

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Charles Melbuer

and

96-01414

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Jerry E. Smith

REPRESENTATION OF PARTIES

Charles Melbuer ("**Claimant**") was represented by Joseph R. Winston, Esq., Winston & Liston, P.C., Colorado Springs, Colorado and Ronald A. Peterson, J.D., Colorado Springs, Colorado.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("**Respondent Merrill**") and Jerry E. Smith ("**Respondent Smith**") was represented by John J. Kilkenny, Esq., Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about April 1, 1996. Submission Agreement of Claimant Charles Melbuer was signed on April 27, 1996.

Statement of Answer was filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jerry E. Smith on or about June 26, 1996. Submission Agreement of Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. was signed on June 25, 1996 by John R. Cummings. Submission Agreement of Respondent Jerry E. Smith was signed on June 26, 1996.

HEARING INFORMATION

Pre-hearing conferences were held on January 24, 1997 for one (1) session and January 29, 1997 for one (1) session with Susan M. Thevenet, Esq., presiding. The hearing was held on Tuesday, February 4, 1997 for two (2) sessions, and Wednesday, February 4, 1997 for two (2) sessions in Denver, Colorado for a total of two (2) pre-hearing and four (4) hearing sessions.

CASE SUMMARY

Claimant alleged that over a five year period, he retained Respondents to execute futures trades on his behalf and that Respondent Smith failed to execute certain trades despite being specifically advised to do so. In addition, Claimant alleged that Respondent Smith made unauthorized purchases. Specifically, Claimant alleged the following:

- ▶ In March 1991 Respondent Smith failed to sell Gold contracts as directed. (At the hearing, this claim was withdrawn).
- ▶ On August 10, 1994, Respondent Smith, without the knowledge or permission of the Claimant, purchased Coffee futures contracts.
- ▶ In July 1994 Claimant placed an order to sell Platinum contracts at \$433. The next day, the Claimant placed an order to sell the contracts at \$426. These orders were not executed as directed.
- ▶ On August 31, 1994, Claimant called and directed Respondent Smith to purchase Coffee futures contracts at \$217 and to put a stop order at \$216 or to sell at that level. The order to sell at \$216 was not executed.
- ▶ On August 8, 1994, Claimant put in a stop loss if the price went down to \$516. Respondent failed to sell at \$516.
- ▶ On July 14, 1994 after purchasing Coffee future contracts, Claimant ordered Respondent Smith to sell the contracts if the price increased four points. Respondent Smith failed to comply with this order and sold the contracts at the purchase price. The price of the contracts increased a total of six points by the end of the day.
- ▶ On July 27, 1994, Respondent Smith was directed to make specific trades regarding Coffee futures. Respondent Smith failed to make the trades as directed.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that claimant was and remains a sophisticated commodity and options trader with an apparent risk tolerance for aggressive strategies. With respect to the specific allegations of Claimant, Respondents stated as follows:

- ▶ Regarding the January 1991 gold contracts, Respondents stated that as the price increased Respondent Smith suggested to Claimant that he liquidate his positions. At that time, Claimant declined the suggestion because he felt that the Persian Gulf War would continue to boost the value of gold. The contracts expired worthless. Claimant never entered an order to sell these contracts.
- ▶ Regarding the alleged unauthorized trade, Respondent Smith categorically denied ever entering a trade for the Claimant without his permission. Furthermore, as with all of his trading, Claimant received written notice of this transaction and its net result on a relatively contemporaneous basis. Claimant did not mention that this purchase was unauthorized until three months later.

- ▶ On July 21, 1994 Claimant purchased 4 Oct PL at \$416 which gave him a total of 5 Oct PL contracts. Claimant refused to enter a protective limit order. At all times a licensed financial consultant was available to take the Claimant's instructions directly and thereby insure prompt and accurate execution.
- ▶ On August 25, 1994, Claimant purchased 1 call option for Dec 94 Coffee. On August 31, 1994, Claimant bought 5 Dec 94 Coffee futures at \$217. Respondents stated that Claimant never gave a Stop Loss Order to any Merrill Lynch employee for the futures contract or the option. Claimant did authorize a "Market On Close" order that same day.

Respondents further stated that all of Claimant's trading was unsolicited. All of the trades were read back to him and confirmed in writing each trading day. Respondents also asserted the following affirmative defenses:

- ▶ The claim fails to state a claim upon which relief can be granted.
- ▶ Claimant is barred from any recovery because he directed, authorized, consented to, acquiesced in, and/or ratified all transactions in his accounts with Merrill Lynch.
- ▶ Claimant made all of the investment decisions with regard to his accounts and any losses which may have been suffered by Claimant were caused by the informed decisions made by the Claimant and due to market conditions outside the control of Respondents.
- ▶ Respondents are not liable to Claimant in any amount because at all times relevant herein, Respondents acted properly and in good faith in regard to Claimant's accounts.
- ▶ The Statement of Claim fails to plead fraud with the requisite particularity so that Respondents are able to respond.

RELIEF REQUESTED

Claimant requested the entry of judgment jointly and severally against Respondents as follows:

1. For general and special damages as determined by the arbitration panel according to proof;
2. For disgorgement of all commissions by the Respondents on Claimant's accounts;
3. For exemplary damages as provided by law;
4. For pre- and post-judgment interest as provided by law;
5. For attorneys' fees based upon the special relationship between the parties;
6. For cost and expert witness fees; and
7. For such other and further relief as the Arbitration Panel deems just and proper.

Respondents requested that the claims for damages be denied in all respects, and that the costs of this action, including attorneys' fees, be assessed against him.

OTHER ISSUES CONSIDERED & 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 receive conformed copies of the award while the original(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. The claims asserted in this matter shall be and hereby are denied.
2. Each party shall bear its own costs, expenses and fees, including attorneys' fees incurred in this matter not specifically enumerated herein.
3. The request to expunge the CRD record of Respondent Smith is denied.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There were two (2) sessions x \$300 and four (4) sessions x \$750 = \$3,600 in forum fees. Pursuant to §10332(b) 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 §10332(c) of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimant Charles Melbuer. Claimant Charles Melbuer shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,050 as forum fees. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Jerry E. Smith shall be and hereby are jointly and severally liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,800 as the balance due for forum fees.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350

previously paid by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. **Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.**

/s/ Susan M. Thevenet, Esq.

Susan M. Thevenet, Esq.
Public Arbitrator, Presiding Chair

Dated:

February 6, 1997

/s/ William H. Long, Esq.

William H. Long, Esq.
Public Arbitrator

February 7, 1997

/s/ Richard M. Reider

Richard M. Reider
Industry Arbitrator

February 6, 1997