

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Rose Cirrincione

and

04-08807
Chicago, Illinois

Name of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.
Salvatore Frank Guagliardo

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

REPRESENTATION OF PARTIES

Rose Cirrincione ("**Claimant**") was represented by Steven B. Nagler, Esq., Northbrook, Illinois.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Respondent MLPF & S**") and Salvatore Frank Guagliardo ("**Respondent Guagliardo**") hereinafter referred to as ("**Respondents**") were represented by Peter E. Cooper, Esq., Lawrence Kamin Saunders & Uhlenhop, LLC, Chicago, Illinois.

CASE INFORMATION

The Statement of Claim was filed on or about December 30, 2004. Claimant's Response to Respondent's Motion to Dismiss was filed on or about August 11, 2005. Submission Agreement of Claimant Rose Cirrincione was signed on November 28, 2004.

Respondents' Joint Answer and Affirmative Defenses to Claimant's Statement of Claim was filed by Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Salvatore Frank Guagliardo on or about April 1, 2005. Motion to Dismiss was filed on or about March 31, 2005. Reply Memorandum in Further Support of Motion to Dismiss was filed on or about August 18, 2005. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith, Inc. was signed on January 19, 2005.

CASE SUMMARY

Claimant alleged that:

By the end of October, 1999, the claimant's account had a net portfolio balance of \$86,671, comprised of \$171,892 in equities less \$85,221 margin. In November, 1999, Guagliardo solicited the Claimant to make a series of speculative investments, including the stocks of Agilent Technologies, Inc., Cobalt Networks, Inc. (with a total acquisition cost of over \$280,000), Cacheflow, Inc. (with a total acquisition cost of \$590,000), and Ibasis, Inc., and also, purchased 5000 shares of United Parcel Services, on an initial offering, representing an investment of \$325,000. The account, which had been generally around \$85,000 in net equity, by the end of November, 1999, had risen to \$249,670 in net equity, and a margin balance of \$148,967. However, during November, 1999, Guagliardo had told the Claimant that she had to make additional deposits into the account to maintain margin, and the Claimant deposited a total of \$74,625 into the account.

In December, 1999, Guagliardo again made a large unauthorized speculative trade, this time purchasing 5000 shares of Agency.com, Ltd. with a total investment of \$450,000. Two days later this investment was sold and resulted in a loss of \$148,760. The Claimant had no idea of this trade at the time. In addition, Guagliardo liquidated other investments in the account in December, resulting in further losses. The Claimant complained to Guagliardo, and he promised to find other trades to put her into an attempt to make up the losses.

The Claimant contends that she was a victim of a fraudulent scheme and unauthorized trading involving Guagliardo, and that Merrill was grossly derelict in its duties in monitoring her account, in breach of their fiduciary duty to her. The alleged unauthorized trades made by Guagliardo from the Claimant's account were so unusual when compared to the trading activity in the account and the Claimant's trading pattern from April through October, 1999. This increase in volume and dollar amount in the trades should have warned Merrill of a problem. As a result of this fraudulent scheme, the unauthorized trading and the failure of Merrill to properly monitor the account was a breach of their fiduciary duty and Merrill and Guagliardo are responsible to the claimant for the losses resulting in her account and for punitive damages.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated as follows:

During the brief eight-month period that Claimant held her account at Merrill Lynch, she engaged in an aggressive pattern of speculative trades in an effort to realize short-term gains in the equities market. By November of 1999, acting on the advice of her brother Tom, she had refined that trading strategy to entail day-trading on new issues immediately following an issuers' initial public offering. This strategy resulted in substantial profits in November, but

led to large losses in December, when a \$450,000 "bet" on Agency.com resulted in a 48-hour loss of \$150,000. At all times, Claimant controlled her own account and is fully responsible for all damages she suffered.

RELIEF REQUESTED

Claimant requested an award against the respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Salvatore Frank Guagliardo, jointly and severally, as follows:

- A. Compensatory damages in the amount of \$190,169.39, resulting from the actual out-of-pocket losses incurred by the Claimant, plus interest on that amount from December 31, 1999;
- B. Punitive damages in an amount no less than three times the actual damages found by the Arbitrators to be due the Claimant;
- C. Reasonable attorneys' fees, expert witness fees, forum fees, costs and expenses, as provided by the Illinois statutory and common law claims for breach of fiduciary duty; and
- D. Such further relief as the Arbitrators determine as just, fair, proper and reasonable.

Respondents requested that the Panel enter an award as follows:

- a) Dismissing the Statement of Claim in its entirety without any award of damages;
- b) Awarding Respondents the costs of defense of the action, including reasonable attorneys' fees and filing costs;
- c) Order that all references to this matter be expunged from S. Frank Guagliardo's permanent registration record maintained by the Central Registration Depository ("CRD"); and
- d) Awarding Respondents such other and further relief as the Panel believes is just, equitable and proper.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Merrill Lynch Pierce Fenner & Smith, Inc. contended that Respondent Salvatore Frank Guagliardo had not been properly served with the Statement of Claim.

Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrators have determined that Respondent Salvatore Frank Guagliardo has not been properly served with the Statement of Claim pursuant to Rule 10314 of the NASD Code of Arbitration Procedure (the "Code").

Respondent Salvatore Frank Guagliardo did not file with the 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 is bound by the determination of the arbitration panel on all issues submitted.

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 the NASD Dispute Resolution (the "NASD").

AWARD

After considering the pleadings and the arguments presented at the hearing conducted telephonically on September 9, 2005, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The panel has decided to grant the motion to dismiss with prejudice.
2. That 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.
3. 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, not specifically awarded or otherwise provided for above.

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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm(s) is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	\$	2,250.00
Pre-hearing process fee	\$	750.00
Hearing process fee	\$	4,000.00
Total Member Fees	\$	7,000.00

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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

2 Pre-hearing session(s) with Panel	x	1,200.00	\$	2,400.00
June 2, 2005	1	session		
September 9, 2005	1	session		
Total Forum Fees			\$	2,400.00

The Arbitration Panel has assessed \$1,200.00 of the forum fees to Rose Cirrincione.

The Arbitration Panel has assessed \$1,200.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

Fee Summary

Claimant, Rose Cirrincione, is liable for:

Initial Filing Fee	= \$	375.00
<u>Forum Fees</u>	= \$	1,200.00
Total Fees	= \$	1,575.00
<u>Less payments</u>	= \$	-1,575.00
Balance Due NASD Dispute Resolution	= \$	0.00

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

Member Fees	= \$	7,000.00
<u>Forum Fees</u>	= \$	1,200.00
Total Fees	= \$	8,200.00
<u>Less payments</u>	= \$	-7,000.00
Balance Due NASD Dispute Resolution	= \$	1,200.00

All balances are due to NASD Dispute Resolution

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ARBITRATION PANEL

Marilee Roberg, J.D. - Public Arbitrator, Presiding Chair
Joseph D. Vu - Public Arbitrator
Ralph Pierce - Non-Public Arbitrator

Concurring Arbitrators:

Marilee Roberg
Marilee Roberg, J.D.
Public Arbitrator, Presiding Chair

10/17/05
Signature Date

Joseph D. Vu
Public Arbitrator

Signature Date

Ralph Pierce
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)

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Concurring Arbitrators:

Marilee Roberg, J.D.
Public Arbitrator, Presiding Chair

Signature Date

Joseph D. Vu
Public Arbitrator

Signature Date


Ralph Pierce
Non-Public Arbitrator

10/15/05
Signature Date

Date of Service (For NASD office use only)