

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:
Christopher J. Wendling and Constance M. Wendling, Claimants v. Merrill Lynch, Pierce, Fenner
& Smith, Inc., Respondent

Case Number: 02-00977

Hearing Site: Seattle, Washington

REPRESENTATION OF PARTIES

For Claimants:

Al Van Kampen, Esq.
Rohde & Van Kampen PLLC
Seattle, Washington

For Respondent:

James P. Lucking, Esq.
Bingham McCuthen LLP
Seattle, Washington

CASE INFORMATION

Statement of Claim filed: February 19, 2002

Claimants' Joint Uniform Submission Agreement signed: January 14, 2002

Statement of Answer filed by Respondent: May 24, 2002

Respondent's Uniform Submission Agreement signed: May 23, 2002

CASE SUMMARY

Claimants' Statement of Claim alleged breach of fiduciary duty, misrepresentation, omission, failure to supervise, unsuitability, negligence, and violations of Washington State Securities Act, Washington Consumer Protection Act, the NASD and NYSE rules. The allegations concern the trading of incentive stock options in Ariba, Inc.

Respondent denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted affirmative defenses.

RELIEF REQUESTED

Claimants requested \$4,000,000.00 in compensatory damages, unspecified punitive and exemplary damages, pre-award and post-award interest, tax offset, attorney's fees, and costs.

Respondent requested dismissal of the Claimants' Statement of Claim in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

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, testimony, evidence presented at the hearing, and post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent is liable to and shall pay Claimants the sum of \$1,510,000.00 in compensatory damages and interest.
- 2) Respondent is liable to and shall pay to Claimants the sum of \$191,134.25 in attorney's fees, pursuant to the Cash Management Account Agreement entered into between the parties, RCW 4.84.330, and *Herzog Aluminim, Inc. v. Gen. A. Window Corp.*, 39 Wash. App.188, 196-97, 692 P.2d 867 (1984).
- 3) Respondent is liable to and shall pay to Claimants the sum of \$29,557.65 in costs.
- 4) Claimants' request for punitive damages is denied.
- 5) Except as discussed herein, the parties shall bear their respective costs, including attorney's fees.
- 6) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$ 600.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 5,000.00
Total Member Fees	= \$ 8,550.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

One (1) Pre-hearing conference session with the Panel @ \$1,200.00/session = \$ 1,200.00
Pre-hearing conference: December 11, 2002 1 session

One (1) Pre-hearing conference session with a single arbitrator @ \$450.00/session = \$ 450.00
Pre-hearing conferences: May 9, 2003 1 session

Twelve (12) Hearing sessions with the Panel @ \$ 1,200.00/session	= \$ 14,400.00
Hearings:	
July 14, 2003	2 sessions
July 15, 2003	2 sessions
July 16, 2003	3 sessions
July 17, 2003	3 sessions
July 18, 2003	2 sessions

Total Forum Fees = \$ 16,050.00

- 1) The Panel assessed \$8,025.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

- 2) The Panel assessed \$8,025.00 of the forum fees jointly and severally to Claimants Christopher J. Wendling and Constance M. Wendling.

Fee Summary

1. Claimants Christopher J. Wendling and Constance M. Wendling are charged jointly and severally with the following fees and costs:
- | | |
|--|----------------------|
| Initial Filing Fee | = \$ 600.00 |
| <u>Forum Fees</u> | = \$ 8,025.00 |
| Total Fees | = \$ 8,625.00 |
| <u>Less payments</u> | = \$ (1,800.00) |
| Balance Due NASD Dispute Resolution | = \$ 6,825.00 |
2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is charged with the following fees and costs:
- | | |
|--|----------------------|
| Member Fees | = \$ 8,550.00 |
| <u>Forum Fees</u> | = \$ 8,025.00 |
| Total Fees | = \$ 16,575.00 |
| <u>Less payments</u> | = \$ (8,550.00) |
| Balance Due NASD Dispute Resolution | = \$ 8,025.00 |

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

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ARBITRATION PANEL

<i>Peter L. Sill</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Dante Lee Montoya, CPA</i>	-	<i>Public Arbitrator</i>
<i>William J. Chambers</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrator's Signatures

PETER L. SILL
Chair, Public Arbitrator

Signature Date

Dante Lee Montoya, CPA

DANTE LEE MONTOYA, CPA
Public Arbitrator

10/04/2003

Signature Date

WILLIAM J. CHAMBERS
Non-Public Arbitrator

Signature Date

10/6/03

Date of Service