

**Award  
NASD Dispute Resolution**

In the Matter of the Arbitration Between:	)	
	)	
<u>Name of the Claimant</u>	)	<u>Case Number:</u> 04-01564
Paul G. Schoen, as Successor Trustee	)	
of the Suzanne K. Schoen Trust	)	
	)	
<u>Name of the Respondents</u>	)	<u>Hearing Site:</u> St. Louis, Missouri
Merrill Lynch Pierce Fenner & Smith, Inc.	)	
and Jordan M. Gelb	)	

**NATURE OF DISPUTE**

Customer vs. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Howard J. Stein, Esq., located in Chicago, Illinois represented Claimant, Paul G. Schoen, as Successor Trustee of The Suzanne K. Schoen Trust, hereinafter referred to as "Claimant."

John S. Monical, Esq. of the law firm Lawrence, Kamin, Saunders & Ulenhop, LLC, located in Chicago, Illinois represented the Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") and Jordan M. Gelb ("Gelb"), hereinafter collectively referred to as "Respondents."

**CASE INFORMATION**

Statement of Claim filed on or about March 8, 2004. Claimant, Paul G. Schoen, signed the Uniform Submission Agreement on February 26, 2004.

Joint Statement of Answer and Counterclaim against Paul G. Schoen, Individually, filed by Respondents, Merrill Lynch and Gelb, on April 29, 2004. Respondent, Merrill Lynch, signed the Uniform Submission Agreement on March 31, 2004. Respondent Gelb signed the Uniform Submission Agreement on April 16, 2004.

Claimant filed a Motion to Dismiss Counterclaim on July 13, 2004, and Respondents filed a Response to the Motion to Dismiss Counterclaim on July 29, 2004.

Respondent filed a Motion for Leave to File an Amended Counterclaim for Indemnification on September 20, 2004. Claimant filed an Opposition to Respondent's Motion for Leave to File Amended Counterclaim on October 4, 2004.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty, suitability, failure to supervise and violation of the Illinois Consumer Fraud Act. The causes of action relate to shares in Van Kampen Technology Fund, Pilgrim International Small-Cap Growth Fund,

Putnam International New Opportunities Fund, Kemper Technology Fund and Van Kampen Emerging Growth Fund. Claimant asserted that these were unsuitable transactions and did not meet Claimant's investment needs and objectives.

Unless specifically admitted in its Answer, Respondents, Merrill Lynch and Gelb denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Merrill Lynch acted in good faith and, accordingly, cannot be held liable as control person of Gelb under Section 20(a) of the Securities Exchange Act of 1934, 17 U.S.C. §78t(a) (2001).
2. The Trust, through its duly appointed Trustee, authorized and ratified all trades entered in the Account.
3. Claimant failed to mitigate damages.
4. The Trust is estopped from asserting claims for damages. Respondents justifiably relied upon stated investment objectives, repeated acknowledgements and express instruction to provide recommendation according to growth strategy and to buy and sell as instructed. The Trust, through the conduct and representations of its duly appointed Trustee, is estopped from now asserting that the investments were unsuitable.
5. After being fully informed, the Trust through its duly appointed Trustee, expressly agreed with the investments made in its Account. Such conduct is inconsistent with and constitutes a waiver of the Trust's claims.
6. The Statement of Claim fails to state a claim against Respondents upon which relief can be granted.
7. Respondents are not liable to the Trust in any amount because at all times relevant herein they acted properly, in good faith and in a commercially reasonable manner with respect to Claimants' accounts.
8. The Trust, through its duly appointed Trustee, assumed the risks of the investments made through Respondents, and through their unilateral decisions regarding when to purchase and whether to hold such securities.
9. The Trust's claims for relief are barred by the applicable statute of limitations and repose.
10. All transaction upon which Claimant bases this claim against Respondents were conducted in accordance with all applicable exchange and SRO rules and regulations.

#### **RELIEF REQUESTED**

Claimant Schoen, as Successor Trustee, requested compensatory damages in the amount of \$100,000.00, treble damages in amount of \$200,000, cost, expenses and attorney's fees.

Respondents, Merrill Lynch and Gelb, requested denial and dismissal of all claims in their entirety, the full amount of any award entered against Merrill Lynch, all expenses, costs and attorney's fees, and for such other and further relief as Panel believes is proper.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

Having duly reviewed the parties' pleadings and heard arguments on August 26, 2004, the Panel issued an Order dated August 26, 2004, granting Claimant's Motion to Dismiss

Counterclaim for Indemnification against Paul G. Schoen, Individually, but denied Claimant's request for attorney's fees in connection with said Motion.

Having duly reviewed the parties' pleadings and heard arguments on December 9, 2004, the Panel issued an Order dated December 10, 2004, granting Respondents' Motion to File Amended Counterclaim for Indemnification.

