreements; Claimant failed to exercise due diligence and care and otherwise acted in a negligent and reckless manner with respect to the transactions alleged to form the basis of the claims against Respondents and did not rely upon any alleged false or misleading statements or omissions allegedly made by Merrill Lynch or Park; and Respondents are not liable because at all times they acted in good faith and did not directly or

indirectly know of, induce, or in any way participate in the acts, or acts constituting the purported causes of action alleged in the Statement of Claim.

RELIEF REQUESTED

Claimant requested an award of \$750,000 in compensatory damages, plus costs, attorneys' fees, interest and any other relief the panel deemed appropriate.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees. In addition, Respondents requested that the panel order the expungement of this matter from the CRD records of Richard Scott Park.

OTHER ISSUES CONSIDERED & DECIDED

On or about February 2, 2005, the panel denied Respondents' Motion to Stay.

On or about February 24, 2005, the panel denied Respondents' Motion to Dismiss, and in the Alternative, Motion to Stay.

On or about October 13, 2005, the panel denied Respondents' Motion for Summary Judgment.

At the close of Claimant's case-in-chief, Respondents orally made a Motion for a Directed Verdict. The panel granted the Motion for a Directed Verdict as to Respondent, Richard Scott Park, and dismissed all claims asserted against Park with prejudice. The panel denied the Motion for a Directed Verdict for all claims asserted against Respondent, Merrill Lynch Pierce Fenner & Smith, Inc.

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. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with NASD Dispute Resolution ("NASD").

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims, each and all, are denied and dismissed with prejudice in their entirety;
2. The panel recommends the expungement of all reference to the above captioned arbitration from Respondent, Richard Scott Park'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, Richard Scott Park, must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

3. To the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto, are denied with prejudice; and
4. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys' fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain the non-refundable filing fee for each claim:

Initial claim filing fee = \$ 375

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. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	= \$ 2,250
Pre-hearing process fee	= \$ 750
Hearing process fee	= \$ 4,000

Adjournment Fees

Adjournments granted during these proceedings:

July 25-28, 2005 - Adjournment requested by all parties
(Fee assessed 50% to Claimant and 50% to Respondents, jointly and severally) = \$ 1,200

Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing 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) Decision on a discovery-related motion on the papers by the panel x \$600

Respondents submitted one (1) discovery-related motion (Motion to Preclude) = \$ 600

Two (2) Pre-hearing sessions with the Chairperson x \$ 450 = \$ 900

Pre-hearing conference: July 6, 2005 2 sessions

Three (3) Pre-hearing sessions with Panel x \$ 1,200 = \$ 3,600

Pre-hearing conferences: June 4, 2004 1 session

February 11, 2005 1 session

October 10, 2005 1 session

Four (4) Hearing sessions with Panel x \$ 1,200 = \$ 4,800

Hearing Dates: December 15, 2005 2 sessions

December 16, 2005 2 sessions

Total Forum Fees = \$ 9,900

The Arbitration Panel has assessed \$ 4,950 of the forum fees to David L. Freibert.

The Arbitration Panel has assessed \$ 4,950 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

FEE SUMMARY

Claimant, David L. Freibert, is liable for:

Initial Filing Fee	= \$ 375
Adjournment Fee	= \$ 600
Forum Fees	= \$ 4,950
Total Fees	= \$ 5,925
Less payments	= \$ 1,575
Balance Due NASD Dispute Resolution	= \$ 4,350

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

Member Fees	= \$ 7,000
Forum Fees	= \$ 4,950
Total Fees	= \$ 11,950
Less payments	= \$ 7,000
Balance Due NASD Dispute Resolution	= \$ 4,950

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Richard Scott Park, are jointly and severally liable for:

Adjournment Fees	= \$ 600
Total Fees	= \$ 600
Less payments	= \$ 600
Balance Due NASD Dispute Resolution	= \$ 0

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

ARBITRATION PANEL

Earle R. Frost, Jr., Esq. - Public Arbitrator, Presiding Chair
Hugh C. Durbin - Public Arbitrator
David T. Maddux - Non-Public Arbitrator

Concurring Arbitrators:

Earle R. Frost, Jr., Esq.
Public Arbitrator, Presiding Chair

Signature Date

Hugh C. Durbin
Public Arbitrator

Signature Date

David T. Maddux
Non-Public Arbitrator

Signature Date

1/9/06

Date of Service (NASD use only)

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

Member Fees	= \$ 7,000
Forum Fees	= \$ 4,950
Total Fees	= \$ 11,950
Less payments	= \$ 7,000
Balance Due NASD Dispute Resolution	= \$ 4,950

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Richard Scott Park, are jointly and severally liable for:

Adjudgment Fees	= \$	600
Total Fees	= \$	600
Less payments	= \$	600
Balance Due NASD Dispute Resolution	= \$	0

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

ARBITRATION PANEL

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Hugh C. Durbin - Public Arbitrator

David T. Maddux - Non-Public Arbitrator

Concurring Arbitrators:

Earle R. Frost, Jr.
Earle R. Frost, Jr., Esq.
Public Arbitrator, Presiding Chair

January 6, 2005
Signature Date

Hugh C. Durbin
Public Arbitrator

Signature Date

David T. Maddux
Non-Public Arbitrator

Signature: _____ Date: _____

Date of Service (NASD use only)

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

Member Fees	= \$ 7,000
Forum Fees	= \$ 4,950
Total Fees	= \$ 11,950
Less payments	= \$ 7,000
Balance Due NASD Dispute Resolution	= \$ 4,950

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Richard Scott Park, are jointly and severally liable for:

Adjournment Fees	= \$ 600
Total Fees	= \$ 600
Less payments	= \$ 600
Balance Due NASD Dispute Resolution	= \$ 0

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David T. Maddux - Non-Public Arbitrator

Concurring Arbitrators:

Earle R. Frost, Jr., Esq.
Public Arbitrator, Presiding Chair

Hugh C. Durbin
Hugh C. Durbin
Public Arbitrator

Signature Date

6 January 2006
Signature Date

David T. Maddux
Non-Public Arbitrator

Signature Date

1/9/06
Date of Service (NASD use only)

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

Member Fees	= \$ 7,000
<u>Forum Fees</u>	= \$ 4,950
Total Fees	= \$ 11,950
<u>Less payments</u>	= \$ 7,000
Balance Due NASD Dispute Resolution	= \$ 4,950

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Richard Scott Park, are jointly and severally liable for:

<u>Adjournment Fees</u>	= \$ 600
Total Fees	= \$ 600
<u>Less payments</u>	= \$ 600
Balance Due NASD Dispute Resolution	= \$ 0

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Hugh C. Durbin - Public Arbitrator
David T. Maddux - Non-Public Arbitrator


Concurring Arbitrators:

Earle R. Frost, Jr., Esq.
Public Arbitrator, Presiding Chair

Signature Date

Hugh C. Durbin
Public Arbitrator

Signature Date



David T. Maddux
Non-Public Arbitrator

1/9/06

Signature Date

1/5/06

Date of Service (NASD use only)