

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

John A. Fenwick (Claimant) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., James D. Harris, and Robert D. Travis (Respondents)

Case Number: 04-07582

Hearing Site: East Charleston, West Virginia

Nature of the Dispute: Customer vs. Member and Associated Persons

REPRESENTATION OF PARTIES

Claimant John A. Fenwick hereinafter referred to as "Claimant": Robert A. Campbell, Esq., Farmer, Cline & Campbell PLLC, Charleston, West Virginia.

Respondents Merrill Lynch, Pierce Fenner & Smith, Inc. ("Merrill Lynch"), James D. Harris ("Harris"), and Robert D. Travis ("Travis") Carranza M. Pryor, Esq., Sutherland, Asbill & Brennan LLP, Atlanta, Georgia.

CASE INFORMATION

Statement of Claim filed on or about: November 11, 2005.

Claimant signed the Uniform Submission Agreement: November 1, 2004.

Joint Statement of Answer filed on or about January 7, 2005.

Merrill Lynch signed the Uniform Submission Agreement: December 2, 2004.

Harris signed the Uniform Submission Agreement: January 5, 2005.

Travis signed the Uniform Submission Agreement: January 5, 2005.

CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty; violation of industry standards; breach of express and implied contractual duties; fraud, and negligence. The causes of action relate to Claimant's order to liquidate his three managed Merrill Lynch accounts.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$85,000.00, punitive damages, pre-judgment interest, attorney's fees, and costs to be determined by the Panel.

Respondents requested that that Claimant's claims be dismissed, that they be awarded costs as determined by the Panel, and that this matter be expunged from the CRD records of Respondents Harris and Travis.

OTHER ISSUES CONSIDERED AND DECIDED

On or about August 16, 2005, Claimant filed a Motion to change the hearing location from Columbus, Ohio to East Charleston, West Virginia. After Respondents filed their opposition to the Motion, a telephonic conference was held on December 20, 2005, with the Panel and the arbitrators. After due deliberation by the arbitrators, the Panel determined to grant Claimant's Motion and change the hearing location to East Charleston, West Virginia.

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. Respondents Harris, Travis and Merrill Lynch are jointly and severally liable for and shall pay to the Claimant \$67,990.44 in compensatory damages plus pre-judgment interest at 10% per annum, accruing from July 5, 2002 until July 21, 2006.
2. Respondents Harris, Travis and Merrill Lynch are jointly and severally liable for and shall pay to the Claimant attorneys' fees in the amount of 33 1/3% of the total recovery pursuant to Pauley v. Gilbert, 206 W.Va 114, 522 S.E. 2d 208 (1999).
3. Respondent Harris, Travis and Merrill Lynch are jointly and severally liable for and shall pay to the Claimant \$225.00 to reimburse Claimant for the filing fee paid to NASD Dispute Resolution.
4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

DISSENTING OPINION

Arbitrator James A. Melfi dissents to the award of Claimant's attorney's fees because generally, in the absence of a statute, court rule, or contract, each party to a lawsuit pays their own attorney's fees. However, the Panel relied on the West Virginia Supreme Court of Appeals which recognized that breach of fiduciary duty alone may constitute conduct that can form the basis for an award of attorneys' fees (Pauley v. Gilbert, 206 W. Va. 114, 522 S.E.2d 208 (1999)). Thus, by majority decision, the Panel granted Claimant's request for attorneys' fees as calculated in the Award section.

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 = \$ 225.00

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 persons at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch, Pierce, Fenner & Smith is a party.

Member surcharge = \$ 1,100.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 1,700.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

August 4 & 5, 2005 dates, adjournment by Claimant = Waived

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. 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:

Two (2) Pre-hearing conference sessions with a single arbitrator @ \$450.00 per session

Pre-hearing conferences: June 17, 2005 1 session = \$ 900.00

July 26, 2005 1 session

Two (2) Pre-hearing conference sessions with Panel @ \$750.00 per session

Pre-hearing conferences March 21, 2005 1 session = \$ 1,500.00

December 20, 2005 1 session

Three (3) Hearings with Panel @ \$750.00 per session = \$ 2,250.00

Pre-hearing conferences: July 20, 2006 2 sessions

July 21, 2006 1 session

Total Forum Fees = \$4,650.00

The Panel has assessed \$4,650.00 of the forum fees jointly and severally against Respondents Harris, Travis and Merrill Lynch.

Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee = \$ 225.00

Total Fees = \$ 225.00

Less payments = \$ 1,425.00

Refund Due the Claimant = \$ 1,200.00

2. Respondent Merrill Lynch is solely liable for:

| | | |
|-------------------------------------|------|----------|
| <u>Member Fees</u> | = \$ | 3,550.00 |
| <u>Total Fees</u> | = \$ | 3,550.00 |
| <u>Less payments</u> | = \$ | 3,550.00 |
| Balance Due NASD Dispute Resolution | = \$ | 0.00 |

3. Respondents Harris, Travis and Merrill Lynch are jointly and severally liable for:

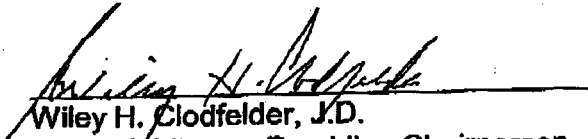
| | | |
|-------------------------------------|------|----------|
| <u>Forum Fees</u> | = \$ | 4,650.00 |
| <u>Total Fees</u> | = \$ | 4,650.00 |
| <u>Less payments</u> | = \$ | 0.00 |
| Balance Due NASD Dispute Resolution | = \$ | 4,650.00 |

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


ARBITRATION PANEL

| | | |
|---------------------------|---|--|
| Wiley H. Clodfelder, J.D. | - | Public Arbitrator, Presiding Chairperson |
| Regina F. Burch, J.D. | - | Public Arbitrator |
| James A. Melfi | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures

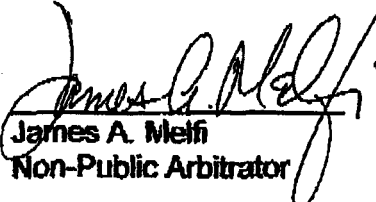

Wiley H. Clodfelder, J.D.
Public Arbitrator, Presiding Chairperson

9/4/06
Signature Date


Regina F. Burch, J.D.
Public Arbitrator

8/30/06
Signature Date

Dissenting In Part, Concurring In Part, Arbitrator's Signature


James A. Melfi
Non-Public Arbitrator

8/29/06
Signature Date

September 6, 2006

Date of Service (For NASD Dispute Resolution use only)