

**Award  
FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant

Clair R. Couturier, Jr.

Case Number: 11-00867

vs.

Respondents

Merrill Lynch, Pierce, Fenner & Smith Incorporated  
Walter Schlaepfer  
The Phil Scott Group

Hearing Site: Seattle, Washington

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

The case proceeded under the Majority Public Panel Rule/Majority Public Panel

**REPRESENTATION OF PARTIES**

Claimant Clair R. Couturier, Jr., hereinafter referred to as "Claimant": Bradley B. Jones, Esq., Gordon Thomas Honeywell LLP, Tacoma, Washington and Barry R. Lax, Esq., Lax & Neville, LLP, New York, New York.

Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Walter Schlaepfer, hereinafter collectively referred to as "Respondents": Nathan T. Alexander, Esq. and J. David Jackson, Esq., Dorsey & Whitney LLP, Seattle, Washington.

The Phil Scott Group did not enter an appearance in this matter.

**CASE INFORMATION**

Statement of Claim filed on or about: February 25, 2011

Amended Statement of Claim filed on or about: March 11, 2011

Claimant signed the Submission Agreement: February 22, 2011

Statement of Answer filed by Respondents on or about: June 7, 2011

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated signed the Submission Agreement: May 2, 2011

Respondent Walter Schlaepfer did not sign the Submission Agreement.

### **CASE SUMMARY**

Claimant asserted the following causes of action in the Statement of Claim and Amended Statement of Claim: breach of fiduciary duty; violation of suitability standards; violation of the Washington State Securities Act; breach of contract; violation of the Washington Consumer Protection Act; and negligence. In Claimant's Amended Statement of Claim, Claimant added Walter Schlaepfer as a Respondent. Claimant did not specify the securities at issue in this matter.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and Amended Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim and Amended Statement of Claim, Claimant requested:

1. Compensatory damages in the amount of \$2,500,000.00;
2. Interest;
3. Costs;
4. Expert witness fees;
5. Attorneys' fees;
6. Treble damages;
7. Rescission; and
8. Such other and further relief as deemed appropriate by the Panel.

In their Answer, Respondents requested:

1. Claimant's claims be dismissed in their entirety;
2. Costs and expenses;
3. Expungement of this matter from Respondent Walter Schlaepfer's Central Registration Depository ("CRD") records; and
4. Such other and further relief as may be deemed just and proper.

At the close of the hearing, Respondents requested attorneys' fees in the amount of \$287,240.31.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

Respondent Walter Schlaepfer did not file with FINRA Dispute Resolution a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

The Phil Scott Group is not a member or associated person of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to Claimant's claims against The Phil Scott Group.

On March 11, 2011, Claimant filed his Amended Statement of Claim before the Panel's appointment to the case. Therefore, in accordance with the Code Rule 12309(a), FINRA Dispute Resolution accepted Claimant's Amended Statement of Claim.

On the first day of the evidentiary hearing, the Panel was informed that Claimant's counsel, Barry R. Lax, Esq., had not signed the Stipulated Protective Order in the case. In light of this revelation, the Chair ordered that if Mr. Lax wanted to participate in the hearing, he would be bound by the terms of that agreement including its confidentiality provisions.

On the tenth day of the evidentiary hearing, Respondents' counsel made an oral "Motion for Mistrial" following the Chair's ruling on the admission of one of Claimant's exhibits. The Panel heard oral argument from both parties, and after due deliberation determined to deny the motion.

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.

### **FINDINGS**

In finding for the Claimant, the Panel was particularly concerned by the following actions of Respondents:

1. Misrepresentations and omissions were contained in the unrestricted marketing materials supplied by Respondents to Greg Porter, who in turn, having been cloaked with apparent authority by Respondents, presented the misleading materials to Claimant. This wrongdoing was caused by Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's inadequate supervision before the fact and aggravated by its failure to take corrective action after it received notice of the communications.
2. Respondents' manner of using the Personal Investment Advisory Questionnaire as a disclosure device was misleading and had the capacity to deceive. Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's continuing approval of this use constitutes inadequate supervision.
3. Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's failure to comply with its own ARMOR report procedures constitutes a breach of its duties toward Claimant and another example of inadequate supervision.

This list is not all-inclusive but is intended to give Respondents the benefit of some of the Panel's conclusions so Respondents can modify their conduct accordingly.

### **AWARD**

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



**Discovery-Related Motion Fees**

Fees apply for each decision rendered on a discovery-related motion.

One (1) Decision on a discovery-related motion on the papers  
with (1) one arbitrator @ \$200.00 = \$ 200.00  
Respondents submitted (1) discovery-related motion

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Total Discovery-Related Motion Fees = \$ 200.00

1. The Panel has assessed \$100.00 of the discovery-related motion fees to Claimant.
2. The Panel has assessed \$100.00 of the discovery-related motion fees jointly and severally to Respondents.

**Contested Motion for Issuance of a Subpoena Fees**

Fees apply for each decision on a contested motion for the issuance of a subpoena.

One (1) Decision on a contested motion for the issuance of a subpoena  
with (1) one arbitrator @ \$200.00 = \$ 200.00

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Total Contested Motion for Issuance of Subpoenas Fees = \$ 200.00

1. The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees to Claimant.
2. The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees jointly and severally to Respondents.

**Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each session conducted. A 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:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00/session = \$ 900.00  
Pre-hearing conferences: May 17, 2012 1 session  
July 17, 2012 1 session

One (1) Pre-hearing session with the Panel @ \$1,200.00/session = \$ 1,200.00  
Pre-hearing conference: August 5, 2011 1 session

Twenty-Eight (28) Hearing sessions @ \$1,200.00/session = \$33,600.00  
Hearing Dates: September 24, 2012 2 sessions  
September 25, 2012 2 sessions  
September 26, 2012 2 sessions  
September 27, 2012 2 sessions  
September 28, 2012 2 sessions  
October 1, 2012 2 sessions  
October 2, 2012 2 sessions  
October 3, 2012 2 sessions

October 4, 2012	2 sessions
October 5, 2012	2 sessions
October 8, 2012	2 sessions
October 9, 2012	2 sessions
October 10, 2012	2 sessions
October 11, 2012	2 sessions

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Total Hearing Session Fees	= \$35,700.00
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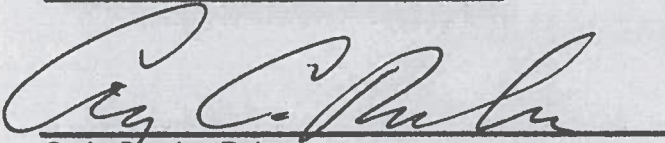
1. The Panel has assessed \$17,850.00 of the hearing session fees to Claimant.
2. The Panel has assessed \$17,850.00 of the hearing session fees jointly and severally to Respondents.

**ARBITRATION PANEL**

Craig Charles Beles	-	Public Arbitrator, Presiding Chairperson
Ann Sattler	-	Public Arbitrator
Robert E. Meston	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Craig Charles Beles  
Public Arbitrator, Presiding Chairperson

12/6/2012  
Signature Date

\_\_\_\_\_  
Ann Sattler  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Robert E. Meston  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

December 11, 2012  
Date of Service (For FINRA Dispute Resolution office use only)

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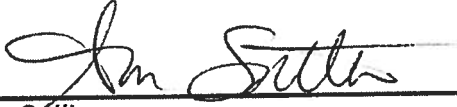
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Non-Public Arbitrator

12-8-12  
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Signature Date

December 11, 2012

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