

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration BetweenName of Claimants

Jonathan and Joseph Penni

vs.

Case #
90-02338Name of RespondentsMerrill Lynch Pierce Fenner & Smith Inc
Noel M. Webster
Harvey CookREPRESENTATIONFor Claimant: Miles E. Hoisington, Esq. and Samuel M. Shafner, Esq. of
Shafner & Gilleran.

For Respondents: Bryan G. Killian, Esq. of Sherin and Lodgen.

CASE INFORMATION

Statement of Claim filed: August 23, 1990.

Claimant's Submission Agreement signed on: August 09, 1990.

Joint Statement of Answer filed by Respondents, Merrill Lynch, Pierce, Fenner
& Smith, Inc. and Harvey Cook, on: December 24, 1990.

Respondents did not sign Submission Agreements.

Statement of Answer filed by Respondent, Noel Webster, filed: January 10,
1991.

Respondent's Submission Agreement signed on: December 20, 1990.

HEARING INFORMATIONHearing Date/Hearing Sessions: October 03, 1991 - Two sessions
October 04, 1991 - Two sessions
October 29, 1991 - Two sessions.

Hearing Location: Boston, Massachusetts.

CASE SUMMARY

Claimant, Jonathan D. and Joseph Penni, allege that Respondents intentionally and/or recklessly (1) executed multiple unauthorized index option transactions, improperly placed trades that belong to other accounts into the Pennis' account and assigned the proceeds and losses among several accounts (so called "Robin Hooding") including the Pennis' account; (2) failed to provide, after promising to issue, account summaries which would accurately state the status of the Pennis' account; (3) stated in writing that the Pennis' account was worth \$190,000 then later claimed that the account -- at the same time -- had a debit of \$27,000.00; (4) failed to assist the Pennis to decipher their account statements (5) deliberately and maliciously attempted to cover up Webster's misconduct; (6) aided and abetted Webster and Cook's misconduct through material, intentional misrepresentations and willful activity to cover up Webster's wrongdoing; (8) failed to adequately and meaningfully supervise Webster and other Merrill Lynch personnel. Claimants contend that Respondents' actions amounted to breach of contract, breach of fiduciary duty; breach of broker's duty of reasonable care, breach of brokerage's duty to supervise, negligent misrepresentation; intentional misrepresentation; fraud and deceit and conversion. Claimants further allege violation of 15 USC 78J(b) and Rule 10b-5, 18 USC 1961 et. seq., and various sections of the NASD Rules of Fair Practice, NYSE and American Stock Exchange rules. Claimants also contend that Joseph Penni's signature on the Standard Options Agreement was forged.

Respondents, Merrill Lynch and Harvey Cook, deny each and every allegation of wrongdoing and deny that the account agreement was forged. Respondents allege that Jonathan Penni was interested in speculation and suggested most of the trades that occurred in his account. Respondents further allege that Jonathan Penni engaged in free-riding and later changed his account to a joint account with his father so that he could continue his option trading. Respondents also allege that Jonathan Penni did not complain about the single account where he made a profit, only the joint account. Respondents contend that although he complained about unauthorized trades, he could not identify the unauthorized transaction. Respondents asserted six affirmative defenses.

Respondent, Noel Webster, deny the allegations of wrongdoing and deny liability. Webster contends that Jonathan Penni was an experienced options trader and that Penni was his only options account. He contends that Penni knew the value of his account but requested a letter stating he had \$190,000.00 in his account so that he could purchase a piece of equipment. Said Respondent contends that mistakes with many of his accounts, but he does not recall the corrections alleged by the Claimants. Webster also allege that he entered into a settlement with Merrill Lynch on all outstanding claims against him, including the Claimants' claim.

RELIEF REQUESTED

Claimants request an award of \$214,000.00 plus dividends, interest at a rate

of twelve percent (12%) from September, 1985, or the date of each unauthorized trade, attorneys' fees and punitive damages for Merrill Lynch's intentional and/or reckless disregard of the Pennis' interest.