At the proceeding of this matter, Respondents, Merrill Lynch and Gelb, moved to dismiss this case at the close of Claimant's case. The Panel denied Respondents' motion.

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

1. Any and all claims asserted by Claimant, Paul G. Schoen, as Successor Trustee for The Suzanne K. Schoen Trust, are denied.
2. The Claimant, Paul G. Schoen, is solely liable for and shall pay to Respondents, Merrill Lynch and Gelb, attorney's fees in the amount of \$12,000.00. In deciding to award attorney's fees, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of attorney's fees to the Respondents.
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Jordan M. Gelb's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-90 and 99-54, Respondent Gelb must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
4. Parties shall bear their own costs, including attorneys' fees, except as specified herein.
5. Any and all relief not specifically addressed herein, including punitive and treble damages, is denied.

### **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
Counterclaim filing fee	= \$1,000.00

#### **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 Pierce Fenner & Smith, Inc. is a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00

**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:

Three (3) Pre-hearing sessions with Panel @ \$1,125.00 = \$3,375.00

Pre-hearing conferences: July 22, 2004 1 session  
August 26, 2004 1 session  
December 9, 2004 1 session

Five (5) Hearing sessions @ \$1,125.00 = \$5,625.00

Hearing Dates: January 24, 2005 2 sessions  
January 25, 2005 2 sessions  
January 26, 2005 1 session

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Total Forum Fees = \$9,000.00

1. The Panel assessed forum fees in the amount of \$4,500.00 solely to Claimant, Paul G. Schoen, Successor Trustee for The Suzanne K. Schoen Trust.
2. The Panel assessed forum fees in the amount of \$4,500.00 jointly and severally to Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Jordan M. Gelb.

**SEE SUMMARY**

1. Claimant, Paul G. Schoen, is solely liable for:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$4,500.00</u>
Total Fees	= \$4,800.00
<u>Less payments</u>	<u>= \$1,425.00</u>
Balance Due NASD Dispute Resolution	= \$3,375.00

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

Member Fees	= \$5,200.00
<u>Less payments</u>	<u>= \$5,200.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Jordan M. Gelb, are jointly and severally liable for:

Counterclaim Filing Fee	= \$1,000.00
<u>Forum fees</u>	<u>= \$4,500.00</u>
Total Fees	= \$5,500.00
<u>Less payments</u>	<u>= \$1,500.00</u>
Balance Due from NASD Dispute Resolution	= \$4,000.00

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

**ARBITRATION PANEL**

George T. Mehan, Jr.	-	Public Arbitrator, Presiding Chairperson
Marilyn T. Selby, JD	-	Public Arbitrator
M. Eileen Dorsey, CFP	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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George T. Mehan, Jr.  
Public Arbitrator, Presiding Chairperson

2/7/05  
Signature Date

\_\_\_\_\_  
Marilyn T. Selby, JD  
Public Arbitrator

2/7/05  
Signature Date

\_\_\_\_\_  
M. Eileen Dorsey, CFP  
Non-Public Arbitrator

2/7/05  
Signature Date

2/7/05  
Date of Service (For NASD Dispute Resolution office use only)

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Arbitration No. 04-01684  
Award Page 5

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

**ARBITRATION PANEL**

George T. Mehan, Jr.	-	Public Arbitrator, Presiding Chairperson
Marilyn T. Selby, JD	-	Public Arbitrator
M. Eileen Dorsey, CFP	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
George T. Mehan, Jr.  
Public Arbitrator, Presiding Chairperson

  
February 7, 2005  
Signature Date

Marilyn T. Selby, JD  
Public Arbitrator

Signature Date

M. Eileen Dorsey, CFP  
Non-Public Arbitrator

Signature Date

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

NASD Dispute Resolution

Arbitration No. 04-01584

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**ARBITRATION PANEL**

George T. Mehan, Jr.	-	Public Arbitrator, Presiding Chairperson
Marilyn T. Selby, JD	-	Public Arbitrator
M. Eileen Dorsey, CFP	-	Non-Public Arbitrator

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Public Arbitrator, Presiding Chairperson

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Public Arbitrator

2-7-05  
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Signature Date

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Non-Public Arbitrator

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Signature Date

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NASD Dispute Resolution  
Arbitration No. 04-01664  
Award Page 5

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**ARBITRATION PANEL**

George T. Mehan, Jr.	-	Public Arbitrator, Presiding Chairperson
Marilyn T. Selby, JD	-	Public Arbitrator
M. Eileen Dorsey, CFP	-	Non-Public Arbitrator

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Public Arbitrator, Presiding Chairperson

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Signature Date

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Marilyn T. Selby, JD  
Public Arbitrator

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Signature Date

  
\_\_\_\_\_  
M. Eileen Dorsey, CFP  
Non-Public Arbitrator

8/7/05  
\_\_\_\_\_  
Signature Date

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