

9600791

NASD Regulation, Inc. Award

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

American Contract Bridge League, Inc.

vs.

95-04545

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Matthew T. Guagliardo,
Bank One, Columbus, N.A.

and

Name of Third Party Claimant

Merrill Lynch, Pierce, Fenner & Smith, Inc.

and

Name of Third Party Respondent

American Contract Bridge League Educational Foundation

REPRESENTATION OF PARTIES

American Contract Bridge League, Inc. ("Claimant") and American Contract Bridge League Educational Foundation ("ACBL") were represented by Donald S. Holm, III, Esq., of Hanover, Walsh, Jelenak & Blair, Memphis, Tennessee.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill"), Matthew T. Guagliardo ("Guagliardo"), Bank One, Columbus, N.A. ("Bank One") (jointly referred to as "Respondents") were represented by Shea S. Wellford, Esq., of Martin, Tate, Morrow & Marston, P.C., Memphis, Tennessee.

CASE INFORMATION

Claimant filed the Statement of Claim on or about September 22, 1995, and signed the Submission Agreement on September 22, 1995.

Respondents filed a joint Statement of Answer and Third Party Claim of Merrill on or about November 27, 1995. Merrill signed the Submission Agreement on October 12, 1995. Guagliardo signed the Submission Agreement on October 18, 1995. Bank One signed the

Submission Agreement on February 28, 1996.

ACBL filed a response to the Third Party Claim on or about January 2, 1996.

HEARING INFORMATION

Pre-hearing conferences were held on August 19, 1997 for one (1) session and on September 18, 1997 for one (1) session.

The Arbitration Panel held a hearing on April 21 and 22, 1998 for two (2) sessions each day in Memphis, Tennessee for a total of four (4) hearing sessions.

CASE SUMMARY

Claimant stated that: Respondents performed, amongst other things, clerical and bookkeeping services to the American Contract Bridge League Charity Foundation ("Charity Foundation") and to ACBL; ACBL was organized as a Tennessee corporation; Claimant is the assignee of all claims and causes of action which ACBL may have against Respondents; ACBL opened a Working Capital Management Account with Merrill on or about October 5, 1989; a signature card has been on file with Respondents containing the authorized signatures for the ACBL checking account; a former employee of Claimant embezzled funds, by forging the signatures required on the account, starting in 1988, and was not discovered by Claimant until September of 1994; upon discovery, Claimant notified Respondents of the forgeries on or about September 16, 1994. Claimant alleged that: Respondents were negligent in servicing ACBL's checking account; Respondents breached the checking account contract with Claimant; and Merrill and Guagliardo breached their fiduciary duty to Claimant.

Unless otherwise admitted in their Answer, Respondents denied the allegations set forth in the Statement of Claim. Respondents also asserted the following affirmative defenses: ACBL is estopped by its course of conduct from asserting a dual signature requirement; ACBL contractual undertakings estop it from asserting these claims; UCC 4-406 and 3-406 prevent ACBL from asserting breach of contract or negligence claims against respondents; ACBL's negligence bar it from recovery; ACBL cannot seek recovery under both contract and tort theory; under the common law, ACBL's negligence in failing to examine its account statements prevents it from recovering from Merrill; and there is no private right of action for an alleged Rule 405 violation.

In its Third Party Claim against ACBL, Merrill asserted that ACBL's account was closed with a \$30,547.79 debit balance. Merrill also asserted that, pursuant to the contract between the

parties, the debit balance along with interest and costs of collection, including reasonable attorneys' fees are due and owing.

For its response to the Third Party Claim, unless otherwise admitted therein, ACBL denied any liability to Merrill for the debit balance. ACBL also asserted the following affirmative defenses: The Third Party Claim failed to state a claim upon which relief may be granted; Merrill is estopped from seeking reimbursement for the debit balance in the account because it was notified within the time limits prescribed in the contract between the parties that forged checks and/or checks bearing less than the required number of signatures had been paid in error by Merrill and that such activity was the cause of the debit balance; and even if the amounts claimed by Merrill were due from ACBL, Merrill had subsequently forgiven the obligation to make such payment.

RELIEF REQUESTED

Claimant requested an award of the following: \$866,696.99 or such other amount as the proof may show, plus prejudgment interest on that amount, and that Claimant have such other and further relief as the panel deemed necessary and proper.

Respondents denied the claims asserted against them. Merrill, in its Third Party Claim, requested an award against ACBL of the following: \$30,547.79; interest; attorneys' fees; and costs of collection.

ACBL requested that the Third Party Claim be dismissed with costs adjudged against Merrill.

OTHER ISSUES CONSIDERED & DECIDED

Respondents filed a motion to dismiss the Statement of Claim on the grounds that the claims were legally barred and unsupported by the facts of the case. After review of the motion and response, and deliberation, the motion was denied.

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 NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the, the

undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims are, and each of them, denied with prejudice.

Third Party Respondent, American Contract Bridge League Educational Foundation is liable for, and shall pay to Merrill Lynch, Pierce, Fenner & Smith, Inc the sum of 30,547.79 in satisfaction of its Third Party Claim.

Each party shall bear its own costs associated with this arbitration.

All claims/requests for relief not specifically set forth herein are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each prehearing conference, if any. There were two (2) pre-hearing sessions x \$300 and four (4) hearing sessions x \$600 = \$3,000 in forum fees. Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332 (c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to Rule 10332 (c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable Third Party Claim filing fee in the amount of \$500 and shall retain as forum fees the Third Party Claim hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Merrill.

Pursuant to Rule 10333 of the Code, Merrill shall pay to NASD Regulation, Inc. Office of Dispute Resolution the past due member surcharge in the amount of \$500.

Pursuant to Rule 10319 of the Code, Claimant shall pay to NASD Regulation, Inc. Office of Dispute Resolution past due postponement fees in the amount of \$600. Further, pursuant to Rule 10319 of the Code, Merrill shall pay to NASD Regulation, Inc. Office of Dispute Resolution past due postponement fees in the amount of \$600.

Additional forum fees in the amount of \$500 (\$1,500 - \$1,000) are assessed by the arbitrators against the Claimant.

Additional forum fees in the amount of \$900 (\$1,500 - \$600) are assessed by the arbitrators against Merrill.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

Jack F. Marlow
Jack F. Marlow
Public Arbitrator, Presiding Chair

/s/

May 18, 1998

Donald J. Aho

Donald J. Aho

Public Arbitrator

/s/

May 15, 1998

Clarence Albert Getchell, III

Clarence Albert Getchell, III
Industry Arbitrator

/s/

May 18, 1998