Respondents, Merrill Lynch and Cook, request the Statement of Claim be denied in its entirety.

Respondent, Noel Webster, requests that all claim asserted against him be denied.

OTHER ISSUES CONSIDERED AND DECIDED

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 received conformed copies of the Award while the originals remain on file with the NASD.

This matter was previously scheduled for a hearing on July 17 and 18, 1991. At the joint request of the parties, this matter was adjourned to October 3, 1991. Claimants requested that this Panel waive the \$1000.00 postponement fee while Merrill Lynch requested that Panel split the fee. This Panel determined that the fees should be split between Claimants and Merrill Lynch.

On October 03, 1991, Respondents, Merrill Lynch and Cook, moved to dismiss the 10b-5 claim and relied upon Lampf v. Gilbertson et al. This panel reserved decision on the motion.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents are hereby liable and Claimants are awarded a total of Fifty Five Thousand Dollars and Zero Cent (\$55,000.00) to be paid as stated in paragraphs 2, 3 and 4;

2. Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., is hereby liable to the Claimants and shall pay them Forty Five Thousand Dollars and Zero Cent (\$45,000.00);

3. Respondent, Harvey Cook, is hereby liable to the Claimants and shall pay Claimants Five Thousand Dollars and Zero Cent (\$5,000.00);

4. Respondent, Noel Webster, is hereby liable to the Claimants and shall pay Claimants Five Thousand Dollars and Zero Cent (\$5,000.00);

5. Of the total award, the Claimants shall receive Twenty Thousand

Dollars and Zero Cent (\$20,000.00) in compensatory damages and \$35,000.00 for attorney's fees and expert witness fees.

6. The claim for punitive damages is denied;
7. The claim for RICO damages is denied.

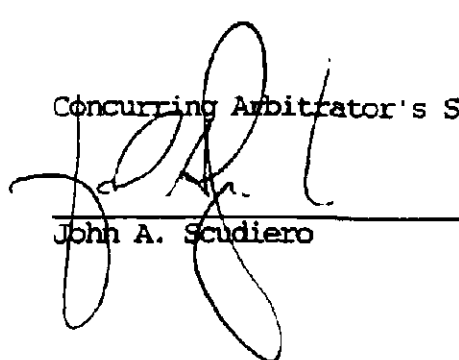
FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed and fees previously paid shall be applied to the amount assessed.

1. The NASD has received and shall retain the \$250.00 non-refundable filing paid by the Claimants;
2. The NASD has received and shall retain the \$1000.00 hearing deposit paid by the Claimants;
3. The NASD has received and shall retain the \$375.00 postponement fee paid by the Respondent, Merrill Lynch, Pierce & Smith, Inc.;
4. Claimants are assessed a non-refundable filing fee of \$250.00;
5. Claimants are further assessed \$500.00 for postponement of the July 17, 1991, hearing;
6. Respondent, Merrill Lynch, is assessed \$500.00 for postponement of the July 17, 1991, hearing;
7. Merrill Lynch is further assessed \$5,000.00 for five hearing sessions at \$1,000.00 per session ($\$1,000.00 \times 5 \text{ sessions} = \$5,000.00$) which shall be satisfied upon reimbursement to Claimants of \$500.00 and remittance of the balance, \$4,625.00, to the NASD.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrator's Signature


John A. Scudiero

Public

Date of Decision:

DATED BY NASD
NOVEMBER 14, 1991

Dollars and Zero Cent (\$20,000.00) in compensatory damages and \$35,000.00 for attorney's fees and expert witness fees.

6. The claim for punitive damages is denied;
7. The claim for RICO damages is denied.

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Lowell A. Warren, Jr.

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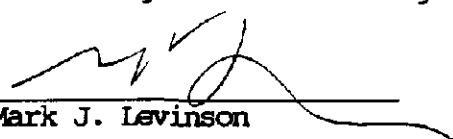
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Mark J. Levinson

Chairperson-Public

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NOVEMBER 14, 1991

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