

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Claimant

G. Earl Cummins, individually and as Trustee
U/T DTD 02/19/88 by G. Earl Cummins

and

Case Number: 04-00281
Hearing Site: Troy, Michigan

Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

NATURE OF DISPUTE

Customer v. Member

REPRESENTATION OF PARTIES

G. Earl Cummins, individually and as Trustee U/T DTD 02/19/88 by G. Earl Cummins ("Claimant") was represented by Mitchell L. Perlstein, Esq., Investors' Law Center PA, Boca Raton, Florida.

Merrill Lynch Pierce Fenner & Smith, Inc. ("Respondent") was represented by W. Scott Turnbull, Esq., Miller Canfield Paddock & Stone PLC, Detroit, Michigan.

CASE INFORMATION

The Statement of Claim was filed on or about January 16, 2004. The Submission Agreement was signed on or about November 13, 2003, by G. Earl Cummins, individually and as Trustee. The Amended Statement of Claim was filed on or about June 15, 2004.

The Statement of Answer and Motion for a More Definite Statement was filed by Respondent on or about August 5, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: fraud and deceit; breach of fiduciary duty; negligence and gross negligence; breach of contract; failure to supervise; violation of NASD rules; and violations of federal and state law. The causes of action related to Claimant's allegation that Respondent concentrated Respondent in unspecified speculative equities and used margin to leverage Claimant's account in contravention of Claimant's investment objectives.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: Claimant's claims are barred by the applicable statutes of limitation; Claimant's claims are barred by waiver, ratification, acquiescence, and estoppel; and the market was responsible for any losses.

RELIEF REQUESTED

Claimant requested an award in the amount of \$1,000,000.00; plus interest, costs, and such other relief as the arbitrators determine to be fair and appropriate.

Respondent requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondent did not file with NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, and appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

At the hearing, after the close of Claimant's case-in-chief, Respondent moved for dismissal. The panel granted the motion.

At the hearing, Respondent requested that non-party John Kulhavi's CRD record be expunged of all references to this matter.

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 original(s) 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;
- 2.) The panel recommends the expungement of all reference to the above captioned arbitration from non-party John Kulhavi's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, John Kulhavi must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
- 3.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and

- 4.) Any relief not specifically enumerated, including punitive damages and attorneys' fees, is hereby denied with prejudice.

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

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 = \$ 2,250.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 4,000.00

Adjournment Fees

Adjournments requested during these proceedings:

May 24-26, 2005, adjournment requested by Claimant (fee waived) = \$ 1,200.00

September 13-15, 2005, adjournment requested jointly (fee waived) = \$ 1,200.00

October 25-27, 2005, adjournment requested jointly (fee waived) = \$ 1,500.00

Forum Fees and Assessments

The Panel has assessed forum fees for each hearing session conducted and each decision rendered on a discovery-related motion on the papers. 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) Pre-hearing session with Panel x \$1,200.00 = \$1,200.00

Pre-hearing conference: September 23, 2004 1 session

Two (2) Hearing sessions x \$1,200.00	= \$ 2,400.00
Hearing Dates: January 25, 2006 2 sessions	
<u>Total Forum Fees</u>	<u>= \$ 3,600.00</u>

The Arbitration Panel has assessed \$1,800.00 of the forum fees to G. Earl Cummins, individually and as Trustee U/T DTD 02/19/88 by G. Earl Cummins.

The Arbitration Panel has assessed \$1,800.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

Fee Summary

Claimant, G. Earl Cummins, individually and as Trustee U/T DTD 02/19/88 by G. Earl Cummins, is liable for:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 1,800.00
<u>Total Fees</u>	<u>= \$ 2,175.00</u>
<u>Less payments</u>	<u>= \$ 1,575.00</u>
Balance Due NASD Dispute Resolution	= \$ 600.00

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

Member Fees	= \$ 7,000.00
Forum Fees	= \$ 1,800.00
<u>Total Fees</u>	<u>= \$ 8,800.00</u>
<u>Less payments</u>	<u>= \$ 7,000.00</u>
Balance Due NASD Dispute Resolution	= \$ 1,800.00

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

ARBITRATION PANEL

Harvey Frank - Public Arbitrator, Presiding Chair
Floyd E. Jamison, MA - Public Arbitrator
Stephen D. Arkwright - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Harvey Frank
Harvey Frank
Public Arbitrator, Presiding Chair

01/26/2006
Signature Date

/s/ Floyd E. Jamison, MA
Floyd E. Jamison, MA
Public Arbitrator

01/26/2006
Signature Date

/s/ Stephen D. Arkwright
Stephen D. Arkwright
Non-Public Arbitrator

01/26/2006
Signature Date

01/26/2006
Date of Service (For NASD office use only)

ARBITRATION PANEL

Harvey Frank - Public Arbitrator, Presiding Chair
Floyd E. Jamison, MA - Public Arbitrator
Stephen D. Arkwright - Non-Public Arbitrator

Concurring Arbitrators:

Harvey Frank
Harvey Frank
Public Arbitrator, Presiding Chair

1/26/06
Signature Date

Floyd E. Jamison, MA
Floyd E. Jamison, MA
Public Arbitrator

Signature Date

Stephen D. Arkwright
Stephen D. Arkwright
Non-Public Arbitrator

Signature Date

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Floyd E. Jamison, MA - Public Arbitrator
Stephen D. Arkwright - Non-Public Arbitrator

Concurring Arbitrators:

Harvey Frank
Public Arbitrator, Presiding Chair

Signature Date

Floyd E. Jamison M.A.
Floyd E. Jamison, MA
Public Arbitrator

1-26-06
Signature Date

Stephen D. Arkwright
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)

ARBITRATION PANEL

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Floyd E. Jamison, MA - Public Arbitrator
Stephen D. Arkwright - Non-Public Arbitrator

Concurring Arbitrators:

Harvey Frank
Public Arbitrator, Presiding Chair

Signature Date

Floyd E. Jamison, MA
Public Arbitrator

Signature Date

Stephen D. Arkwright
Non-Public Arbitrator

1-26-05
Signature Date

Date of Service (For NASD office use only)