

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Kenneth G. Gilliland, IRA, Claimant v. Merrill Lynch, Pierce, Fenner & Smith Incorporated and Patricia A. Reno, Respondents

Case Number: 04-01908

Hearing Site: Los Angeles, California

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

REPRESENTATION OF PARTIES

For Claimant:

**Arthur S. Leider
Investors Arbitration Specialists
San Diego, California**

For Respondents:

**Eric J. Glassman, Esq.
Mennemeier, Glassman & Stroud LLP
Sacramento, California**

CASE INFORMATION

Statement of Claim filed: March 22, 2004

Claimant's Uniform Submission Agreement signed: March 26, 2004

Joint Statement of Answer filed by Respondents: June 16, 2004

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission Agreement signed: May 24, 2004

Respondent Patricia A. Reno's Uniform Submission Agreement signed: April 8, 2005

CASE SUMMARY

In his Statement of Claim, Claimant alleged breach of fiduciary duty in violation of California Civil Code §2322(c), negligence, fraudulent misrepresentations and omissions, and unsuitable recommendations in violation of NASD Rules of Conduct Section 2310. Claimant's allegations involved the purchase of two Alliance funds and a ML Global Technology fund in his IRA account.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In his Statement of Claim, Claimant requested \$250,000.00 in compensatory damages, \$250,000.00 in punitive or exemplary damages, pre- and post-judgment interest, and costs, including witness and attorney's fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, expungement of any reference to this matter from the regulatory record of registered persons, and costs, including attorney's fees.

OTHER ISSUES CONSIDERED AND DECIDED

On March 15, 2004, Claimant and Claimant's representative signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100, the waiver of the Claimant shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

At the hearing, Claimant amended his Statement of Claim, pursuant to Rule 10328(b) of the *NASD Code of Arbitration Procedure* ("Code"), to request \$172,460.00 in compensatory damages.

On April 22, 2005, Respondents made a motion to dismiss the claim based on statute of limitations. Claimant opposed the motion.

FINDINGS AND CONCLUSIONS

The Panel finds that Respondents failed to follow its required practices and procedures as set forth in the excerpts from its Sales Practices & Supervision Manual and in its Recommendations & Dealing with Clients Manual of Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated admitted into evidence by the Panel.

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:

- 1) Respondents' Motion to Dismiss the claim is denied.
- 2) Respondents are jointly and severally liable to and shall pay Claimant the sum of \$85,000.00 in compensatory damages.
- 3) Respondents are jointly and severally liable to and shall pay Claimant the sum of \$300.00 as reimbursement for filing costs.
- 4) Respondents are jointly and severally liable to and shall pay Claimant the sum of \$5,400.00 as reimbursement for expert witness fees.
- 5) Except as noted in #4 above, the parties shall bear their respective costs, including attorney's fees.
- 6) Any and all other relief not specifically addressed herein, including punitive and exemplary damages, is denied.

FEEES

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	= \$ 300.00
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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	= \$ 1,700.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 2,750.00
Total Member Fees	= \$ 5,200.00

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:

One (1) Pre-hearing conference session with the Panel @ \$1,125.00/session = \$ 1,125.00
Pre-hearing conference: August 26, 2004 1 session

Five (5) Hearing sessions @ \$1,125.00/session = \$ 5,625.00
Hearings: April 21, 2005 2 sessions
April 22, 2005 3 sessions

Total Forum Fees = \$ 6,750.00

The Panel assessed \$6,750.00 of the forum fees jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Patricia A. Reno.

Fee Summary

1. Claimant Kenneth G. Gilliland is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
<u>Less payments</u>	= \$(1,425.00)
Refund Due Claimant Kenneth G. Gilliland	= \$(1,125.00)

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

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

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

Forum Fees	= \$ 6,750.00
<u>Less payments</u>	= \$ (0.00)
Balance Due NASD Dispute Resolution	= \$ 6,750.00

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.

NASD E-
Arbitration
Award

ARBITRATION PANEL

Alvin S. [Signature]

Public Arbitrator, Presiding Chair

Donald S. [Signature]

Public Arbitrator

Michael C. [Signature]

Non-Public Arbitrator

CONCURRENCE

Alvin S. [Signature]
Chair, Presiding Arbitrator

4-27-05
Signature Date

Donald S. [Signature]
Public Arbitrator

Signature Date

Michael C. [Signature]
Non-Public Arbitrator

Signature Date

4/27/05
Date of Service

ARBITRATION PANEL

Alvin S. Milder	-	Public Arbitrator, Presiding Chair
Donald S. Simons	-	Public Arbitrator
Michael C. Pocaterra	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures:

Alvin S. Milder
Chair, Public Arbitrator

Signature Date

Donald S. Simons
Donald S. Simons
Public Arbitrator

APRIL 27, 2005
Signature Date

Michael C. Pocaterra
Non-Public Arbitrator

Signature Date

4/27/05
Date of Service

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Public Arbitrator

Signature Date



Michael C. Pocaterra
Non-Public Arbitrator

4-27-05

Signature Date

Date of Service